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CASES ARGUED AND DECIDED  
IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

179, 180, 181, 182 U. S.

BOOK 45,  
LAWYERS' EDITION,  
CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND  
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY  
THE PUBLISHERS' EDITORIAL STAFF

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v. 179-182

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OF THE  
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. GEORGE SHIRAS, JR.,

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MARSHAL,

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\*Resigned.

†Appointed April 5, 1901. Took oath April 9, 1901.

## JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

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Allotment, Feb. 21, 1898, see Appendix VII. Book 42.

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\*Territories assigned to circuits by order of the Supreme Court.



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# THE DECISIONS

## OF THE

# Supreme Court of the United States

AT  
OCTOBER TERM, 1900.

**[1]•WASHBURN & MOEN MANUFACTURING COMPANY, Petitioner,**  
*v.*  
**RELIANCE MARINE INSURANCE COMPANY (LIMITED).**

(See S. C. Reporter's ed. 1-19.)

*Marine insurance—constructive loss—actual total loss of part—right to abandon—refusal to accept abandonment—insurer's forwarding of goods—effect of state decisions.*

1. A rider on the margin of a policy of marine insurance stating: "Free of particular average, but liable for absolute total loss of a part if amounting to 5 per cent,"—*is in part materia* with a memorandum by which goods are "warranted by the assured free from average unless general," and qualifies the

memorandum so that, instead of limiting the liability to an actual total loss, it permits recovery for an actual total loss of a part.

2. The construction of a policy of marine insurance, depending on questions of general commercial law, is a matter on which courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the decisions of the courts of the state in which the contract was made.
3. The general rule that a damage exceeding 50 per cent justifies abandonment and recovery on a marine policy as for a constructive total loss does not apply to memorandum articles in respect of which the exception of particular average excludes a constructive total loss, though a rider extends the insurance to an actual total loss of a part.
4. The jury cannot be permitted to pass on the question of actual total loss on a marine policy, when a large part of the goods reach their destination *in specie*, and a substantial part of them are wholly uninjured.

NOTE.—Upon the question of abandonment generally—see notes to Mayo v. India Mut. Ins. Co. (Mass.) 9 L. R. A. 831; Bradile v. Maryland Ins. Co. 9 L. ed. U. S. 1123.

As to what is a total loss—see note to Great Western Ins. Co. v. Fogarty, 22 L. ed. U. S. 216.

On constructive total loss of memorandum articles—see note to Morean v. United States Ins. Co. 4 L. ed. U. S. 75.

For a collection of cases on marine insurance—see note to London Assurance v. Companhia De Moagens Do Barreiro, 42 L. ed. U. S. 113.

As to when United States courts do not follow state decisions—see note to United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490.

*What is acceptance of abandonment to marine insurer.*

- I. Introduction.
- II. Silence or delay.
- III. Taking possession to raise and repair.
  - a. In general.
  - b. Effect of "sue and labor" and other clauses.
- IV. Other conduct.
  - V. Acts or declarations of agents.

179 U. S. U. S., Book 45.

### I. Introduction.

The right of the assured in a policy of marine insurance to abandon the property insured to the insurer as for a total loss is absolute when justified by the circumstances, and no acceptance by the insurer is essential to validate the abandonment. It is only where an offer to abandon has been made under circumstances which did not warrant it, or which at least raise a doubt as to the existence of the right to abandon, that the question of the insurer's acceptance becomes important. In such cases a determination of the question in the affirmative will render unnecessary any inquiry as to the justification for the abandonment, as it is well settled that an offered abandonment may be accepted even where the assured has no right to abandonment, and, if accepted, must be with its consequences.

### II. Silence or delay.

The underwriter is not bound to signify his acceptance within a reasonable time, nor can his silence *per se* be proof of his acceptance. If he says nothing and does nothing the proper conclusion is that he does not mean to accept.



5. A consignee who refuses to accept uninjured goods, and unjustifiably endeavors to abandon them to the insurer, who refuses to accept the abandonment, cannot hold the insurer liable for any loss sustained by the forced sale of the goods.
6. An insurer which has stipulated in the policy that its acts in recovering, saving, and preserving the property in case of disaster shall not be considered an acceptance of abandonment cannot be deemed to accept an attempted abandonment of the goods by carrying them from a place where there is no agent of the assured, no adequate means of protection, and no market, to the port of destination where there are excellent facilities for protecting and handling them, easy access to the head agency of the assured, and a good market.

[No. 6.]

*Argued March 15, 16, 1899. Decided October 15, 1900.*

*Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905.

The acceptance of an abandonment is to be by something distinct and unequivocal. *O'Leary v. Pelican Ins. Co.* 29 N. B. 510 (*Per King, J.*).

To the contrary is *Hudson v. Harrison*, 6 J. B. Moore, 288, 3 Brod. & B. 97, in which insurers who took no action for nearly three months after a meeting of underwriters was called, some of whom attended and authorized the insured to act for the benefit of all concerned, when they interposed to prevent a sale of the recovered cargo on their account, were held to have acquiesced in the abandonment of the cargo by notice given immediately after loss.

The court said that the obligation of the assured to elect within a reasonable time whether he will abandon or not implies a corresponding obligation on the insurer to accept or reject the abandonment within a reasonable time.

But in *Provincial Ins. Co. v. Leduc*, 43 L. J. P. C. N. S. 49, L. R. 6 P. C. 224, 31 L. T. N. S. 142, 22 Week. Rep. 929, the court, in answer to the contention that the silence of an insurer may be construed to be an acceptance of an abandonment, in support of which *Hudson v. Harrison* was cited, said: "It is not necessary to go to that length in this case. Their lordships consider that Mr. Justice Story was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing and does nothing the proper conclusion is that he does not mean to accept."

Underwriters who neither expressly assent to an abandonment of a cargo, nor perform any act indicating their acceptance, cannot hold the insured to his abandonment, or insist that by reason of such abandonment they become substituted to the cargo or its proceeds, in the insured's right, according to the proportion covered by their policy. *Child v. Sun Mut. Ins. Co.* 2 Sandf. 76.

### III. Taking possession to raise and repair.

#### a. In general.

The earliest case is *Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905, in which underwriters, by taking the sole possession and management of a stranded vessel after abandonment, raising and subsequently repairing her, were held thereby to accept the abandonment.

But in another case arising out of the same wreck, the supreme court of Massachusetts was

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the First Circuit to review a decision affirming a decree of the Circuit Court in an action at law brought on a policy of marine insurance in a state court and thence removed into the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*  
See same case below, 50 U. S. App. 231, 82 Fed. Rep. 296, 27 C. C. A. 134.

\*Statement by Mr. Chief Justice Fuller: [2]

This was an action at law brought in the superior court of Massachusetts for the county of Suffolk, and thence removed into the circuit court of the United States for the district of Massachusetts, by the Washburn & Moen Manufacturing Company against the Reliance Marine Insurance Company (Limited) of London, England, on a policy of marine insurance taken out, March 15, 1893, in the sum of \$48,800, on a cargo of wire

of the opinion that an underwriter may take an abandoned vessel into his possession and repair her, the assured refusing to do it, and if he can do this at an expense less than half her value he may restore the vessel to the assured, and thus avoid paying for a total loss. *Peele v. Suffolk Ins. Co.* 7 Pick. 254, 19 Am. Dec. 286.

So, underwriters who take possession of a stranded vessel, and within a reasonable time tender her substantially repaired and restored to the insured, who makes no objection to the sufficiency of the repairs, cannot be treated as having accepted the abandonment. *Marmaud v. Melledge*, 123 Mass. 173.

Taking possession of an abandoned vessel and repairing it do not amount to an acceptance of the abandonment, where accompanied by an express refusal to accept the abandonment. *Marine Dock & Mut. Ins. Co. v. Goodman* (Ala.) 4 Am. L. Reg. 481.

But if the conduct of an insurer implies an acceptance of an abandonment, such acceptance is to be legally presumed, notwithstanding the declared intent of the party to the contrary, the actual intent in such case being immaterial. *Badger v. Ocean Ins. Co.* 23 Pick. 347.

In *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 332, Fed. Cas. No. 5,487, the principle laid down in *Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905, *supra*, that if an insurer takes and retains possession of a vessel for the purpose of repairing it he thereby accepts an offer of abandonment, was followed over an objection that the policy in question was made and was to be executed in Massachusetts, under whose laws the insurers had a right to take possession of a vessel when an offer of abandonment was made, and seasonably repair and restore her to the insurer. The court said that the question was not one of mere local municipal law, but one arising under the law merchant, and that the decisions of the courts of another state were not binding on the Federal courts, and that the latter had no right to conform to them when they believed them not to announce the true rule.

By delaying the repairs beyond a reasonable time the underwriter forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon. *Peele v. Suffolk Ins. Co.* 7 Pick. 254, 19 Am. Dec. 286.

Neglect of the underwriters to raise, repair, and restore a stranded vessel to the insured within a reasonable time after taking possession



shipped from Boston to Velasco, Texas, on the schooner Benjamin Hale, John Hall, master.

The memorandum clause of the policy ran thus: "Memorandum. It is also agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting, and cassia, except in boxes,

free from average under 20 per cent unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under 7 per cent unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under 10 per cent unless general."

And on the margin the following was stamped or written: "Free of particular average, but liable for absolute total loss of a part if amounting to five (5 %) per cent."

It was also provided: "And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safe- [3] guard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering,

sion of the vessel for that purpose amounts to an acceptance of the abandonment, and renders them liable as for a total loss. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727.

After a vessel has been abandoned by her owner, and taken into custody by the insurer with a view to raising and repairing her, unless she is repaired and tendered to the owner within a reasonable time the insurer forfeits his right to return, and must be considered as having accepted the abandonment. Copelin v. Phoenix Ins. Co. 46 Mo. 211, 2 Am. Rep. 504.

Underwriters who act upon a notice of abandonment without inquiring as to the cause of accident, take the vessel in charge, place her in dry dock, cause her to be repaired at great expense, and retain possession without offering to return her to the owners, cannot, as a defense to an action brought upon the policy, set up a claim that the acceptance is not conclusive on the ground that the loss was occasioned by perils not insured against, of which the insurer was ignorant until after the repairs were made. Richelieu & O. Nav. Co. v. Thames & M. Marine Ins. Co. 72 Mich. 571, 40 N. W. 758.

There is an unsupported *dictum* in Marine Dock & Mut. Ins. Co. v. Goodman (Ala.) 4 Am. L. Reg. 481, to the effect that the qualification asserted in Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727, *supra*, that the underwriter must repair and tender the vessel within a reasonable time, is unwarranted by the principle upon which the underwriter takes possession and repairs.

Deficiencies in the repairs or equipment of the vessel when tendered to the assured will not render the underwriters liable as having accepted the abandonment, where the assured makes no objection on account of the insufficiency of the repairs, and points out no deficiencies. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727.

But the refusal of the underwriters, or their unreasonable neglect to supply the deficiency in repair or equipment pointed out by the assured at the time of the offer to restore, amounts to an acceptance of the abandonment, and entitles the insured to recover as for a total loss. *Ibid*.

And the assured need not point out deficiencies which are obvious, and are very great when compared with the repairs actually made. Copeland v. Phoenix Ins. Co. Woolw. 278, Fed. Cas. No. 3,210, Aff'd in Copeland v. Phoenix Ins. Co. 9 Wall. 461, 19 L. ed. 739.

Insurers against total loss and general average who raise a ship which was voluntarily stranded and abandoned to them, and tender

her back to the owners without making or offering to pay the cost of any repairs other than those made by them as necessary to keep the ship afloat, must be deemed to have accepted the abandonment. Northwestern Transp. Co. v. Continental Ins. Co. 24 Fed. Rep. 171.

Whether the insurer accepts the abandonment or not is a matter of construction of his words and conduct. Any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus seeks the common interest. Richelieu & O. Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 846.

In Northwestern Transp. Co. v. Thames & M. Ins. Co. 59 Mich. 214, 26 N. W. 336, the court said that the act of an insurer in recovering a stranded vessel would be construed most strongly against it as its interest was a matter entirely within its own knowledge, and by speaking it had the power to solve all doubts and dispel all ambiguities; and, although no duty rested upon it to say whether it accepted the abandonment or not, so long as it was both silent and inactive, yet when it did act, its duty was to say for what purpose and with what intent it proposed to act.

So, Insurers who, after notice of abandonment, take possession of a vessel, repair, and retain her in their possession from the time it is raised up to the time of libeling it for salvage expenses, without repudiating the notice of abandonment and informing the assured as to the character in which they are acting, must thereby be deemed to have accepted the abandonment and to have become liable as for a total loss. Provincial Ins. Co. v. Ledue, L. R. 6 P. C. 224, 43 L. J. P. C. N. S. 49, 31 L. T. N. S. 142, 22 Week. Rep. 929.

And Insurers against total loss only, who take unconditional possession of an abandoned vessel without giving notice of their object, and proceed to repair her, and make no tender to the owner, being unwilling to restore her except on condition that their expenses are repaid or secured to them, must be deemed to have accepted the abandonment. Cincinnati Ins. Co. v. Bakewell, 4 B. Mon. 557.

#### b. Effect of "sue and labor" and other clauses.

To meet the decision in Peele v. Merchants' Ins. Co. 3 Mason, 27, Fed. Cas. No. 10,905, *supra*, policies of marine insurance were amended so as to provide that the acts of the insured or insurers in recovering, saving, and preserving the property should not be considered a waiver, or acceptance of the abandonment.



saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said assurers will contribute according to the rate and quantity of the sum herein insured."

The Benjamin Hale sailed for Velasco, March 31, 1893, and on April 15 ran ashore on Bahama Banks, but, after throwing overboard 200 reels of barbed wire, floated and proceeded. On the night of April 19 the schooner again ran ashore, on Bird Key, near Dry Tortugas, and largely filled with water. Wreckers came on board April 21. The master went to Key West, and from thence telegraphed the Washburn & Moen Company, April 24, that the vessel was ashore, and he thought the loss was total. April 24, 25, or 26 the agent of that company told the agent of the insurance company, in

Boston, "what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters." April 29 a written notice of abandonment was given, which the insurance company explicitly declined to accept. The master returned at once with further assistance, reaching the wreck the morning of April 25, and the vessel was floated April 29, and finally taken to Key West, arriving May 4. The captain testified that "from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. . . . Think about one half of cargo was discharged on the reef, of which he thinks about 1,300 reels were dry." This was substantially all carried to Key West, where the unloading was completed May 10.

Captain Hall made a memorandum at Key

In *Gloucester Ins. Co. v. Younge*, 2 Curt. C. C. 332, Fed. Cas. No. 5,487, this clause was held to have no reference to repairs other than those which may be needful for the temporary preservation of the property and its relief from perils within the policy, and therefore not to confer upon the insurer a right to take possession of an abandoned vessel and seasonably repair and restore her to the insured.

But taking possession of and repairing an abandoned vessel is not conclusive evidence of an acceptance of the abandonment, where the policy provides that in case of the neglect or refusal of the assured to adopt measures for the safeguard and recovery of the vessel the insurer may interpose and repair her on account of the assured. *Norton v. Lexington F. L. & Marine Ins. Co.* 16 Ill. 235.

And an insurer, by taking possession of and selling a cargo which has been damaged by a cause expressly excepted from the terms of the policy, does not become liable as for a total loss, unless its acts amount to a conversion for which it would be liable, where the policy provides that the acts of the insurer in saving or disposing of the property shall not be considered a waiver or acceptance of an abandonment, or as affirming or denying any liability under the policy. *Schuyler v. Phoenix Ins. Co.* 134 N. Y. 345, 32 N. E. 25.

Insurers who take possession of an abandoned vessel to repair her, under the authority conferred on them by the policy, must return her, properly repaired, within a reasonable time, or they will be deemed to have accepted the abandonment, although they were not bound by it when made. *Norton v. Lexington F. L. & Marine Ins. Co.* 16 Ill. 235; *Copein v. Phoenix Ins. Co.* 9 Wall. 461, 19 L. ed. 739; *Reynolds v. Ocean Ins. Co.* 1 Met. 160.

Insurers who retain possession of an abandoned vessel for more than six months and then offer to return her only partially repaired, will be deemed to have accepted the abandonment, notwithstanding a stipulation in the policy that the acts of the insurers in preserving, securing, or saving the property insured, in case of danger or disaster, shall not be considered an acceptance of the abandonment. *Copein v. Phoenix Ins. Co.* 9 Wall. 461, 19 L. ed. 739.

Underwriters who take possession of insured property under the sue and labor clause will be deemed to have dealt with it in such a manner as to make it their own, where, after the refusal of the owner to accept the vessel with partial repairs, they retain her, without apparent excuse, until more than half the season of navigation has passed, and then make another

tender while the vessel is still in an incomplete condition. *Young v. Union Ins. Co.* 24 Fed. Rep. 279.

Insurers who, after an abandonment and refusal to accept, take possession and control of a stranded vessel, with the purpose and design of getting her off, repairing, and restoring her, are bound, from the time they take possession with that intention, to use reasonable diligence, as well in getting her off as in repairing her after her arrival in port, notwithstanding a clause in the policy providing that no act done by the insurers towards saving the property shall be deemed to be a constructive acceptance of an abandonment. *Reynolds v. Ocean Ins. Co.* 1 Met. 160.

The duty of an underwriter, when he takes possession and recovers a stranded vessel, to proceed with due diligence to put her in repair, is not modified by a provision in the policy that, in case of the neglect or refusal of the insured to take measures for the safeguard and recovery of the vessel, or to repair the same when recovered, the insurer may interpose and recover the vessel, or, after recovery, cause her to be repaired, or both, for account of the insured. *Northwestern Transp. Co. v. Thames & M. Ins. Co.* 59 Mich. 214, 26 N. W. 336.

The neglect of an insurer, after taking possession of a stranded vessel, to effect the rescue until more than six months after the disaster, and more than five months after her abandonment by the assured, and his failure to cause repairs to be made after recovering her and taking her to port, or to tender the amount found necessary by the survey to place her in repair, constitute an acceptance of the abandonment notwithstanding a provision of the policy that the acts of the insurer in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of the abandonment. *Ibid.*

Underwriters who, after refusing to accept an abandonment, elect to take possession of the vessel under the rescue clause, which secures to them their expenses if successful, either out of the vessel or from the insured, become liable to the latter as for an "actual total loss," by permitting the vessel to be sold to satisfy a lien in favor of a wrecking company which they have employed to save the vessel. *Carr v. Security Ins. Co.* 109 N. Y. 505, 17 N. E. 369.

#### IV. Other conduct.

Any act done by the underwriters in consequence of an abandonment, which can be justified only under a right derived from it, is of



West as to the condition of the cargo when landed there. From this it appeared that out of 13,051 reels of barbed wire, shipped from Boston, 12,277 (or 12,625) were landed at Key West, of which 989 were perfectly dry, and 10,448 had received "hardly perceptible" damage. Of plain wire, 1,102 bundles were shipped, and all landed at Key West, [4] and 464 were stated to be nearly "dry. Five reels of salamander wire and a wire rope were all landed and transshipped dry and unimpaired; also 243 kegs of staples out of 249; and 478 bundles of hay bands out of 1,050.

Libels for salvage were filed against vessel and cargo at Key West, and the schooner condemned and sold, but the cargo was released and the amount decreed in respect thereof paid by the insurance company.

The goods were forwarded from Key West to Velasco on the schooner Cactus, where they were tendered to the Washburn & Moen Company, which refused to receive them. That company again abandoned, and the insurance company again declined to accept abandonment.

Itself decisive evidence of an acceptance. *Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 846.

Underwriters will not be deemed to have accepted an abandonment of the stranded vessel, made by the assured after a sale to a third person, by purchasing the vessel from the assured's vendees upon their refusal to give her up, nor by employing her for their own use without tendering her to the original owners. *Badger v. Ocean Ins. Co.* 23 Pick. 347.

The assistance of the underwriters in superintending the unloading of the cargo, which was requisite for the repair of the ship, will not be construed into an acceptance of, or acquiescence in, the abandonment of the freight. *Griswold v. New York Ins. Co.* 1 Johns. 205, 8 Johns. 321.

The answer of the underwriters to a letter informing them of the loss, that they desired "that the assured would do the best they could with the damaged property," is not an assent to an abandonment, so as to convert a partial into a total loss. *Theiluson v. Fletcher*, 1 Esp. 73, 1 Dougl. 315.

It is error for the trial court to hold, as matter of law, that a sunken vessel was not abandoned by the owners, and that the insurer had not accepted the abandonment, where the evidence shows that the insurer's agent, after examining the wreck, mailed the captain's verified statement of the circumstances of the loss, together with a full report of his own as to the condition of the wreck, to the insurer, which was received and retained by it; that he afterwards received a letter from the insurer's adjuster, stating that he had examined the wreck and would raise the boat; that the insurer retained the proofs of loss and an assignment, executed by the insured to it, of all their interest in the boat; and that thereafter the captain, at the insurer's request, verified and delivered to it a further detailed statement of the loss. *Singleton v. Phenix Ins. Co.* 132 N. Y. 298, 30 N. E. 839.

#### V. Acts or declarations of agents.

Where the acts of an agent in taking possession of an abandoned vessel in pursuance of 179 U. S.

At this time a very large part of the goods existed *in specie*, and a considerable part was practically uninjured. There were no facilities for handling, and no market for, barbed wire at Key West, but there were at Velasco, which was also but 60 miles by rail from Houston, the headquarters of the general agent of the manufacturing company in Texas.

The goods were afterwards sold by order of court on the libel of the master of the Cactus for freight, demurrage, and expenses, and realized \$10,000. Plaintiff was not present and made no bid at the sale.

As the cost of saving the cargo and bringing it to Key West, and expenses there, exceeded the sum realized at forced sale, and the freight to Velasco added some hundreds of dollars to that, plaintiff contended that the cost was more than the value at Key West and at Velasco.

In respect of the forwarding of the cargo from Key West to Velasco, the charter party was signed by Captain Hall as master of the Benjamin Hale. This was in Boston several days after Hall had left Key West, but there

his instructions to look after the interests of the company, coupled with a failure to repudiate the notice of abandonment, amount to an acceptance, or are evidence from which an acceptance may be inferred, the company is bound by these acts, notwithstanding the agent's want of authority to accept an abandonment. *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224, 43 L. J. P. C. N. S. 49, 31 L. T. N. S. 142, 22 Week. Rep. 929.

The receipt of a notice of an abandonment, by an agent of the insurance company, which he forwards to his principal, with a recommendation of payment, does not amount to an acceptance of the abandonment. *O'Leary v. Pelican Ins. Co.* 29 N. B. 510 (*Per King, J.*).

The answer, "All right," made by the agent of the insurer to the statement of the owner of a stranded vessel that he had telegraphed to the captain to wreck the boat if he could not raise her, does not amount to an acceptance by the insurer of an abandonment by the insured. *Copeland v. Phoenix Ins. Co.* 1 Woolw. 278, Fed. Cas. No. 3,210.

A wrecking master instructed by an insurance company to go to the assistance of a stranded vessel has no authority to accept an abandonment. *Kirby v. Thames & M. Ins. Co.* 27 Fed. Rep. 221.

The president of an insurance company and his assistants have no authority to accept an abandonment, where the act incorporating the insurance company provides that no losses shall be settled or adjusted unless with the approbation of at least four of the directors, with the president and his assistants, or a majority of them. *Beatty v. Marine Ins. Co.* 2 Johns. 109, 3 Am. Dec. 401.

Statements of the Boston agents of a foreign insurance company, to the effect that the money would be paid or that "it would be all right," made in answer to a verbal abandonment to the underwriters of a vessel stranded on the English coast, do not amount to an acceptance of a total loss, or estop the insurers from disputing it, in the absence of proof that the agents had authority other than to issue policies, receive premiums, and represent the underwriters in legal proceedings taken in Massachusetts. *Monroe v. British & Foreign Marine Ins. Co.* 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. Rep. 777



was evidence that he had previously authorized the agents of the vessel at Key West, and who paid for the discharge of the cargo there, to charter the Cactus, and the second bill of lading was signed by one of them as attorney in fact for Captain Hall, and stated that the goods were shipped by him.

[5] The agent for the board of underwriters testified that he instructed the agent at Key West to see that a vessel was secured \*and the cargo properly shipped to Velasco according to the original bill of lading; that Hall authorized the Cactus to be chartered; and that he always insisted that Hall should forward the cargo; while Hall said that he received a request from defendant's agent to so forward.

The circuit court ruled that the defendant was not liable for a constructive total loss; that the transshipment of the cargo at Key West, though made by the underwriters as he thought it was, did not, under the circumstances, make them liable for the property as underwriters; and that "inasmuch as a portion of this cargo—a considerable portion, including the staples and a very large percentage of the fencing wire—was at Key West in a condition to be transshipped, and did in fact arrive at Velasco *in specie*, and suitable for the purposes for which it was intended, although not so suitable as it would have been if it had not been submerged in the sea," there was no absolute total loss of the whole.

It was agreed that there was an actual total loss of parts of the cargo to the amount of \$2,500 and that, under the views expressed by the court, plaintiff was entitled to a finding that there was a constructive total loss.

Accordingly a verdict was directed for \$2,500, and a special verdict "that there was a constructive total loss."

Judgment was rendered in favor of plaintiff, and each party prosecuted a writ of error from the circuit court of appeals.

That court concurred in the rulings of the circuit court, but was of opinion that the cargo was forwarded from Key West to Velasco under authority of the captain of the Benjamin Hale. 50 U. S. App. 231, 82 Fed. Rep. 296, 27 C. C. A. 134.

Judgment having been affirmed, the Washburn & Moen Manufacturing Company applied for and obtained a writ of certiorari from this court.

Errors were relied on by petitioner, in substance, that the circuit court erred in not ruling that plaintiff was entitled to recover for a constructive total loss under the policy; and in not allowing the question whether there was an absolute total loss to go to the jury; or the question whether defendant had accepted plaintiff's abandonment of the cargo.

Mr. Eugene P. Carver argued the cause, and, with Mr. Edward E. Blodgett, filed a brief for petitioner:

Under the usual form of policy the assured can recover for a constructive total loss of cargo, provided there has been an abandonment duly made, if the loss or in-

jury sustained amounts to 50 per cent of the value fixed in the policy, or provided the property will not bring 50 per cent of such valuation; in case of cargo.

*Kettell v. Alliance Ins. Co.* 10 Gray, 144; *Delaware Ins. Co. v. Winter*, 38 Pa. 176; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. ed. 243; *Moses v. Columbian Ins. Co.* 6 Johns. 219.

In determining the damage or injury to the property, the cost of saving it or raising it if submerged, and bringing it into port, will be taken as a part of the damage or injury, in order to make up the necessary 50 per cent.

*Ellicott v. Alliance Ins. Co.* 14 Gray, 318; *Wallace v. Thames & M. Ins. Co.* 22 Fed. Rep. 66; *Tudor v. New England Mut. Marine Ins. Co.* 12 Cush. 554; *Northwestern Transp. Co. v. Continental Ins. Co.* 24 Fed. Rep. 171.

If goods or vessels are insured by a policy containing any one of the clauses, "free of particular average," "free of partial loss," "free of average unless general," or "against total loss only," the insured can recover for a total loss where they are damaged to the extent of 50 per cent and there has been a seasonable abandonment.

*Heebner v. Eagle Ins. Co.* 10 Gray, 131, 69 Am. Dec. 308; *Kettell v. Alliance Ins. Co.* 10 Gray, 144; *Mayo v. India Mut. Ins. Co.* 152 Mass. 172, 9 L. R. A. 831, 25 N. E. 80; *Greene v. Pacific Mut. Ins. Co.* 9 Allen, 217; *Pierce v. Columbian Ins. Co.* 14 Allen, 320.

The terms, "memorandum articles" and "common memorandum articles," have a well-known meaning in the law of marine insurance, as being "articles which are perishable in their own nature."

2 Arnould, *Ins. Perkins'* ed. 852, 856; *Mayo v. India Mut. Ins. Co.* 152 Mass. 172, 9 L. R. A. 831, 25 N. E. 80; *Pierce v. Columbian Ins. Co.* 14 Allen, 320.

It was a question of fact for the jury as to whether, on all the evidence, the defendant company had not accepted the abandonment.

*Orient Ins. Co. v. Adams*, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68; *Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905; *Copelin v. Phoenix Ins. Co.* 9 Wall. 461, 19 L. ed. 739; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 846; *Northwestern Transp. Co. v. Continental Ins. Co.* 24 Fed. Rep. 171; *Carr v. Security Ins. Co.* 109 N. Y. 505, 17 N. E. 369; *Cossmann v. British America Assur. Co.* L. R. 13 App. Cas. 161.

If the use of the property insured, for the purpose for which it is made, requires an expenditure greater than the property is worth after that expenditure, then it is the case of an actual total loss, and no abandonment is necessary.

*Wallerstein v. Columbian Ins. Co.* 44 N. Y. 240, 4 Am. Rep. 664; *Bullard v. Roger Williams Ins. Co.* 1 Curt. C. C. 148, Fed. Cas. No. 2,122; *Kinsman v. China Mut. Ins. Co.*



49 Fed. Rep. 876; *Williams v. Kennebec Mut. Ins. Co.* 31 Me. 455.

A constructive total loss by legal process may be occasioned either by acts of the assured, or by acts which arise from perils against which they insured.

*Stringer v. English & S. Marine Ins. Co.* L. R. 4 Q. B. 671.

The contract in the case was made in Massachusetts, and should therefore be governed by the law of Massachusetts.

*Pierce v. Columbian Ins. Co.* 14 Allen, 320; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Equitable L. Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583; *Gelpcke v. Dubuque*, 4 Harvard L. Rev. 311, note.

The distinction between the decisions of the Massachusetts supreme court and those of the United States Supreme Court is clear.

*Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39, 3 L. ed. 481; *Morean v. United States Ins. Co.* 1 Wheat. 219, 4 L. ed. 75.

Mr. Frederic J. Stimson argued the cause and filed a brief for respondent:

The marginal clause and the memorandum are to be taken together; they have the same meaning, and are in no sense contradictory. Both are qualified by the exception stated in the latter clause: "but liable for absolute total loss of a part if amounting to 5 per cent." The words "free from particular average," in the margin, are equivalent to "free from average unless general," in the memorandum, since average must be either general or particular; and the words are recited over again merely to indicate clearly that the words which follow, insuring against "absolute total loss of a part," are not intended otherwise to relax the provisions of the memorandum.

*Chadsey v. Guion*, 97 N. Y. 333; *Brooke v. Louisiana Ins. Co.* 5 Mart. N. S. 530; *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216.

The word "absolute" has the same meaning as "actual."

*Monroe v. British & Foreign Marine Ins. Co.* 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. Rep. 777.

Memorandum articles, or articles warranted free of particular average, free from average unless general, or however otherwise the meaning may be expressed, are insured only against an actual total loss.

*Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39, 3 L. ed. 481; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415, 3 L. ed. 389; *Morean v. United States Ins. Co.* 1 Wheat. 219, 4 L. ed. 75; *Hugg v. Augusta Ins. & Bkg. Co.* 7 How. 595, 12 L. ed. 834; *Insurance Co. of N. A. v. Canada Sugar Ref. Co.* 31 C. C. A. 65, 58 U. S. App. 22, 87 Fed. Rep. 491; *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216; *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220, Fed. Cas. No. 11,949; *Monroe v. British & Foreign Marine Ins. Co.* 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. Rep. 777.

The principles above stated have been supported and established by the opinions of 179 U. S.

the best writers on insurance, and by many cases in the courts of the several states.

*Phillips, Ins.* §§ 1615, 1767; 2 Parsons, Ins. 111; *Brooke v. Louisiana Ins. Co.* 5 Mart. N. S. 530; *Skinner v. Western Marine & F. Ins. Co.* 19 La. 273; *Williams v. Kennebec Ins. Co.* 31 Me. 455; *Willard v. Millers' & Mfrs.' Ins. Co.* 24 Mo. 561; *Waln v. Thompson*, 9 Serg. & R. 115, 11 Am. Dec. 675; *Spring v. Gray*, 6 Pet. 151, 8 L. ed. 352; *Maggrath v. Church*, 1 Cai. 196, 2 Am. Dec. 173; *Neilson v. Columbian Ins. Co.* 3 Cai. 108; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33; *De Peyster v. Sun Mut. Ins. Co.* 19 N. Y. 272, 75 Am. Dec. 331; *Burt v. Brewers' & Maltsters' Ins. Co.* 9 Hun, 383; *Chadsey v. Guion*, 97 N. Y. 333; *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.* 19 Jones & S. 444; *Carr v. Security Ins. Co.* 109 N. Y. 504, 17 N. E. 369.

The memorandum clause was introduced with the intention of protecting insurers against losses arising solely from a deterioration of the article by its perishable quality, and as to such articles underwriters are free from all partial loss of every kind which does not arise from a contribution towards a general average.

*Biays v. Chesapeake Ins. Co.* 7 Cranch, 415, 3 L. ed. 389.

That it was the duty as well as the right of the captain of the "Benjamin Hale" to forward the cargo seems clear.

2 Parsons, Ins. p. 155; 2 Phillips, Ins. § 1624; *Abbott, Shipping*, 411; *Cannon v. Meaburn*, 1 Bing. 243; *Shipton v. Thornton*, 9 Ad. & El. 314.

Where the insured makes seasonable abandonment to the insurer, who makes no reply thereto, but leaves the insured in doubt concerning his intentions, then the acts of the insurer may in some cases be treated as an implied acceptance of the abandonment.

*Smith v. Robertson*, 2 Dow, 474; *Hudson v. Harrison*, 3 Brod. & B. 97; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224; *Richelieu Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 846; *Northwestern Transp. Co. v. Thames & M. Ins. Co.* 59 Mich. 214, 26 N. W. 336; *Richelieu & O. Nav. Co. v. Thames & M. Marine Ins. Co.* 72 Mich. 571, 40 N. W. 758; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 541; *Singleton v. Phenix Ins. Co.* 132 N. Y. 298, 30 N. E. 839; *Peele v. Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905.

This principle, however, has no application to the case at bar.

*Shepherd v. Henderson*, L. R. 7 App. Cas. 49.

The object of the "sue and labor" clause is to provide that acts otherwise unlawful, or which otherwise might be construed as an acceptance of an abandonment, shall by virtue of the stipulation become lawful and without prejudice to the rights of the insurer.

*Schuyler v. Phoenix Ins. Co.* 56 Hun, 493, 10 N. Y. Supp. 205; *Thompson Steel Co. v. Boylston Mut. Ins. Co.* 12 Mo. App. 244; *Monroe v. British & Foreign Marine Ins. Co.*



3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. Rep. 777.

Questions of a commercial and general nature, like this, are not deemed by the courts of the United States to be matters of local law, in which the courts of the United States are positively bound by the decisions of the state courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and principle.

*Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322, Fed. Cas. No. 5,487; *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 225, Fed. Cas. No. 11,949.

[8] \*Mr. Chief Justice Fuller delivered the opinion of the court:

By the memorandum, wire of all kinds was expressly "warranted by the assured free from average unless general;" and by the rider, "free of particular average, but liable for absolute total loss of a part if amounting to 5 per cent."

The memorandum and marginal clauses were *in pari materia* and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words, the qualification was manifestly inserted so that, while conceding that under the memorandum clause no liability was undertaken for a constructive total loss, but only a liability for an actual total loss, the insurers might be held for an actual total loss of a part.

The contracting parties thus recognized the rule that articles warranted free of particular average, or free from average unless general, are insured only against an actual total loss.

[9] The warranty or memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles, regarded as perishable in their nature, and upon certain others none under a given rate per cent. This was about 1749, and since then, in the growth of commerce, the list of articles freed by the stipulation from particular average has been enlarged so as to embrace "many, which, though they may not be inherently perishable, are in their nature peculiarly susceptible to damage.

The early form ran as follows: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent; and all other goods, and also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

In 1764 Lord Mansfield in *Wilson v. Smith*, 3 Burr. 1550, held that the word "unless" meant the same as "except," and that "the words 'free from average unless gener-

al' can never mean to leave the insurers liable to any particular average."

In *Cocking v. Fraser*, 4 Dougl. 295 (1785), the court of King's bench held, Lord Mansfield and Mr. Justice Buller speaking, that the insurer was secured against all damage to memorandum articles, unless they were completely and actually destroyed so as no longer physically to exist.

Chancellor Kent in his Commentaries commended this rule as "very salutary, by reason of its simplicity and certainty, . . . considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty;" and declared that, notwithstanding the authority of *Cocking v. Fraser* had been shaken in England, the weight of authority in this country was "in favor of the doctrine that, in order to charge the insurer, the memorandum articles must be specifically and physically destroyed, and must not exist *in specie*." He added, however, that it had been "frequently a vexed point in the discussions, whether the insurer was holden, if the memorandum articles physically existed, though they were absolutely of no value." 3 Kent, 1st ed. 1828, 244; 12th ed. \*296.

The general rule is firmly established in this court that the insurers are not liable on memorandum articles, except in case of actual total loss, and that there can be no actual total loss \*where a cargo of such articles has arrived, in whole or in part, *in specie*, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity. *Biays v. Chesapeake Ins. Co.* (1813) 7 Cranch, 415, 3 L. ed. 389; *Marcardier v. Chesapeake Ins. Co.* (1814) 8 Cranch, 39, 3 L. ed. 481; *Morean v. United States Ins. Co.* (1816) 1 Wheat. 219, 4 L. ed. 75; *Hugg v. Augusta Ins. & Bkg. Co.* (1849) 7 How. 595, 12 L. ed. 834; *Great Western Ins. Co. v. Fogarty* (1873) 19 Wall. 640, 22 L. ed. 216. And see *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220, Fed. Cas. No. 11,949; *Marean v. United States Ins. Co.* 3 Wash. C. C. 256, Fed. Cas. No. 9,064. [10]

*Biays v. Chesapeake Ins. Co.* was a case of insurance upon hides, of which some were totally lost; some were saved in a damaged condition; and some were uninjured. This court overruled the contention that there could be a total loss as to some of them notwithstanding the memorandum clause, and Mr. Justice Livingston said:

"Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may once have existed from the term *average* being used in different senses, that is, as signifying a *contribution to a general loss*, and also a *particular or partial injury falling on the subject insured*,



it is well understood at the present day, with respect to such [memorandum] articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average. It only remains, then, to examine, and so the question has properly been treated at bar, whether the hides, which were sunk, and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as \*in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue (which in this case amounts to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so so long as a part continues to be less than the whole. This loss, then, being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it."

[11]

In *Marcadier v. Chesapeake Ins. Co.* some of the goods insured were warranted "free from average unless general," and damages were claimed for a constructive total loss of these goods, but the claim was disallowed. After stating the American rule that a damage of ordinary goods exceeding 50 per cent entitles the insured to recover for a constructive total loss, Mr. Justice Story continued:

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety of value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

In *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220, Fed. Cas. No. 11,949, where a clause in the policy exempted the insurers from liability for any partial loss on goods esteemed perishable in their own nature, and the goods insured were held to be perishable, the same eminent judge charged the jury:

"The principle of law is very clear that, as this is an insurance on a perishable cargo, 179 U. S.

the plaintiff is not entitled to recover, \*un- [12] less there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been 99 per cent or, in truth, even if the cargo had there been of no real value."

Part of the cargo in *Morean v. United States Ins. Co.* was warranted free from average unless general, and Mr. Justice Washington said:

"All considerations connected with the loss of the cargo, in respect to quantity or value, may at once be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. . . . The only question that can possibly arise, in relation to memorandum articles is whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy."

In *Hugg v. Augusta Ins. & Bkg. Co.* the insurance was upon freight on a cargo of jerked beef, perishable articles being warranted free from average, and it was held that defendant was not liable for a total loss of freight, unless it appeared that the entire cargo was destroyed *in specie*. The memorandum clause is \*given in the margin.† Mr. [13] Justice Nelson, delivering the opinion of the court, made these, among other, observations:

"What constitutes a total loss of a memorandum article has been the subject of fre-

†"It is also agreed that bar and sheet iron, wire, tin plates, salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, furs, skins, and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp free from average under 20 per cent, unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under 7 per cent, unless general; and coffee in bags or bulk, and pepper in bags or bulk, free from average under 10 per cent, unless general."



quent discussion both in the courts of England and this country, and in the former of some diversity of opinion; but in most of the cases the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain *in specie*, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. . . .

"The only doubt that has been expressed in respect to the soundness of this rule is whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction *in specie*. . . . In this country the rule has been uniform that there must be a destruction of the article *in specie*, as will be seen by a reference to the following authorities. . . .

[14] "Whether the test of liability is made to depend upon the destruction *in specie*, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain *in specie*, and are capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction \*in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

"The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial, into a total, loss."

The case came up on a certificate of division, and the answer to the first question certified was:

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction *in specie* of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The cases in this court are reviewed and applied by Mr. Justice Miller in *Great Western Ins. Co. v. Fogarty*, in which it was ruled that, where certain machinery had been so injured as to have lost its identity as such, recovery for total loss might be sustained.

The same conclusion has been announced in many of the state courts. *Brooke v. Louisiana Ins. Co.* 5 Mart. N. S. 530, 535; *Skin-*

*ner v. Western Marine & F. Ins. Co.* 19 La. 273; *Gould v. Louisiana Mut. Ins. Co.* 20 La. Ann. 259; *Williams v. Kennebec Mut. Ins. Co.* 31 Me. 455; *Waln v. Thompson*, 9 Serg. & R. 115, 11 Am. Dec. 675; *Willard v. Millers' & Mfrs.' Ins. Co.* 24 Mo. 561; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33; *De Peyster v. Sun Mut. Ins. Co.* 19 N. Y. 272, 75 Am. Dec. 331; *Burt v. Brewers' & Malsters' Ins. Co.* 9 Hun, 383, s. c. 78 N. Y. 400; *Chadsey v. Guion*, 97 N. Y. 333; *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.* 19 Jones & S. 444; *Carr v. Security Ins. Co.* 109 N. Y. 504, 17 N. E. 369.

It is said that a different rule has been laid down in Massachusetts by the supreme judicial court of that commonwealth. *Kettell v. Alliance Ins. Co.* 10 Gray, 144; *Mayo v. India Mut. Ins. Co.* 152 Mass. 172, 9 L. R. A. 831, 25 N. E. 80.

\*Even if this were absolutely so we should [15] not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the state decisions as in matters of purely local law.

We are not, however, persuaded that the cases cited justify the asserted conclusion as respects articles specifically included in the memorandum.

In *Kettell v. Alliance Ins. Co.* the memorandum clause of the policy provided that the insurers should not be liable for any partial loss on, among other articles, "salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to 7 per cent on the whole aggregate value of such articles, and happen by stranding." At the end of the last paragraph of the policy, next before the formal conclusion, were printed these words: "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted."

The shipment consisted of 500 boxes of tin plates, invoiced and valued together at one sum. The vessel was wrecked; all the plates damaged more or less; and some of them totally destroyed. Chief Justice Shaw ruled, for the court, that the exception did not come under the memorandum clause; that it recognized a distinction between tin and brass goods liable to tarnish, and memorandum articles liable to decay; and that the natural construction of the exception was "that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature." The insurers were held liable for a constructive total loss under the 50-per cent rule.

In the case before us wire of all kinds was specifically exempted by the memorandum clause, and the exemption was relaxed by the



rider in respect of absolute, that is, actual, loss of a part.

[16] \*If the contract in that case had been in terms and arrangement the same as the contract in this, it does not follow that the same result would have been reached.

But we must not be understood as accepting the views expressed in *Kettell's Case*, great as is the weight attaching to the utterances of the distinguished judge who delivered the opinion. We do not think the words, "partial loss excepted," had any other meaning as applied to tin plates than if applied to articles having an inherent tendency to decay. Tin plates may not be perishable in their nature in the sense of liability to corporeal destruction, but their original character as tin plates is perishable by reason of liability to corrosion and rust. And this may explain why the words, "and happen by stranding," were omitted from the exception. It appears to us that the natural meaning of the exception was to exempt the underwriters from liability for an actual partial loss, and, therefore, for a constructive total loss, which involves an actual partial loss, and a remainder transferred by abandonment.

*Mayo v. India Mut. Ins. Co.* 152 Mass. 172, 9 L. R. A. 831, 25 N. E. 80, follows the prior case, but the court expressly refused to decide "whether in this commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge *in specie*."

It would subserve no useful purpose to attempt a review of the English cases on this subject. If in England a plaintiff may recover for a constructive total loss of memorandum articles, it is when they are so injured as to be of no substantial value when brought to the port of destination.

In the United States (and herein is a material difference between the jurisprudence of the two countries), the general rule is that a damage exceeding 50 per cent justifies abandonment and recovery as for constructive total loss. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39, 3 L. ed. 481; *Le Guidon* (Paris, 1831) chap. VII. art. 1; chap. V. art. 8. But this principle is not applicable to memorandum articles in respect of which the exception of particular average excludes a constructive total loss.

[17] There is no pretense here that this wire, with some small exceptions duly allowed for, did not exist at Key West, and did not arrive at Velasco *in specie*, and, as to a large part, with its original character unimpaired. Abandonment is necessary when the loss is only constructively total, and under this policy no right of abandonment existed at the time of the disaster or afterwards, by the exercise of which the assured could turn this partial loss in fact into a total loss by construction.

The salvage charges at Key West were paid by the underwriters as incurred to avert an impending actual total loss of the whole subject of the insurance. It was to their particular interest, as well as to the general public interest, that the goods should be

saved, and it is apparent that plaintiff could not injure their market by refusing to receive them, and then claim that their value was determined by the price they brought at forced sale.

Counsel conceded that the cargo was damaged to an amount exceeding 50 per cent, and that, therefore, there was a constructive total loss according to the American rule applicable to non-memorandum articles. But there was not an actual loss of the whole, and by the memorandum and rider the insurance company was exempted from liability, except for the actual loss of a specific part, and for that plaintiff has duly recovered.

The circuit court correctly ruled that under the terms of the policy plaintiff could not recover for a constructive total loss of the goods insured; and, inasmuch as a large part of the goods reached Velasco *in specie*, a substantial part of them being wholly uninjured, was right in declining to permit the jury to pass on the question of actual total loss.

There is nothing taking the case out of the general rule. The forced sale certainly does not affect it.

After some previous jettison the cargo passed through the wreck, and the bulk of the wire, some damaged and much uninjured, arrived at the port of destination.

The consignee, which was also the manufacturer, refused to accept it, and declined to put an end to the proceedings which were instituted to its knowledge. If there had been a constructive total loss and a sufficient abandonment prior to the sale, defendant was then liable. As there was not, and no right to abandon or acceptance of abandonment, the goods were at plaintiff's risk, and defendant was not responsible for any loss plaintiff sustained by the sale. [18]

But although, as we have seen, plaintiff had no right to abandon, and although defendant specifically refused to accept an abandonment, it is contended that defendant transshipped the wire, and that such transshipment amounted to an acceptance of abandonment.

The circuit court of appeals was of opinion that the forwarding from Key West to Velasco was done under the authority and with the approval of the captain of the Benjamin Hale. As the cargo was in a condition for transshipment, and there was opportunity to effect it, defendant rightfully insisted that it was the duty of the master to forward it to the destined port.

Yet, even if the underwriters chartered the Cactus and forwarded the cargo, we agree with both courts that neither that nor any other act disclosed by the evidence, would have authorized the jury to find that defendant had accepted the attempted cession of the cargo.

The sue and labor clause expressly provided that acts of the insurer in recovering, saving, and preserving the property insured, in case of disaster, were not to be considered an acceptance of abandonment. Whether

regarded as embodying a common-law principle, or as new in itself, the clause must receive a liberal application, for the public interest requires both insured and insurer to labor for the preservation of the property. And to that end provision is made that this may be done without prejudice.

The circuit court of appeals well points out that at Key West there was no agent of the assured, no adequate means of protection, and no market; while at Velasco there were excellent facilities for protection and handling of cargo, easy access to the company's head agency, and a good market; and it was the port of destination.

If, then, it was the insurer that carried the property, to be preserved and carried, to Velasco, where it was offered to the consignees, such labor and care rendered in good faith did not operate as an acceptance of abandonment,—and especially as there was no right to abandon and a distinct refusal to accept.

[19] \*Acts of the insurer are sometimes construed as an acceptance, when the intention to accept is fairly deducible from particular conduct, in the absence of explicit refusal. Silence may give rise to ambiguity solvable by acts performed. Here, however, defendant refused to accept, and there was no ambiguity in its attitude; and what was done, if done by it, was no more than it had the right to do without incurring a liability, expressly disavowed. There was nothing to be left to the jury on this branch of the case.

Some further suggestions are made, but they call for no particular consideration.

*Judgment affirmed.*

EMILIE SAXLEHNER, *Petitioner,*  
v.

EISNER & MENDELSON COMPANY.

(See S. C. Reporter's ed. 19-41.)

*Trademarks—in name "Hunyadi"—abandonment of right—laches—infringement by use of one of several words—word becoming generic—abandonment by party having exclusive sale—infringement of labels.*

1. The name "Hunyadi," being neither descriptive nor geographical, but purely arbitrary and fanciful, as applied to medicinal waters, is the proper subject of a trademark.

2. To establish the defense of abandonment it is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon, since acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there never was an intention to give up and relinquish the right claimed.
3. The use of one only of the words which constitute a trademark may be sufficient to constitute an infringement, without appropriating all the words included in it.
4. Failure to prevent others from appropriating the word "Hunyadi" as a name for mineral waters until it had become a generic name does not show an abandonment of the right of the owner of a trademark in that word, when he made every effort in his power to put a stop to the use of it by other persons.
5. An abandonment of a trademark by a party having exclusive sale of the goods to which it was applied under a contract with the owner, which he reserved the right to cancel upon notice, is not binding upon him unless it was done with his knowledge and acquiescence.
6. The laches of the owner of a trademark in the word "Hunyadi" is sufficient to defeat his rights therein, when by twenty years of inaction he has permitted the use of the word by infringers in this country, who have been using it under licenses from the Hungarian government, until the name has become generic as indicative of the whole class of medicinal waters for which it is used.
7. The supposition on the part of a foreign owner of a trademark, that a person having the exclusive contract for the sale of his goods in this country will protect it against infringers, but who is not authorized to abandon it, will not relieve him from the effect of his laches when infringers are allowed to use the word for many years until it becomes a generic name.
8. The right to a trademark, once lost by permitting infringers in this country to use it until the word has become generic, is not regained here by a change of the law of the country of its origin, by which the owner's right to it is established there after it has been held to be public property for many years.
9. Laches as a defense in case of an active and continuing fraud must amount to assent or acquiescence.
10. A right of action for fraudulent use of labels in this country is not defeated on the ground of laches by failure for many years to assert it, when during that time the owner was making repeated, persistent, and for a long time unsuccessful, efforts in his own country to establish his rights.

NOTE.—Laches or abandonment as a defense in suits for infringement of trade marks or names, or for unfair competition in trade.

#### I. Delay to seek relief.

##### a. In general.

As a general rule, mere delay to seek relief will not bar the right to relief for an infringement of a trade mark or name, or to restrain unfair competition in trade, although it may preclude the granting of a preliminary injunction, or defeat any recovery for prior infringement.

Mere lapse of time will not deprive the owner of a trademark of his right to enjoin an infringement. *Ei Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 7 So. 23.

There is no fixed time within which a person

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- I. Delay to seek relief.
  - a. In general.
  - b. Effect of statute of limitations.
- II. Implied consent or acquiescence.
- III. Abandonment.
  - a. Nonuser.
  - b. Surrender or dedication to public.
- IV. Preliminary injunction.
- V. Accounting.
- VI. Damages.
- VII. Summary.



11. Liability for infringement of a label and bottle is not avoided by the infringer's use of an additional label which is a mere importer's private mark.

[No. 29.]

Argued March 22, 23, 1900. Decided October 15, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decree affirming in part but reversing in part a decree of the Circuit Court for the Southern District of New York on a bill in equity for an injunction against infringing a trademark and labels. *Reversed.*

See same case below, 63 U. S. App. 139, 145, 91 Fed. Rep. 536, 33 C. C. A. 291.

whose trademark is infringed must bring suit in order to save his rights. *Williams v. Adams*, 8 Biss. 452, Fed. Cas. No. 17,711.

Delay alone in bringing suit will not destroy the right of the owner of a trademark to enjoin further infringement, even though it may be such as to preclude a recovery of damages for prior infringement. *Menendez v. Hoyt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

The rule that mere delay will not deprive the party of his remedy by injunction, although it may deprive him of his right to an account in cases where the statute of limitations would bar an action at law, was said in *Hoyt v. Hoyt*, 18 Phila. 375, to rest upon impregnable foundations, "for why should a man be allowed to continue an unlawful and injurious course of conduct to another by reason of the latter having endured the injury for a long time in the past?"

A delay of one year to institute a suit to restrain a piracy of a trade name will not preclude relief. *Gamble v. Stephenson*, 10 Mo. App. 581.

And a delay of several years will not bar the right of an owner of a trademark to restrain its violation by another whose interference with the former's business during that time was inconsiderable. *Rahtjen's American Composition Co. v. Holzappel's Composition Co.* 41 C. C. A. 329, 101 Fed. Rep. 257.

And an injunction to restrain the infringement of a trademark and labels will not be refused on account of a delay of more than twenty years in seeking relief, where the proof of infringement is clear. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

The right to restrain the infringement of a trademark is not lost by the owner's failure for ten years to take legal proceedings to determine whether an alteration, made after a perpetual injunction was granted, was sufficient, where he protested that the alteration was immaterial, and three years before filing his bill served a formal notice that he considered the trademark complained of a colorable imitation of his own, and warned the violators of the consequence. *Lazenby v. White*, 41 L. J. Ch. N. S. 354, note.

But a motion to commit for the breach of an injunction by adopting an altered label also calculated to deceive was refused in *Carties v. May*, *Cox's Manual of Trade Mark Cases*, 200, cited in *Lloyd on Trade Marks*, 57-77, the defendant having avoided the breach and the plaintiff having delayed to enforce his rights for fifteen months. The injunction was enlarged, however, to cover the new fraud, and  
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Statement by Mr. Justice **Brown**:

\*This was a bill in equity filed in the circuit court for the southern district of New York by the widow of Andreas Saxlehner, deceased, a resident of Buda-Pesth and a subject of the King of Hungary, against the Eisner & Mendelson Company, importers and wholesale dealers, to enjoin the defendant from selling any water under a name in which the word "Hunyadi" occurs, or making use in the sale of bitter waters of labels, in form, color, design, and general appearance, imitating the labels used by plaintiff in the sale of Hunyadi Janos water. [20]

The bill averred in substance that plaintiff's husband, Andreas Saxlehner, was, until May 24, 1889, the proprietor of a certain well within the city limits of Buda-Pesth, and that in 1863 he began to sell the waters of the same in the market under the name or

costs awarded against defendant. See also *Rodgers v. Nowill*, 3 De G. M. & G. 614, 22 L. J. Ch. N. S. 404, 17 Jur. 109, 171, 1 Week. Rep. 122, 205, 266, *infra*.

Delay to seek relief forms no defense to a suit to restrain the infringement of a trademark, where the infringing mark was adopted with fraudulent intent. *Sanders v. Jacob*, 20 Mo. App. 96.

So, laches will not avail as a defense to a proceeding to restrain the use of a trade name, where the defendant adopted the name with a fraudulent intent. *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 7 So. 23.

And the lapse of years is no defense to a suit to restrain the infringement of a trademark, where such use was originally fraudulent, was continued with fraudulent intent, and has the practical effect of deceiving the public. *Rodgers v. Rodgers*, 31 L. T. N. S. 285, 22 Week. Rep. 887.

But where an infringement is continued for many years the court will require clearer proof than it otherwise would, both that the acts complained of have been done fraudulently, and that persons have been actually defrauded thereby. *Ibid.*

Delay, in order to bar a suit for the infringement of a trademark, must be such as would lead a reasonable man to suppose that the owner had abandoned his device, or such as induced the defendants to act, or under such circumstances as require the owner to assert his right. *Sheppard v. Stuart*, 13 Phila. 117.

A delay of seven months, with knowledge of an unfair use of a trade name, is fatal to a suit to restrain such use, in which it is not shown that a single person has been misled. *Estcourt v. Estcourt Hop Essence Co.* 32 L. T. N. S. 80, L. R. 10 Ch. 276, 44 L. J. Ch. N. S. 223, 23 Week. Rep. 313.

And an injunction will not be granted to restrain the infringement of a trademark, where the only act complained of was committed more than seven years before suit, and was then known to the only person interested and affected. *Stetson v. Brennen*, 21 App. Div. 552, 48 N. Y. Supp. 601.

The question of a manufacturer's right to restrain the application of a trademark to a variety of goods in which he has not dealt is a sufficiently close one so that extreme delay may solve the question adversely to him. But this principle is inapplicable to a case in which the trademark is also the distinctive part of the plaintiff's corporate name, for laches can never have the effect of a concession that a person will not extend the use or application of his name; nor can it confer upon the wrongdoer



trademark of "Hunyadi Janos;" that as his business increased he acquired additional territory, opened new wells, adopted a novel style of bottles and a peculiar label, and that the water soon became known in all the markets of the world \*under the name of "Hunyadi Janos," or in England and the United States under the name of "Hunyadi" alone; that in March, 1876, Saxlehner entered into a contract with the Apollinaris Company of London, under which such company was given the exclusive right to sell this water in Great Britain and the United States, and that such contract was not terminated until March, 1896; that this company used a label of similar design, but of different color, and that large quantities of this water were exported by Saxlehner through such company and sold in the United States under the name of Hunyadi water; that Saxlehner died May

24, 1889, and plaintiff succeeded him in the business; that prior to his death Saxlehner obtained the registration in the Patent Office of the name "Hunyadi" as his trademark; that the defendant, knowing of these facts, had unlawfully imported and sold bitter water not coming from plaintiff's wells, in bottles of identical shape and size as those used by plaintiff, and with labels in "close and fraudulent simulation of your orator's trademark," but under the name of "Hunyadi Laszlo" or "Hunyadi Matyas,"—all in defiance of plaintiff's right, and with the design of imposing the waters upon the public as those of the plaintiff.

The answer denied the material allegations of the bill, and averred that in the year 1873, one Ignatius Markus, being the proprietor of a certain well within the limits of Budapesth, applied to the proper authorities and

the right to build up and establish a business in another's name. *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297. See also *Collins Co. v. Oliver Ames & Sons Corp.* 20 Blatchf. 542, 18 Fed. Rep. 561, *infra*.

The right to relief from infringement of a trademark is not affected by delay in asserting one's rights, unless he knew of the infringements and acquiesced in them. *Munro v. Tousey*, 36 N. Y. S. R. 520, 13 N. Y. Supp. 79.

Thus, delay in seeking relief on the part of one who has permitted the use of his name by a partnership will not estop him to restrain the use of his name by the corporate successor of the partnership, where he had no knowledge that the partnership had been succeeded by the corporation. *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. Rep. 816.

Knowledge of the piratical use of a trademark is not shown by proof of its use in advertisements extending over a period of ten years, where such advertisements were not steadily or uniformly used, but interchangeably with others unimpeachable as an object of legal complaint. *Klnahan v. Bolton*, 15 Ir. Ch. Rep. 75.

#### b. Effect of statute of limitations.

A neglect to prosecute the infringer and user of a trademark is no defense at law, unless the delay is equal to the time fixed in the statute of limitations, notwithstanding knowledge of the forgeries and sales. *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

So, mere delay to seek relief from the invasion of a trademark, with knowledge of the wrong, though competent evidence to disprove the existence of the right claimed, is no bar to an action to restrain the infringement, unless extended to the period prescribed in the statute of limitations. *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150, 5 S. E. 907.

A delay of two years is no bar to a suit for an injunction to restrain a person from falsely representing by cards and wrappers that the business carried on by him is identical with that carried on by another, since such action, being in the nature of an action for deceit, the injunction only being sought in aid of a legal right, is subject to the six years' statute of limitations. *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, 47 L. J. Ch. N. S. 459, 38 L. T. N. S. 380, 26 Week. Rep. 435.

An action to enjoin the illegal appropriation and use of a trademark is within the provision of the Kentucky statute of limitations that "an action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action ac-

crued." *Northcutt v. Turney*, 101 Ky. 315, 41 S. W. 21.

But the ten years' prescription of the Louisiana statute of limitations is not applicable to a suit to enjoin the infringement of a trademark and labels. *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

And the right of the executors of a deceased partner to restrain the use of his name in the partnership business without their consent duly obtained, as required by Mass. Gen. Stat. chap. 56, cannot be barred by the statute of limitations. *Bowman v. Floyd*, 3 Allen, 76, 80 Am. Dec. 55.

The statute of limitations begins to run against the right to bring an action to enjoin the infringement of a trademark when the defendant begins its use, not from the time his predecessors began to use it, in the absence of any allegation that they had so used the words under a claim of right, or undertook to convey to him a title in the trademark. *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21.

Litigation as to the right to the offices in an association will not suspend the running of the statute of limitations against a right of action by one rival body against another to establish its exclusive right to its name. *Grand Lodge, A. O. of U. W. v. Graham*, 96 Iowa, 615, 31 L. R. A. 133, 65 N. W. 837.

#### II. Implied consent or acquiescence.

Consent by an owner to the use of his trademark by another, when inferred from his knowledge and silence, "lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in taking an account of profits . . . but even the admission of the fact would furnish no reason for refusing an injunction." *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599. See also *McCardel v. Peck*, 28 How. Pr. 120, *infra*.

No presumption of acquiescence by the owner of the exclusive right in a trademark, nor estoppel of his right to restrain its wrongful appropriation, can be created by an illegal and fraudulent attempted appropriation of such mark. *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21.

A caution to the public against the fraudulent use of a device cannot be deemed to be an acquiescence in the infringement. *Gillott v. Esterbrook*, 47 Barb. 455, Affirmed, 48 N. Y. 374.

But delay of coal miners claiming a trademark in the words "Lackawanna Coal," to take



was granted the registration of the name "Hunyadi Matyas" as a denomination of the waters of his spring, such authorities holding that the name was distinguished from that of the "Hunyadi Janos;" that "Hunyadi Janos" when anglicized, is John Hunyadi, the name of a celebrated Hungarian hero, and that the name "Hunyadi" is a common one in Hungary, and means of or from Hunyad, and that for this reason it is of itself incapable of exclusive appropriation by anyone, being a common descriptive personal name, and also used to designate certain districts and towns in Hungary; that in the year 1889 the word had become a generic term, describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary; that the shape of the bottle and the peculiarities of the label have become \*common property, and were

adopted by everyone who sold the Hunyadi water, whether under the name of "Hunyadi Janos," "Laszlo," "Matyas," "Arpad," etc., and that to the time of his death Saxlehner had never asserted or made any claim to the exclusive use of his style of bottle, or capsules, or labels; that in 1886 or 1887 the Apollinaris Company brought suit against the American agents of several of these waters and obtained temporary injunctions, which were subsequently dissolved upon evidence that the word "Hunyadi" was used in Hungary as part of the name of a number of different mineral waters, that Saxlehner refused to join with or aid the Apollinaris Company in opposing a dissolution of such injunctions, and that thereafter these waters were sold freely, openly, and continuously in competition with the "Hunyadi Janos" in the bottles and with the labels and capsules

any action for several years in regard to a dealer in good faith using those words to designate coal sold by him but not mined by them, other than to place the sign "Old Company's Lackawanna Coal" on their premises in the dealer's city, and to "caution consumers of Lackawanna coal against coal not coming from our company," is such acquiescence as amounts to a license to him so to use the words, and estops them from equitable relief. *Delaware & H. Canal Co. v. Clark*, 7 Blatchf. 112, Fed. Cas. No. 3,764.

And a thread manufacturer who has submitted to an alleged imitation of his spool heads without protest for twelve years waives his right to relief. *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966.

So, a mutual benefit association is barred by its laches from maintaining a suit against a similar organization to restrain it from doing business under the same name, where it has knowingly permitted, without objection, such use of its name for ten years prior to the commencement of the action. *Grand Lodge, A. O. of U. W. v. Graham*, 96 Iowa, 615, 31 L. R. A. 133, 65 N. W. 837.

And the failure of the treasurer and managing director of a corporation, in an interview with him as representative of the corporation, to object to the adoption of the name proposed as the corporate name of a rival company, will preclude the former corporation from successfully objecting to the mere use of such corporate name. *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. Rep. 936.

And the silence of two and a half years on the part of a corporation formed by the consolidation of two competing firms is such acquiescence as will bar its right to restrain the use of one of the firm names by a corporation subsequently formed, which expended large sums of money and built up a business, the life of which depends upon the use of such name, where the only use of the name by the former corporation under the consolidation agreement to transfer to it the exclusive use of the firm names so far as they shall "apply or become necessary to be used" was as a part of its corporate title. *Tygart-Allen Fertilizer Co. v. J. E. Tygart Co.* 191 Pa. 336, 43 Atl. 224.

And the failure of a retail dealer to object to or protest against the use of his trade name for more than seven years by another dealer who, for a portion of that time, had a branch store directly opposite the former's place of business, tends to show an acquiescence in such use which would bar his right to equitable relief. *Wormser v. Levy*, 27 Jones & S. 1, 12 N. Y. Supp. 558.

It was intimated in *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, that equitable relief might be refused where the use of a trademark by others for a long period under the assumed permission of the owner had largely enhanced the reputation of the particular brand.

And in *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. Rep. 938, acquiescence for more than eight years in the open and exclusive use of a trademark, under a known assertion of right and at least a color of legal title, was held a bar to equitable relief, the conduct of business being marked with constant and successful efforts to extend the market for the article and enhance its reputation.

So, delay for ten years to contest the right of a rival to the use of a trademark, though knowing he is expending large sums of money in extending the use of and demand for the article on which the trademark is used, will preclude an injunction against his use of it. *Old Times Distillery Co. v. Casey*, 20 Ky. L. Rep. 994, 47 S. W. 610.

And one who has for thirty-four years engaged in the manufacture and sale of artificial Carlsbad water, without protest of any kind, having commenced the business five years before a bottle of the natural Carlsbad was seen in this country, and twelve years before it was imported for sale except in small quantities, will be enjoined from using the word "Carlsbad" to designate the water manufactured and sold by him, only in case he fails to add a word or words plainly indicating that the water is artificial, and not the product of the Bohemian spring. *Carlsbad v. Schuitz*, 78 Fed. Rep. 469.

One who, during the entire life of a patent, has known and acquiesced in the sale, under the name "Charter Oak," of stoves containing the patented improvement, cannot, after his patent expires, prevent the use of such name as a violation of his trademark by a person who has built up a business through such acquiescence, so long as he does not represent the stoves as made by the patentee, or induce others to believe they are so made. *Filley v. Child*, 16 Blatchf. 376, Fed. Cas. No. 4,787.

This decision, though based on acquiescence, could also be sustained on the well-established principle that the name by which a patented article becomes known, even though an arbitrary one or the surname of the patentee, becomes public property on the expiration of the patent, subject to the qualification that every-



affixed thereto as before stated, with the knowledge, consent, and acquiescence of Saxlehner and his agents; that defendant, a Pennsylvania corporation, entered into a contract with the owners of the "Hunyadi Matyas" spring, and obtained the exclusive right to import their waters into the United States for the term of twenty-five years; that in 1890 it began to sell this water in like bottles and with like capsules and labels affixed thereto as now claimed by the plaintiff herein to be in violation of her claimed rights, which bottles, capsules, and labels were similar to those in which the said "Hunyadi Matyas" water had been first imported, and that this was done with the consent of the American agent of the Apollinaris Company, who expressly stated that he had no objection to the label used by the defendant, nor to the way in which it was adver-

tising the "Hunyadi Matyas" water; that in 1889 it also became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo," and "Hunyadi Bela" waters, and began to sell the same in large quantities; that these waters were put up for sale and sold in bottles similar to those of the "Hunyadi Janos," with like capsules and labels; that these waters were sold in open competition with the "Hunyadi Janos" until sometime in 1893, when plaintiff stopped said competition in part by purchasing the Arpad and Bela springs, and thereupon revoked the agency of the defendant\* to sell such waters; [23] that in 1877 Saxlehner applied to the Commissioner of Patents for the registration of the words "Hunyadi Janos" as a trademark; that such trademark was registered September 11, 1877, by which proceeding he abandoned all claim and assertion of right to the

one making use of the name must clearly identify his goods as of his own manufacture. As this question is not strictly within the scope of this note, only a few representative cases will be cited, but these clearly establish the rule. See *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Brill v. Singer Mfg. Co.* 41 Ohio St. 127, 52 Am. Rep. 74; *Lindoleum Mfg. Co. v. Nalrn*, L. R. 7 Ch. Div. 834, 47 L. J. Ch. N. S. 430, 38 L. T. N. S. 448; *Centauro Co. v. Heinsfurter*, 28 C. C. A. 581, 56 U. S. App. 7, 84 Fed. Rep. 955; *Centauro Co. v. Killenberger*, 87 Fed. Rep. 725.

But this principle does not apply where the trademark antedated by more than two and a half years the patent, and the name, and not the patent, gives value to the article. *Batcheller v. Thomson*, 35 C. C. A. 532, 93 Fed. Rep. 660.

And the lapse of a foreign patent does not forfeit the right of the patentee or his successors to restrain the infringement of a valid trademark right previously acquired in the United States. *Rahtjen's American Composition Co. v. Holzapfel's Composition Co.* 41 C. C. A. 329, 101 Fed. Rep. 257.

Acquiescence, to avail as a defense to a motion to commit for breach of an injunction to restrain the use of a trademark, must be such as to create an entirely new right in the defendant. *Rodgers v. Nowill*, 3 De G. M. & G. 614, 22 L. J. Ch. N. S. 404, 17 Jur. 109, 171, 1 Week. Rep. 122, 205, 266.

### III. Abandonment.

#### a. Nonuser.

The question of abandonment is one of intention, and the burden of establishing it lies on the party who affirms it. *Julian v. Hoosier* *Brill Co.* 78 Ind. 408.

Mere suspension, for nearly one year, of a profitable business protected by a patent having several years to run, is not such evidence of an intention to abandon as will bar a suit to restrain an infringement of the trademark used therein. *Ibid.*

So, a delay of three years on the part of the purchaser of the right to carry on a business under a patent, before resuming the business, will not bar her right to restrain an infringement of the trademark used therein, though it may preclude a recovery for the damages suffered, where she intends to engage in the business as soon as she can. *Ibid.*

And the mere intermission in the business of a bank from the time of its failure July 27, 1893, until March 6, 1894, when a purchaser

of the building, fixtures, goodwill, and name from the assignee for the benefit of creditors resumed the business, did not operate as an abandonment of such goodwill or trade name, which will preclude the right to enjoin its wrongful use. *Bank of Tomah v. Warren*, 94 Wis. 151, 68 N. W. 549.

The fact that a corporate manufacturer of tools having the right to make any article of iron, steel, or other metal has made no shovels prior to the fraudulent adoption of its trademark by another corporation for a certain grade of shovels, will not bar the right of the former corporation to restrain such use of its trademark. *Collins Co. v. Oliver Ames & Sons Corp.* 20 Blatchf. 542, 18 Fed. Rep. 561. See also *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297, *supra*.

A stove manufacturer does not abandon his right to the use of a word as his trademark, so as to bar his suit for its infringement, by substituting another name therefor upon a few of his ranges at the purchaser's request. *Shepard v. Stuart*, 13 Phila. 117.

But the failure of exporters to use a trademark on shipments for more than twelve years is such an abandonment as will bar a suit for infringement against one who began to use the trademark before the expiration of that time, and used it thereafter more continuously and extensively than the former or their successors in trade. *Brower v. Boulton*, 53 Fed. Rep. 389, *Affirmed*, 7 C. C. A. 567, 20 U. S. App. 166, 58 Fed. Rep. 888.

And the uninterrupted and innocent use without question, for five years, of a local geographical name for a brand of cigars, will not be judicially interfered with as an infringement, in favor of one who may have first used the name for cigars, but whose use of it on cigars offered for sale has been intermittent, with long lapses. *Levy v. Waitt*, 25 L. R. A. 190, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. Rep. 1008.

The substitution, by the grantees or licensees, of new and different labels upon bottles containing the genuine medicine, and their use of the label of the original proprietor to designate a spurious mixture, is a forfeiture of their right to the use of the original label, which will preclude their successors from injunctive relief. *Manhattan Medicine Co. v. Wood*, 4 Cliff. 488, *Fed. Cas. No. 9,026*.

And an injunction to restrain the use of the name "Worcestershire Sauce" and the imitation of plaintiffs' labels was refused in *Lea v. Miller*, Seton, 4th ed. 242, on the ground that both the name and the style of label had long been used by sauce manufacturers other than plaintiffs,



word "Hunyadi" in and of itself, and that it had for many years previously been a generic term to designate this class of waters. The answer further alleged that the defendant, in order to designate the waters sold by it, and to secure additional protection to the label used by it, registered the trademark "Hunyadi Matyas," since which time the defendant has used such trademark as stated therein, and in accordance therewith.

As the case depended almost wholly upon questions of fact, a somewhat elaborate statement of the evidence becomes necessary.

In 1862, Andreas Saxlehner discovered within the city limits of Buda-Pesth, Hungary, in a valley surrounded on all sides by hills acting as a natural barrier, secluding it from the outer world, a spring which was named by him the "Hunyadi" spring, and on January 19, 1863, the municipal council of

Buda granted him permission to sell the water taken from such spring and to give the spring the name of "Hunyadi," upon the payment of a small sum of money for hospital purposes. Soon after this he began to bottle the water of his spring and to sell it under the arbitrary name or trademark of "Hunyadi Janos;" in other words, John Hunyadi, a Hungarian hero of the fifteenth century. Several wells were subsequently sunk by him in the same valley to the number of about 112, all of which produced water substantially of the same chemical combination, which is led through a system of pipes to large subterranean cisterns, from which it is taken and bottled. It soon began to be exported beyond the limits of Hungary to other European countries, and also to the United States.

Saxlehner was not, however, the first one

and that the latter had publicly abandoned their old labels by the recent adoption of a new label bearing their signature as a distinctive mark.

One who on registering his trademark expressly disclaims the exclusive right to the use of a portion of such mark cannot restrain the use thereof by another. *Rosenthal v. Reynolds* [1892] 2 Ch. 301.

And the registration by a foreigner, of a red anchor in an oval field as a trademark, was an abandonment of his right to the unlimited use of an anchor emblem, which will bar his right to restrain the bona fide use of a black anchor as a trademark under which a business was established prior to a second registration claiming an anchor as the essential feature of the trademark. *Richter v. Anchor Remedy Co.* 52 Fed. Rep. 455, Affirmed, 8 C. C. A. 220, 17 U. S. App. 427, 59 Fed. Rep. 577.

#### *b. Surrender or dedication to public.*

No recovery for the imitation and use of a trademark can be had if the use has continued for such a length of time and under such circumstances as to indicate a dedication or abandonment of the mark to the public, or a license to use it. *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

A thread manufacturer cannot restrain the use of a black and gold label on six-cord spool thread, with proper distinctive marks, where other manufacturers, by long practice and with his acquiescence, have acquired the right to make use of the black and gold label to designate that grade of thread. *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966.

By abandoning a suit to restrain infringement of a trademark, and obtaining an order dismissing the bill without costs, the owner abandons all exclusive right to its use. *Browne v. Freeman*, 12 Week. Rep. 305, 4 New Rep. 476.

Numerous infringements of a trademark do not show an intention to abandon which will be available as a defense to a suit for infringement, where complainants prosecuted all infringers within a reasonable time after they became aware of such infringements. *Williams v. Adams*, 8 Blss. 452, Fed. Cas. No. 17,711.

And a perpetual injunction to restrain the infringement of a trademark and labels will not be denied because of similar infringements by others without the plaintiffs' consent or acquiescence, and with no intention on their part to surrender their rights to the public at large or to the invaders thereof in particular. *Tay-*  
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*lor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784.

So, the fact that other parties have manufactured articles and put them on the market under a trademark, to compete with the owner of the trademark, is no defense to a suit by him to enjoin an infringement, unless he has assented to or acquiesced in such an invasion of his rights. *Filley v. Fassett*, 44 Mo. 168, Am. Dec. 275.

Indeed, the fact that other persons have imitated the trademarks or labels of the complainant rather aggravates than excuses the conduct. *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Funke v. Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413.

And mere neglect to prosecute the other infringers will not bar the owner's right to enjoin such infringement by the defendant. *Funke v. Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413.

And the owner of the right to use a word upon a series of publications, who has not for any length of time abandoned it, and has continuously asserted it in one way or another, although not against all trespassers at once, has lost no right to enjoin its infringement. *Estes v. Leslie*, 23 Blatchf. 476, 27 Fed. Rep. 22.

Evidence that different parties have used at various times some word, letter or character comprised in the trademark is not sufficient to establish an abandonment which will defeat the right of the owner to enjoin the infringement of the trademark by another. *Sohi v. Gelsendorf*, 1 Wilson (Super. Ct. Ind.) 60.

That a device is used upon other articles of manufacture does not deprive a person of his right to be protected in its exclusive use on the one article manufactured by him. *Colman v. Crump*, 70 N. Y. 573.

Consent by a patentee to the sale, by a pattern maker, of modified patterns of a stove, is not sufficient, in a contest with third parties, to establish a dedication or abandonment to the public of his supposed rights in his trademark, the vendees disclaiming all right, claim, or interest in the trademark, either as originators or purchasers. *Filley v. Fassett*, 44 Mo. 169, 100 Am. Dec. 275.

So, in *McCardel v. Peck*, 28 How. Pr. 120, the court said: "It has never been held that a mere consent or acquiescence in the use of a name or trademark conferred an absolute and an irrevocable right which could not be annulled," and that "it should be quite clear that a party had parted forever with his right to the use of his name which he had made valuable, before the courts are authorized to hold



[24] in Hungary to put up the bitter waters with which that kingdom abounds, but others were already sold in the market, one of them being called "Hildegarde," and another "Franz Deak." Different bottles and labels were used for these waters, when Saxlehner adopted, in conjunction with the distinctive name of "Hunyadi Janos," a novel style of bottle of straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos, Budai Keserűviz Forrás," meaning "Hunyadi Janos, bitter water of Buda," together with a supposed portrait of the hero stamped thereon. He also adopted a peculiar label covering almost the whole body of the bottle, divided into three longitudinal panels, the middle one of which bore the same portrait in a medallion, with the name of "Hunyadi Janos" written

in large letters on the top of the label, the color of the middle panel being a reddish brown and the outer panels white. As this water was exported to and sold in the various countries of the world, a different custom concerning its appellation sprung up in different countries, the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name of "Hunyadi" became its common appellation, it being known as Hunyadi water.

In 1872, it seems that one Ignatius Markus discovered a spring upon a plot of ground leased by him, which also produced bitter water of similar quality, and shortly thereafter petitioned the municipal council of Buda, not only for permission to sell the water, which was unconditionally granted up-

that such was the intention." See also *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599, *supra*.

Other infringements of a trademark, and its use on genuine articles by implied license from the owner, do not render the name generic so as to bar the right of the latter to restrain its use. *Williams Mfg. Co. v. Noera*, 158 Mass. 110, 32 N. E. 1037.

Placing a dealer's name at his request, in accordance with a trade custom, on articles bearing the trademark of the manufacturer, is no indication of an abandonment which will bar the latter's right to restrain an infringement. *Sheppard v. Stuart*, 13 Phila. 117.

That a firm to which a foreign manufacturer consigns his goods puts up an American preparation in labels somewhat similar, but not enough like them to deceive, is not sufficient to deprive the foreign maker of his right to enjoin the sale of goods dressed up to imitate his own. *Scheuer v. Muller*, 20 C. C. A. 161, 45 U. S. App. 184, 74 Fed. Rep. 225.

The use of a trademark by several descendants of the original owner, by amicable arrangement between themselves, does not destroy the distinctive features of the trademark, or leave it open to the public to appropriate it. *Pratt's Appeal*, 117 Pa. 401, 11 Atl. 878.

The right of a person who has coined a new arbitrary word, to be protected in its use as a trademark, is not affected by the public adoption of the word as the ordinary designation of the article produced. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712.

So, the right of the owner of a trademark in an old word applied to a new use is not lost by the subsequent use of it by the public as a common appellation of the article so designated. *Société Anonyme v. Micalovitch*, 18 Ohio L. J. 862.

And where a manufacturer has invented a new name consisting either of a new word or a word or words in common use, which he has applied for the first time to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in its use, notwithstanding it has become so generally known that it has been adopted by the public as the ordinary appellation of the article. *Seichow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169.

Referring to two earlier New York cases the court says: "Judge Duer, in *Fetridge v. Wells*, 4 Abb. Pr. 144, uses language with reference to the name 'Balm of a Thousand Flowers,'

which, if adopted without qualification, would sustain the defendants' proposition; but on the other hand, Judge Hoffman, with reference to the same name, in *Fetridge v. Merchant*, 4 Abb. Pr. 156, dissents from the views of Judge Duer."

So, if the primary object of a trademark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to deprive the owner of protection or make it the common property of the trade. But if it be suffered to come into general use without objection from the original proprietor, it becomes merely generic and indicative of quality. *Burton v. Stratton*, 12 Fed. Rep. 696.

And this is the doctrine of the principal case, in which the fact that the appropriation was made against the constant protest of the owner, who made every effort in his power to put a stop to the use of his trademark by others, was deemed a sufficient reason for refusing to deprive him of his right to protection on the ground that the word had become generic. But the court said that, if the word became generic with the assent and acquiescence of the owner, he could not thereafter assert his right to its exclusive use.

Neglect of an owner of a trademark to register it for twenty-four years, coupled with his failure during that period to restrain its use by others as a term descriptive of the article, will make the name *publici juris*, and disentitle him to enjoin its use by another to denote the character and quality of the article. *National Starch Mfg. Co. v. Munn's Patent Malzena & Starch Co.* [1894] A. C. 275.

And the right to a trademark is lost, so as to bar the owner from restraining its infringement, where it has come to be so public and in such universal use that no one can be deceived by the use of it or can be induced by such use to believe that he is buying the goods of the original trader. *Ford v. Foster*, L. R. 7 Ch. 628, 41 L. J. Ch. N. S. 682, 27 L. T. N. S. 219, 20 Week. Rep. 311, 818.

And this test as to whether a mark has by a long user become *publici juris* was approved in *Re Heaton's Trade-Mark*, L. R. 27 Ch. Div. 570, 53 L. J. Ch. N. S. 959, 51 L. T. N. S. 220, 32 Week. Rep. 951.

To warrant a conviction under a penal code provision for the punishment of counterfeiting a trademark, the jury must be satisfied that the trademark, if ever valid, has not been abandoned by acquiescence in its use by others for a long period. *People v. Molina*, 7 N. Y. Crim. Rep. 51, 10 N. Y. Supp. 180.



on the report of the town physician concerning the quality of the water found, but also to be allowed to name this spring "Hunyadi Matyas," and to bring the water into commerce under that name. This was denied, upon the petition and protest of Saxlehner, who claimed the exclusive right to the use of the name "Hunyadi." It was said that the granting of the denomination "Hunyadi Matyas" to another spring "would very likely, nay certainly, lead, both between the owners of the two springs and among the consuming public, to unpleasant misunderstandings, which it is the duty of the authorities to avoid, and even to prevent. And further, the fact that petitioner, notwithstanding the many designations at his disposal, seeks to apply the name 'Hunyadi' to his spring, undoubtedly shows the not very noble intention \*on his part to avail himself

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of the great diffusion and good renown enjoyed by the Saxlehner Hunyadi Bitter Spring, both at home and abroad, which, however, cannot be tolerated by the authorities, and in the present case all the less, as it is a well-known fact that Mr. Saxlehner was able to secure this good renown to his spring only through many years' labor and at considerable expense."

On a petition in appeal, however, to the minister of agriculture, in 1873, the decision of the council, which denied to Markus the permission to use the name "Hunyadi Matyas," was reversed because of certain omissions by Saxlehner to conform to the local laws, and also because "Hunyadi Janos" and "Hunyadi Matyas" "represent two quite clearly different names, which may stand without any infringement to each other." This spring was afterwards registered in Buda-Pesth by the

#### IV. Preliminary injunction.

A motion for an injunction to restrain the infringement of a manufacturer's right by imitating his labels was refused in *Farina v. Gebhardt*, *Cox's Manual of Trade Mark Cases*, 118, because of his delay in making the application.

And a delay of four months to seek relief in equity to prevent the unauthorized use of a name was held, in *Flavell v. Harrison*, 22 L. J. Ch. N. S. 866, 17 Jur. 368, 10 Hare, 467, 1 Week. Rep. 213, to require a motion for an injunction to stand over for six months, with liberty to the plaintiff to bring his action at law.

The right to an interlocutory injunction in a suit to restrain the fraudulent use of a trade name is lost by a delay of several months in filing the bill after sufficient knowledge and information are acquired to enable the complainant to be preferred. *Isaacson v. Thompson*, 41 L. J. Ch. N. S. 101, 20 Week. Rep. 196.

And a delay of from five to nine months to seek relief is fatal to a preliminary injunction to restrain an infringement of a corporate name by a corporation able to respond to a decree for an accounting, unless the balance of inconvenience necessarily resulting from restraining the defendant pending trial if defendant is ultimately successful is so much less than that of refusing the injunction if complainant is successful as to overcome such objection. *Stirling Silk Mfg. Co. v. Sterling Silk Co.* (N. J. Ch.) 46 Atl. 199.

An unexplained delay of nine years to seek relief is such laches as requires the dissolution of a preliminary injunction to restrain the infringement of a trademark which is also the distinctive part of the plaintiff's corporate name. *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151.

A preliminary injunction to restrain the infringement of a trademark will be denied where the alleged infringement has extended over eighteen years, and for several years to the certain knowledge of plaintiff before bringing suit, and no showing of defendant's insolvency or irreparable injury is made, and the right to relief is squarely put in issue by the pleadings. *E. T. Fairbanks & Co. v. Des Moines Scale & Mfg. Co.* 96 Fed. Rep. 972.

And a motion for a preliminary injunction to restrain the sale by retail dealers of cutlery alleged to bear an infringement of complainants' trademark was denied in *Rodgers & Sons v. Philip*, 1 Off. Gaz. 29, on the ground that acquiescence for twenty-five years in the known use of such trademark by other manufacturers without seeking relief was a bar to the maintenance of a suit against mere purchasers in good

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faith of such goods; but whether such acquiescence would debar complainants from their remedy as against rival manufacturers was questioned. Mr. Browne, in his work on *Trademarks*, 2d ed. § 684, states that on final hearing a perpetual injunction was decreed.

But in *Consolidated Fruit-Jar Co. v. Thomas*, 2 N. J. L. J. 272, Fed. Cas. No. 3,131, the court laid down the unqualified rule that delay in seeking relief for the infringement of a trademark is no bar to a preliminary injunction, though it may preclude the party acquiescing from any right to an accounting for past profits. As a general proposition this ruling is not sustained by the authorities, and finds no support in *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, on which the court relied, as in that case the question of a permanent, and not a preliminary, injunction was involved.

This principle is also declared, however, in *Hoyt v. Hoyt*, 18 Phila. 375, in which a motion for a preliminary injunction to restrain an infringement of labels was granted, notwithstanding delay in making the application. The court said: "It is now settled that mere delay will not deprive the party of his remedy by injunction, although it may deprive him of his right to an account in cases where the statute of limitations would bar an action at law,"—citing *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Consolidated Fruit-Jar Co. v. Thomas*, 2 N. J. L. J. 272, Fed. Cas. No. 3,131; *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, 47 L. J. Ch. N. S. 459, 38 L. T. N. S. 380, 26 Week. Rep. 435. But these, with the exception of *Consolidated Fruit-Jar Co. v. Thomas*, and *Amoskeag Mfg. Co. v. Spear* (which was on motion to dissolve an *ex parte* injunction), were cases in which the delay was set up as a bar to relief on final hearing.

Delay, where proof of infringement was clear, was held no bar to granting a preliminary injunction in *Gowans v. Ahlborn Bros.* 4 Knip, 31, although the court said such delay "might be ground for refusing an injunction until after final hearing, if the plaintiffs' right to the trademark were doubtful, or, possibly, if the defendants had adopted their label in ignorance."

A moderate delay to obtain evidence of actual deception is no bar to a motion for an injunction to restrain defendant from representing his business to be that of the plaintiffs, and from using any name, inscription, or device calculated to mislead the public. *Cave v. Myers, Seton*, 4th ed. 238.

And a delay of three months to file a bill to restrain unfair competition in trade, although



name of "Hunyadi Matyas," and thereupon the proprietors of other wells began to sell their waters in Europe under the name of Hunyadi with an added name, and also with the use of a close imitation of the red and white labels. It did not appear, however, that Markus sold any water or made use of the permission granted to him by the minister, or obtained a license from the local authorities; but in 1876, the firm of Mattoni & Wille became the purchasers of the plot of ground leased by Markus and several other adjoining plots containing springs, and in that year registered a separate trademark and name for each of the six springs which they then acquired, among which was a trademark bearing the name "Hunyadi Matyas." In 1877 they began selling these waters in Hungary, claiming certain specific differences of composition of the various wa-

ters which recommended them for different purposes.

In February, 1876, Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which that company agreed to purchase a certain quantity yearly, and Saxlehner bound himself for a term, which finally expired in 1896, to give the company the exclusive right to sell his "Hunyadi Janos" water in Great Britain, United States, and other transmarine countries. The company agreed to purchase at least 100,000 bottles yearly until 1878, and at least 150,000 bottles \*thereafter at a stated [26] price. In addition to this Saxlehner agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. A special label was designed to be used on the bottles sold by the company of substantially the same

with knowledge of the facts, will not bar the right to an interlocutory injunction, where the delay was for the purpose of collecting a sufficient number of cases in which persons had actually been deceived,—especially since the nature of the injunction was such that if granted the defendant would not be injured by the delay. *Lee v. Haley*, L. R. 5 Ch. 155, 22 L. T. N. S. 251, 39 L. J. Ch. N. S. 284, 18 Week. Rep. 242.

The use of the word "cellonite" on manufactured articles and in the business name of a corporation for three or four years will not deprive the owners of the trademark "celluloid" of their right to a preliminary injunction, where they have had no knowledge of such use. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94.

A delay of three years will not bar the right of a Kentucky distiller to a preliminary injunction to restrain the infringement of his trademark by a Boston wholesale dealer, in view of the distance between the parties' respective places of business, and of the fact that no knowledge of such infringement is shown to exist for more than about one year before suit. *G. G. White Co. v. Miller*, 50 Fed. Rep. 277.

Where the delay of the owner of a trademark to prosecute infringers has tended to mislead the public or the defendant sought to be enjoined, into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. *Estes v. Worthington*, 23 Blatchf. 65, 22 Fed. Rep. 822.

So, a label which seemed unobjectionable when submitted to counsel for complainant will not, upon the hearing of a motion for a preliminary injunction in a suit for unfair competition, be deemed a violation of the complainant's rights. *Weber Medical Tea Co. v. Weber*, 102 Fed. Rep. 156.

And a preliminary injunction will not be granted in equity to restrain the use of a trademark, where its use with the implied acquiescence of the owner has contributed to give a reputation to or create a demand for the article to which it has been applied, which it would not otherwise have acquired. *Estes v. Worthington*, 23 Blatchf. 65, 22 Fed. Rep. 822.

And one who has refused to recognize the rights of an original proprietor of a trademark until he thought it would be more profitable to purchase the former's rights and obtain a monopoly in the use of the trademark, reserving the right to annul the contract at his option, is not entitled to a preliminary injunction

against alleged infringers, but will be left to his rights at final hearing. *Ibid.*

But acquiescence in the use of the word "celluloid" by corporations doing business as the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like, indicating confinement to a particular branch of the trade, will not defeat the right of the Celluloid Manufacturing Company to a preliminary injunction to restrain the use by the Cellonite Manufacturing Company of the word "cellonite" as an infringement of its trademark in the word "celluloid,"—especially where these branch companies were principally licensees of complainant. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94.

Other imitations of cigar labels without the consent or acquiescence of the owner constitute no defense to a motion for a preliminary injunction to restrain defendant's use. *Cuervo v. Jacob Henckell Co.* 50 Fed. Rep. 471.

And a preliminary injunction to restrain the imitation of cigar labels will not be denied a manufacturer of cigars because other manufacturers have suffered, without objection, imitations of similar labels. *Cuervo v. Jacob Henckell Co.* 50 Fed. Rep. 471.

So, a manufacturer will not be denied a preliminary injunction to restrain an infringement of his trademark and labels which he and his vendors have alone employed for five years, because his predecessor in the business had, years before, submitted to a like injury without complaint. *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

#### V. Accounting.

Laches, though not of that clear and convincing character which would justify a court of equity in refusing any relief for the infringement of a trademark, may still render it inequitable to compel an accounting for profits. *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297.

Reasonable diligence in asserting his rights is required of an owner of a trademark, to entitle him to an accounting for profits and damages, in a suit to enjoin its infringement. *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 7 So. 23.

Thus, an accounting in a suit to restrain the infringement of a trademark will not be allowed from an earlier period than the filing of the bill, where the owner has not been vigilant in endeavoring to ascertain who are interfering with his trade, and has been guilty of misrepresentations, not, however, in the trademark itself. *Ford v. Foster*, L. R. 7 Ch. 611, 41 L. J.



contents and characteristics, but of a different color, the body of the label being a dark blue, with a red or reddish brown central field. A narrow strip on the top of the label contained the name of the Apollinaris Company as the importer, and from the making of this contract large quantities of water bearing this label were exported and sold in the United States under the name of "Hunyadi Janos," or the shorter name "Hunyadi."

After April, 1889, and until the cancellation of the contract in 1896, this company placed upon each bottle of Janos water which it sold in this country a red diamond containing these words: "The red diamond is the trademark of the Apollinaris Company, Limited, and is meant only to indicate that the mineral waters so marked are sold by the Apollinaris Company, Limited."

Ch. N. S. 682, 27 L. T. N. S. 219, 20 Week. Rep. 311, 818.

And an accounting will be denied without prejudice to a proceeding at law for damages, where the defendant for many years has used the infringing trademark in various forms and for part of the time without actual objection, and the different changes were introduced in attempts to settle the matter amicably. *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.* 52 Mo. App. 10.

A delay of less than one year, though not fatal to the granting of an injunction to restrain the infringement of a trademark, will bar any right to an accounting of profits before the filing of the bill. *Harrison v. Taylor*, 11 Jur. N. S. 408, 12 L. T. N. S. 339.

And a delay of nearly two years in seeking relief for the infringement of a trademark will preclude the owner from obtaining an account of gains and profits. *Lloyd v. William S. Merrill Chemical Co.* 25 Ohio L. J. 319.

So, a delay of two years to seek relief for a colorable imitation of labels will bar any claim to an accounting of profits. *Beard v. Turner*, 13 L. T. N. S. 746.

And no accounting of profits will be directed where the use complained of, without fraudulent intent and under color at least of title, was continued for more than two years without complaint. *Geo. T. Stagg Co. v. Taylor*, 95 Ky. 670, 27 S. W. 251.

And no accounting of sales or damages was granted in a suit for the infringement of a trademark, where the complainants, with notice that their trademark was in common use, did nothing to prevent it for nearly four years, and such use had been practised by all the principal dealers for nearly twenty years prior to the date of suit. *Low v. Fels*, 35 Fed. Rep. 361.

And a delay of five years to bring a suit to enjoin infringement of a trademark, with knowledge of the infringement, is such laches as disentitles plaintiff to an accounting of profits. *Cahn v. Gottschalk*, 14 Daly, 542, 2 N. Y. Supp. 13.

An accounting of past gains and profits will not be decreed where there has been laches in bringing the suit, and long acquiescence in the use of the trademark by others,—especially where the acquiescence covers a period of fourteen years. *Manhattan Medicine Co. v. Wood*, 4 Cliff. 488, Fed. Cas. No. 9,026.

And a delay of twenty years to seek relief, though not ground for refusing an injunction where the proof of infringement is clear, precludes the party from any right to an accounting for past profits. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

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In 1887, Saxlehner caused the name "Hunyadi" to be registered separately from "Janos" as a trademark in the United States Patent Office. In the statement accompanying this registration he was again careful to refer to the red and white or red and blue label upon which said trademark was used by him, and to repeat the caution that he did not in anywise intend by said registration to abridge his right to the exclusive use of said label as a whole, or to any of its features.

The Apollinaris Company embarked in the business of selling Hunyadi Janos water in the United States, but met with competition from one Scherer, who imported the water under the red and white label from Europe, buying it from parties who had purchased it from Saxlehner. The company sought to enjoin Scherer from so selling up-

And no accounting will be granted in a suit to restrain the use of the word "Carlsbad" to designate an artificial water by one who for thirty-four years has been engaged in its manufacture and sale without protest of any kind. *Carlsbad v. Schultz*, 78 Fed. Rep. 469.

And the failure of the proprietor of a mineral spring to interfere for thirty years with the sale of an artificial water under labels implying that the water came from such spring will bar an accounting or a decree for gains and profits. *La Republique Francaise v. Schultz*, 42 C. C. A. 233, 102 Fed. Rep. 153.

But the lapse of five or six months after the imitation complained of was complete before bringing suit, is no bar to the claim for an accounting of profits, though the imitation first began fourteen months prior to the suit. *Avery v. Meikle*, 85 Ky. 435, 3 S. W. 609.

And a delay of one year to file a bill to restrain the use of a label and wrapper as unfair competition in trade will not bar the right to an accounting,—especially where objection was promptly made to such use. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.* 93 Tenn. 146, 23 S. W. 165.

The prescription of one year is not applicable to a claim for an accounting of profits against an infringer of a trademark. *Funk v. Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413.

The rule requiring reasonable diligence in asserting his rights, to entitle the owner of a trademark to an accounting for profits and damages, applies only to those cases where there has been an acquiescence with knowledge of the infringement. *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 7 So. 23; *Sawyer v. Kellogg*, 9 Fed. Rep. 601.

And that the owner of a trademark was represented by a firm in New York as sole agents of the United States, with the exception of California, is not sufficient to charge him with knowledge of an infringement of his trademark, extending over a period of twenty years, by persons conducting a business 800 miles from New York, so as to bar his right to an accounting. *Gilka v. Mihalovitch*, 50 Fed. Rep. 427.

The right to an accounting in a suit to restrain the use of a label as unfair competition in business is not lost by the failure of the plaintiff's predecessor to object to a similar wrong which had ceased ten years before suit was brought. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.* 93 Tenn. 146, 23 S. W. 165.

The principle that laches are not imputable to a sovereign power is not applicable where such laches are set up as a bar to an accounting in a suit for unfair competition brought in



on the ground of its exclusive right within the United States, but failed in the suit. The case was decided in 1886, and reported in 27 Fed. Rep. 18.

In the same year Mattoni & Wille of Budapesth consigned to one Andres in New York 121 cases of Hunyadi Matyas water taken [27] from one of four springs purchased \*by them, one of which was the original Markus spring above mentioned.

About the same time the firm of Ignatz Ungar & Son began to sell waters from a spring owned by them, which was designed "Hunyadi Arpad," through one Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels. The Matyas water was also put up in red and white labels of similar design. Suits were brought against them in 1886, in the circuit court of the United States, by the Apollinaris Company to enjoin the use of the name "Hunyadi" and of the labels. These suits were, however, withdrawn for want of jurisdiction, and two other cases, one against Andres and the other against Ungar, were brought by the Apollinaris Company in the supreme court of the state. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when the injunction in the Ungar suit was dissolved upon application of the defendant, and soon thereafter the Andres suit was voluntarily discontinued. Saxlehner appeared to have had no knowledge of these suits, although an effort was made, which the court below found to have

been unsuccessful, to show that he was notified of the motion to dissolve the injunction, and refused to assist in opposing it. The defendants in these suits seem to have relied largely upon the fact that, under the laws of Hungary, as they then were, they had a right to make use of the word "Hunyadi," provided they annexed thereto as a suffix a word different from "Janos," as, for instance, "Matyas" or "Arpad," and that, having obtained permission by royal grant to make use of these names in Hungary, they were entitled to make use of the same names in other countries.

In the meantime, however, and in 1887, Saxlehner instituted another suit in Hungary to enjoin the use of the name "Hunyadi" as applied to a water sold there called the "Hunyadi Josef." He was again unsuccessful, not only in preventing the use of the word "Hunyadi," but even in preventing the use of colorable imitations of his red and white label, apparently on account of the lack of efficient statutes upon the subject of trademarks. As one of the witnesses, Saxlehner's son, states, he was \*advised by his [28] lawyer that before 1890 there was a statute which gave protection against so-called counterfeit or imitation labels and against literal imitations, but not imitations which were similar merely.

In 1890, a statute was passed which gave a protection to pictorial trademarks only, but not to trademarks designated by name. Plaintiff, whose husband died in 1889, at once took advantage of this statute, and in-

the name of such power, in which a private corporation is the party beneficially interested. *La Republique Francaise v. Schuitz*, 42 C. C. A. 233, 102 Fed. Rep. 153.

## VI. Damages.

Delay to seek relief may be deemed such an assent to the invasion of a trademark as will preclude the owner from claiming damages for its intermediate use. *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150, 5 S. E. 907.

A person who stands by and sees another use his trademark without objection is said, in *Julian v. Hoosier Drill Co.* 78 Ind. 408, to be precluded from recovering damages suffered through such use.

Damages for infringement of a trademark and labels for any period longer than twelve months prior to citation are barred by the prescription of one year. *Woife v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

But a delay of two years in commencing suit after discovering the infringements is no bar to the recovery of the damages sustained from the use of infringing labels, where plaintiff had, prior to the bringing of the action, instituted suit against other infringers, and defendants not only had notice of such prior litigation, but had changed the color of their label on account of a decision in a lower court. *Schmidt v. Brieg*, 100 Cal. 672, 22 L. R. A. 790, 35 Pac. 623.

A letter from an attorney, stating that his client deems the use of its name, though wrongful, not sufficiently harmful to make it worth while to bring another suit, does not constitute an estoppel, and, in an action at law for damages for the wrongful use of such name, has no weight, even on the question of damages.

*The Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. Rep. 941.

That a person has discontinued the use of a trademark and has adopted another will not deprive him of his right of action to recover damages for the subsequent sale of an article not manufactured by him, but stamped with his former trademark and represented to be of his manufacture. *Lemoine v. Gauton*, 2 E. D. Smith, 343.

## VII. Summary.

Delay alone will not preclude the right to restrain further infringement, unless extended to the period prescribed by some applicable provision of the statute of limitations. Nor is acquiescence in general a bar, unless so long continued or under such circumstances as to create an equitable estoppel or amount to an abandonment or dedication to the public of the owner's right. Nonuser unaccompanied by an intention to abandon is, in general, no bar, although it may prove a defense in favor of innocent persons who have built up a business by adoption of the apparently abandoned mark. Public adoption of a valid trademark as the ordinary appellation of the article will not deprive the owner of his right to be protected in its use, unless he has suffered it to come into general use without objection, or, as seems the rule in England, it is so universally used that no one can be deceived thereby, or can be induced by such use to believe he is buying the goods of the original trader. Conduct which will not justify the court in denying relief against continuance of the wrong may be sufficient to warrant the refusal of a preliminary injunction, or the denial of an accounting or an award of damages.

stituted suits against Mattoni & Wille, as well as a number of other infringers. In 1895, another act was passed giving protection to verbal trademarks. The suit against Mattoni & Wille resulted in an order of the minister of commerce, November 26, 1894, canceling the several trademarks of Hunyadi Matyas water, "because, according to the opinion of three experts consulted by the chamber, such trademarks are similar in composition, design, and color, and also for general impression, to the trademarks previously registered for the firm Saxlehner, and have been found to be imitations of the same and apt to mislead the public."

A similar suit instituted by plaintiff against the Compagnie Générale d'Eaux Universelles et de Bains de Mer resulted in a similar decree canceling the Hunyadi Laszlo label, "because of the three experts consulted, two have pronounced same to be entirely similar to the trademark registered for Saxlehner, and the danger of misleading is greatly augmented by the fact that on this trademark the name 'Hunyadi' is applied in a prominent place."

The sale of the Hunyadi Laszlo water seems to have been practically stopped by this decree, but notwithstanding the decree against them of November 26, 1894, Mattoni & Wille continued to use the name Hunyadi Matyas separate from the label, and exported water as before to the defendant in this suit with red and blue labels, which were not registered in Hungary.

[29] In 1895, however, another act was passed in Hungary for the registration of words or names as trademarks. Plaintiff took advantage of this, registered the name "Hunyadi" as a trademark, and promptly instituted another suit against Mattoni & Wille, which resulted, in 1896, in another decree canceling, not \*only the illustrated trademarks, but the verbal trademark "Hunyadi Matyas," and awarding to the plaintiff a priority of right to the exclusive use of the words "Hunyadi Janos" and "Hunyadi" alone, both as a commercial denomination as well as a trademark. In the decree of the minister the prior decree of the minister of agriculture of the year 1873, legalizing the use of Hunyadi Matyas, was referred to and treated as superseded by the laws of 1890 and 1895. "There is," says he, "therefore absolutely no connection between that decision and the case now under consideration." Similar decrees were rendered the same year against other defendants who sought to appropriate the name Hunyadi, including "Hunyadi Josef," against which Saxlehner had been unsuccessful in 1887; Hunyadi Lajos" and also "Uj Hunyadi" or new Hunyadi, whose litigation against Saxlehner seems to have been carried on in the interest of the Apollinaris Company.

In fact, this litigation seems to have resulted in a complete vindication of the right of Saxlehner to the use of the word "Hunyadi."

Promptly upon the rendition of these decrees, and early in 1897, this suit, as well as

the others hereinafter mentioned, was instituted.

The case came on for hearing before the circuit court upon pleadings and proofs, and resulted in a decree enjoining the defendant from selling, or offering for sale, any bitter water not coming from the "Hunyadi Janos" wells of the plaintiff in bottles of a straight shape, with a short neck, and bearing labels in color, size, shape, and general design so closely similar to plaintiff's said label as to be calculated to deceive, but permitting the defendant to make use of the name "Hunyadi" as a prefix to some other name than "Janos," and denying the injunction demanded by the plaintiff against the use of the name "Hunyadi." 88 Fed. Rep. 61.

On appeal to the circuit court of appeals, the decree of the circuit court was affirmed as to the name "Hunyadi," but reversed as to the label, and the bill dismissed. 63 U. S. App. 139, 145, 91 Fed. Rep. 536, 33 C. C. A. 291.

**Messrs. Antonio Knauth and John G. Johnson** argued the cause, and, with *Mr. Arthur von Briesen*, filed a brief for petitioner:

The total loss or forfeiture of trademark rights once obtained cannot be produced by laches or negligence of the owner, even where they exist, unless the owner allows the word or sign to fall into public domain.

*McNendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

Abandonment in industrial property is an act by which the public domain originally enters or re-enters into the possession of the thing (commercial name, mark, or sign) by the will of the legitimate owner. The essential condition to constitute an abandonment is that the one having a right should consent to the disposition. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word.

*Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Galliker v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461, Fed. Cas. No. 9,026; *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150, 5 S. E. 907; *Lasher v. McCreery*, 66 Fed. Rep. 834; *Imperial Chemical Mfg. Co. v. Stein*, 69 Fed. Rep. 616; *Gillott v. Esterbrook*, 47 Barb. 455; *Cahn v. Gottschalk*, 14 Daly, 542, 2 N. Y. Supp. 13.

Where fraud is clearly proved the court will look with more indulgence upon any disability under which the plaintiff may labor, as excusing his delay.

*McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352.

There is no rule of law or equity which requires a complainant to sue all infringers upon his rights at the same time. On the contrary, the reasonableness of allowing him



to await the outcome of test suits has been frequently recognized.

*Edison Electric Light Co. v. Sawyer-Mann Electric Co.* 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. Rep. 597; *Accumulator Co. v. Edison Electric Illuminating Co.* 63 Fed. Rep. 981; *Estes v. Leske*, 23 Blatchf. 476, 27 Fed. Rep. 22.

All element of estoppel is entirely eliminated from the case by the fact that defendant did not act in good faith in introducing its water under the fraudulent label and name.

*Gilka v. Mihalovitch*, 50 Fed. Rep. 427; *Sanders v. Jacob*, 20 Mo. App. 96.

The consent of the Apollinaris Company to the dissolution of its injunctions is regarded as an admission that it had no right to enforce (which is the strongest that can be said), and is no ground upon which to base an estoppel.

*Ross v. Banta*, 140 Ind. 151, 34 N. E. 865, 39 N. E. 732; *Akin v. Kellogg*, 119 N. Y. 442, 23 N. E. 1046; *McKeen v. Naughton*, 88 Cal. 467, 26 Pac. 354; *Brewster v. Striker*, 2 N. Y. 19; *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Estis v. Jackson*, 111 N. C. 145, 16 S. E. 7; *Cameron v. Cameron*, 95 Ala. 344, 10 So. 506; *Whitwell v. Winslow*, 134 Mass. 343.

Where the representation relied on to create an estoppel has been induced by a previous representation by the other party or his agent, no estoppel can arise; and this in itself is conclusive against defendant's claim.

*Holden v. Putnam F. Ins. Co.* 46 N. Y. 1, 7 Am. Rep. 287.

Neither the excuse that the name "Hunyadi" is solely used as a prefix, nor that the "seal brand" label was adopted to differentiate, is entitled to any consideration. If such excuses were usually listened to in trademark cases, imitators would have a very easy and wide course to steer without punishment.

*Hutchinson v. Covert*, 51 Fed. Rep. 832; *G. G. White Co. v. Miller*, 50 Fed. Rep. 277; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Lever v. Goodwin*, L. R. 36 Ch. Div. 1.

Complainant is entitled to an accounting of the damages and profits, besides an injunction.

*Collins Co. v. Oliver Ames & Sons Corp.* 20 Blatchf. 542, 18 Fed. Rep. 561; *Estes v. Leslie*, 27 Fed. Rep. 22; *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712; *Funke v. Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

*Messrs. Joseph H. Choate, Arthur von Briesen, and Antonio Knauth* filed a brief for petitioner on application for writ of certiorari.

*Messrs. Charles G. Coe and Edmund Wetmore* argued the cause and filed a brief for respondent:

Where a question of laches is involved, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were

such as to put the duty of inquiry upon a man of ordinary intelligence.

*Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548, 14 Sup. Ct. Rep. 671.

The right to injunctive relief is barred by a long delay in bringing suit, where the facts show that the delay has been accompanied by acts or conduct showing such acquiescence as would make such relief inequitable.

*Goddon v. Kimmell*, 99 U. S. 210, 25 L. ed. 431; *Richards v. Mackall*, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *Mackall v. Casilear*, 137 U. S. 566, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Gallagher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *Lane & B. Co. v. Locke*, 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352; *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. Rep. 938; *Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A. 520, 37 U. S. App. 109, 68 Fed. Rep. 489; *Richardson v. D. M. Osborne & Co.* 82 Fed. Rep. 95; *Starrett v. J. Stevens Arms & Tool Co.* 96 Fed. Rep. 244; *Meyrowitz v. Eccleston*, 98 Fed. Rep. 437.

The delay of nine years in bringing suit, even if it had not been accompanied by the numerous acts of surrender, acquiescence, and abandonment, would have been fatal in any event to an accounting.

*McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

\*Mr. Justice Brown, after stating the case [30] as above, delivered the opinion of the court:

This case involves the question of plaintiff's exclusive right to the use of the name "Hunyadi" as a trademark for Hungarian bitter waters, as well as her right to the red and blue label and its characteristic features used by her upon the bottles in which she has been accustomed to sell "Hunyadi Janos" water.

From the foregoing summary of the facts it appears:

1. That Saxlehner was the first to appropriate and use the name "Hunyadi" as a trademark for bitter waters, and that such name being neither descriptive nor geographical, but purely arbitrary and fanciful as applied to medicinal waters, was the proper subject of a trademark.

2. That in the shape of his bottles, the design of his capsules and his labels, he was



originally entitled to be protected against a fraudulent imitation.

3. That the defendant is selling a water under the name of "Hunyadi Matyas" in bottles of the same size and shape as the plaintiff's containing a label in three parallel panels of the same colors, size, and general design as those of the plaintiff; that their general appearance is such as to deceive the casual purchaser; and that such bottles and labels were evidently designed for the purpose of imposing the defendant's waters upon the public as those of the plaintiff. A moment's comparison of the two labels will show that, while the printed matter upon each is different from that upon the other, their general resemblance is such as would be likely to mislead the public into the purchasing of one for the other. While the proprietors of the "Hunyadi Matyas" water undoubtedly found a justification for their use of the word "Hunyadi" in the decision of the minister of agriculture of 1873, that decision did not cover the use of the simulated label, the adoption of which seems to have been an act of undisguised piracy.

Practically, the only defenses pressed upon our attention are those of abandonment and laches.

1. To establish the defense of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 186, 41 L. ed. 118, 125, 16 Sup. Ct. Rep. 1002; *Moore v. Stevenson*, 27 Conn. 14; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Judson v. Malloy*, 40 Cal. 299; *Hickman v. Link*, 116 Mo. 123, 22 S. W. 472. And in a recent English case this doctrine has been applied to a case of trademarks. *Mouson v. Boehm*, L. R. 26 Ch. Div. 398. With regard to the defense of abandonment, it may with confidence be said that there is but very slight evidence of any personal intention on the part of Andreas Saxlehner or his wife to abandon the use of the word "Hunyadi" or dedicate the same to the public, and none at all of an intent to abandon the peculiar bottles and labels in connection with which he sold his waters. In fact, Saxlehner's whole life was a constant protest against the use by others of the name "Hunyadi." He discovered his spring in 1862, and in 1863 obtained permission to give it the name of Hunyadi Spring. He carried on an uninterrupted trade under that name until 1872. It also appears from the certificate of the Chamber of Commerce and Industry that the trademark "Hunyadi Janos" was, on December 12, 1872, registered, and that previously to such registration no trademark was entered in which the name "Hunyadi" or "Janos" was contained. It further appears that Ignatius Markus had no sooner petitioned the town council for a license to apply to his spring the name of "Hunyadi Matyas" than Saxlehner entered his protest, and was at first successful, but was finally defeated, 179 U. S.

and that upon the strength of this decision other springs were opened by various parties under trademarks, of which the word "Hunyadi" was the principal component. At that time, owing to the inefficacy of the Hungarian laws upon the subject of trademarks, he could do no more. In 1877 he registered the trademark "Hunyadi Janos" in the Patent Office of the United States. In 1884 he registered both his red and white and red and blue labels in the Buda-Pesth Chamber of Commerce, the latter being intended for use by the Apollinaris Company. In 1887 he instituted an unsuccessful suit in Hungary, against the use of the words "Hunyadi Josef." Upon the passage of the Hungarian law of 1890, legalizing the use of pictorial trademarks, the plaintiff again registered the three labels, and in the following year instituted suits against all infringers in Hungary, which finally resulted in a complete establishment of her rights to the name of "Hunyadi." In 1887 Saxlehner registered the word "Hunyadi" as his trademark in the Patent Office of the United States, and in 1895, when the act for the protection of verbal trademarks was enacted, plaintiff registered the same word in Hungary. Saxlehner appears, however, to have successfully protested against Mattoni & Wille's registration of "Hunyadi Matyas" in Germany. In June, 1896, plaintiff also instituted a suit against the Apollinaris Company in England, and obtained a final injunction against the illegal use of the name "Hunyadi." In the decree of the court of chancery, which is reproduced, it was ordered that the Apollinaris Company deliver up to the plaintiff for destruction all labels, trade documents, and capsules in their possession which, by reason of their exhibiting the name "Hunyadi," are capable of being used for business in the United Kingdom for any Hungarian bitter water not being Hunyadi Janos water. Immediately upon the determination of the Hungarian litigation, and in the spring of 1897, plaintiff began these suits.

There is nothing in these facts tending to show an abandonment by Saxlehner or the plaintiff of their rights either in the name of Hunyadi or in the labels, unless it be the fact that the trademark registered in the United States in 1887 contained the words "Hunyadi Janos," which, it is insisted, was a waiver of a right thereafter to register the name "Hunyadi" alone. That position, however, assumes that, in the absence of such re-registration, other dealers would have the right to seize upon and appropriate the principal word "Hunyadi" of the prior trademark, provided they changed the final word and substituted another. We are not prepared to indorse this contention. It is not necessary to constitute an infringement that every word of a trademark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. It was said by Vice Chancellor Shadwell, in 1847, "that if a thing contains twenty-five parts and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have con-



tributed to the fraud." *Guinness v. Ulmer*, 10 Law Times, 127. While this may be a somewhat exaggerated statement, the reports are full of cases where bills have been sustained for the infringement of one of several words of a trademark. *Shrimpton v. Laight*, 18 Beav. 164; *Clement v. Maddick*, 1 Giff. 98; *Hostetter v. Vowinkle*, 1 Dill. 329, Fed. Cas. No. 6,714; *Morse v. Worrell*, 10 Phila. 168, 9 Am. L. Rev. 368; *Grillon v. Guenin*, Weekly Notes (1877), 14; *American Grocer Pub. Asso. v. Grocer Pub. Co.* 25 Hun, 398. It would seem that the registration in 1887 of the single word "Hunyadi" was really unnecessary for the protection of Saxlehner's rights, though we see no reason for holding the former registration an estoppel. The evidence shows that these Hungarian bitter waters were largely known in this country as Hunyadi waters, and that in a certain sense Hunyadi had become a generic word for them. Of course, if it became such with the assent and acquiescence of Saxlehner, he could not thereafter assert his right to its exclusive use. But as this appropriation was made against his constant protest, and as he apparently made every effort in his power to put a stop to the use of it, it ought not to be charged up against his claim that the word had become generic.

It is contended, however, that the conduct of the Apollinaris Company was such as to show an abandonment both of the name and label, and that plaintiff is estopped by their act in further asserting title to them. This defense presupposes that the Apollinaris Company had power to bind Saxlehner by its admission and contract. Certainly the contract gave it no such power in express terms. Saxlehner did not purport to make [34] \*the company his agent. He agreed to sell the company a certain number of cases of his water at a certain price, and also agreed to sell to no one else during the pendency of the contract. It was agreed that their consignments should carry the label "Sole importers, Apollinaris Company, Limited, 19 Regent street, London, S. W." The company agreed not to compete with Saxlehner upon the continent, and upon his part he agreed to make over to the company all orders arising from countries reserved to it, as well as to refuse such orders where he had good reason to suppose they were intended for such countries. This is practically all there is of the contract. No agreement was made with respect to the trademark or the goodwill of the business, and the company reserved the right, which it subsequently exercised, of canceling the contract upon notice. While such contract may have authorized the company to prosecute infringers here, and in the conduct of those particular suits Saxlehner may have been bound, it did not agree to do so or preclude the institution of other suits by him, nor was there any authority on the part of the company to bind him by its admissions.

The conduct of the Apollinaris Company, relied upon as evidence of abandonment, consists principally in the discontinuance of the two suits against Ungar and Andres after

preliminary injunctions had been obtained (Saxlehner was not shown to have had knowledge of these suits); of a conversation between Mendelson, treasurer of the defendant company, and Steinkopf, a director of the Apollinaris Company in London, in which Mendelson spoke of his intention to sell the Hunyadi Matyas water, of which he had obtained control, and Steinkopf stated "that he could have no objection to that; that there were other Hunyadi waters," and of some other statements equally unimportant. There is little in any of these indicative of an intent on the part of the Apollinaris Company to abandon its exclusive right to the use of the word "Hunyadi" in America. Certainly, nothing indicative of such an intent on the part of Saxlehner, whose conduct in Hungary was wholly inconsistent with that theory. Evidence that the Apollinaris Company intended to abandon an exclusive right to the name "Hunyadi" might be \*sufficient [35] as against them to defeat a suit for an injunction, but would not be binding upon the plaintiff unless done with her knowledge and acquiescence.

2. The defense of laches depends upon somewhat different considerations, and, so far as it applies to the use of the word "Hunyadi," we think it is established. It appears that after the decision of the minister of agriculture in 1873 sustaining the claim of Markus to the trademark "Hunyadi Matyas," other springs were opened whose waters were bottled under different trademarks, in all of which the word "Hunyadi" was a component, and as early as 1886 these waters found their way to the United States, and were put on sale here with the knowledge of the Apollinaris Company. There is no evidence that Saxlehner had personal knowledge of these infringements, and while something may be said in his favor in view of his persistent efforts to establish his rights in Hungary, he was bound to know the law in this country, and to take steps within a reasonable time to vindicate his rights. The infringers were making use of their trademarks under licenses from the Hungarian government, and we see no reason to doubt that they were proceeding in good faith to dispose of their waters under the trademarks registered in Hungary. Under these circumstances, if Saxlehner had intended to assert his rights, under the laws of this country, to the exclusive use of the word "Hunyadi," he was bound to act with reasonable promptness. It is true that he may have supposed the Apollinaris Company would assert his rights in that particular for their own benefit; but if, as we have already held, he was not bound by their admissions, he is in no position to take advantage of their inaction, and, as against traders who were selling bitter waters under trademarks legalized by the Hungarian government, he should not have waited until the name "Hunyadi" had become generic in this country, and indicative of this whole class of medicinal waters.

We do not find it necessary to decide exactly what effects shall be given to the various decrees of the Hungarian ministers and



courts. It is quite sufficient to observe that the use of the words "Hunyadi Matyas" was expressly sanctioned \*within the Kingdom of Hungary by the minister of agriculture in 1873, and it would seem that under our treaty with the Austro-Hungarian Empire of June 1, 1872 (17 Stat. at L. 917), the right to use the word became available in the United States. By the first article of this treaty "every reproduction of trademarks which, in the countries or territories of the one of the contracting parties, are affixed to certain merchandise . . . is forbidden in the countries or territories of the other of the contracting parties;" and by the same article, "If the trademark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties." In view of the decision of the minister of agriculture of 1873, sustaining the trademark "Hunyadi Matyas," and the subsequent adoption of the word "Hunyadi" in connection with some other word by numerous proprietors of similar waters, it seems to be clear that the word became, and continued to be for twenty years, public property in the Kingdom of Hungary, and it is difficult to escape the conclusion that it also became so here. It is true the law of Hungary was subsequently changed in this particular, and that the courts of that country held the plaintiff entitled to the benefit of that change; but it needs no argument to show that, if the word once became public property here, a subsequent change in the law in her own country would not inure to the advantage of the plaintiff here. The right to individual appropriation once lost is gone forever.

If, upon the other hand, we assume that the case can be decided without reference to the law of Hungary or the decisions of its officers and courts, the plaintiff is still at a disadvantage by reason of not instituting her suits more promptly. Saxlehner knew, as a matter of fact, that the minister of agriculture had overruled his protest, and that the word "Hunyadi" had become public property in the Kingdom of Hungary. He knew that a large number of dealers would appropriate the word, and that he was himself selling a large quantity of bitter water in the United States. He must also have known, or at least had good reason to know, that his competitors were doing the same thing. Under such circumstances he should have instituted \*inquiries upon his own account, and, regardless of his contract with the Apollinaris Company, have seen to it that his own interests were protected. If the Apollinaris Company were not his agent for the protection of his rights in the United States, then it was incumbent upon him to assert such rights personally or through some other recognized medium. In now invoking our laws, his successor is bound to show that she has complied with our requirements of diligence and promptness in instituting suit. She has failed in this particular. By twenty years of inaction she has permitted the use of the word by numerous

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other importers, and it is now too late to resuscitate her original title.

3. This argument, however, has but a limited application to the appropriation of the bottles and red and blue labels covering them, which appear to have been seized upon by the proprietors of the Matyas spring as well as by others, without a shadow of justification and in fraud of plaintiff's rights. As already stated, Saxlehner, when he began selling his water, adopted not only the name "Hunyadi Janos," but a straight bottle with a short neck, to the top of which was attached a metal capsule with an inscription, as well as a peculiar label, covering almost the whole body of the bottle, divided into three rectangular panels of red and white, which at the time of his contract with the Apollinaris Company was changed to red and blue, so far as it applied to waters sold to that company for the American market. A narrow strip on the top of the label was added, containing the imprint of the Apollinaris Company as importers, and from 1876, the date of the contract, until 1886 the business was carried on by the Apollinaris Company in this country without any important competitors. In 1886, however, Mattoni & Wille began to consign "Hunyadi Matyas" bitter water to New York, put up in bottles bearing a red and white label. In 1889 the Eisner & Mendelson Company, defendant herein, made a contract with Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of their bitter waters for the term of twenty years. During 1889 and 1890 defendant imported some 20,000 bottles under the name of "Royal \*Hungarian Bitter Water," under a red and white label devised by themselves. In 1890 the defendant took a new lease for five years, with an option for a renewal for twenty years, from Mattoni of the Hunyadi Matyas spring. The circuit court found in this connection that "the reason which induced Eisner to make this lease was his desire to control the American label, so that neither Mattoni & Wille nor European purchasers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label, and is described in the complaint containing the name 'Hunyadi Matyas,' 'Buda Keserűviz' and a medallion portrait of King Stephen in the center of the red division. He intentionally simulated the Saxlehner United States label for the purpose of obtaining, by means of the simulation, a part of the goodwill which the Janos water had gained." [88 Fed. Rep. 61.]

We are pointed to no decision of the Hungarian authorities authorizing the use of Saxlehner's label by other parties. The petition of Markus did not ask for permission to use it. The decision of 1873 did not grant it. The decree favorable to Saxlehner did not mention it, but dealt only with the name "Hunyadi." Notwithstanding repeated violations of his label, he seems to have been unable to obtain redress on account of the inefficacy of the laws until 1896, when a com-



petitive trademark was ordered to be canceled in his favor by reason of its resemblance to Saxlehner's label, as well as by the use of the word "Hunyadi." In all his applications, both in Hungary and the United States, for the registration of his trademark name, there is an express reservation of his right to the medallion head of Hunyadi and to his label. Indeed, we find no authority whatever for the appropriation of this label by any of Saxlehner's competitors, and nothing to show that it was not a case of undisguised piracy. The only justification for its appropriation now insisted upon is the fact that, by general use in this country for the past ten years, it has come to be recognized as a kind of generic label applicable to all Hungarian bitter waters, and if Saxlehner had originally an exclusive right to make use of it, that right has been lost by his acquiescence and that of the Apollinaris Company in its general use by other \*importers. But in cases of actual fraud; as we have repeatedly held, notably in the recent case of *McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proved the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence.

As applicable to trademarks, two cases in this court are illustrative of this principle. In *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that "equity courts will not, in general, refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits." An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits. See also *Harrison v. Taylor*, 11 Jur. N. S. 408. An effort was made in *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, to obtain a reconsideration of the principle of *McLean v. Fleming*, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But, the Chief Justice observed: "The intentional use of another's trademark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked."

Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, . . . nor will the issue of an injunction \*against the infringement of a trademark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right. (*Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176.) . . . So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

In the case under consideration we do not see how it is possible to wring an abandonment on the part of Saxlehner or the plaintiff from the repeated and persistent efforts made by them in Hungary to assert their rights. But it was not until the law was amended in 1895 that these efforts were successful. It can scarcely be wondered at that, in view of the disabilities under which he labored in his own country, Saxlehner should have thought it futile to undertake the prosecution of his rights in a distant land. As the defendant is unable to call to his assistance any authority from the home government for the use of these simulated labels, and as they and their vendors in Hungary seized upon these labels with knowledge of Saxlehner's rights, it is no hardship to enjoin their further use, and to hold defendant liable for such profits as it may have realized or for such damages as the plaintiff may have sustained by reason of the illegal use.

It seems, however, that in 1893 the defendant company began to affix to their bottles of Matyas water an additional label, consisting of a red seal upon a white ground, and containing the words, "Ask for the Seal brand. This label has been adopted to protect the public from imitation and as a guarantee of the genuineness of the Hunyadi Matyas Water imported solely by Eisner & Mendelson Co., New York." The attention of druggists was called to this Seal brand by advertisements in the trade papers. The circuit court was of opinion that, as the word "Hunyadi" had become generic, and was no longer subject to individual appropriation, this label was a sufficient attempt on the part of defendant to assert that it was the seller of the \*Matyas water, and that from its adoption it freed the defendant from the charge, which before that time was true, that it was cajoling or deceiving the ordinary purchaser into the belief that he was buying the Janos water; and in its decree refused to enjoin the defendant from selling such water under the red and blue label bearing the name "Hunyadi Matyas" in connection with the Seal brand label.

We are of opinion, however, that as defendant's bottle and label are a clear infringement upon those of the plaintiff, it would be



destructive to her just rights to permit the use of such bottles and labels by the defendant, notwithstanding the affixing of the Seal brand, which is a mere private mark of the importer. The injury to her is in the simulation of her bottle and label, and she has the right to require that her competitors shall be forced to adopt a style of bottle which no one with the exercise of ordinary care can mistake for hers. While this label may have been adopted in good faith, we do not think its employment would prevent the casual customer from purchasing this water as that of the plaintiff, and that the injunction should also go against its use and that plaintiff should recover her damages therefor.

We are therefore of opinion that *the decree of the Circuit Court of Appeals must be reversed*, and the case remanded to the Circuit Court for the Southern District of New York, with directions to reinstate its decree of April 29, 1898, except so far as it denies to the plaintiff an injunction against the use of the Seal brand labels and damages sustained by such use, and for further proceedings not inconsistent with the opinion of this court.

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\*EMILIE SAXLEHNER

v.

SIEGEL-COOPER COMPANY.

EMILIE SAXLEHNER

v.

RUDOLPH GIES.

EMILIE SAXLEHNER

v.

LOUIS MARQUET.

(See S. C. Reporter's ed. 42, 43.)

*Trademarks—infringement—injunction.*

The infringer of a trademark is not exonerated from liability to a suit for an injunction by reason of the fact that he acted innocently.

[Nos. 30, 31, 32.]

*Argued March 22, 23, 1900. Decided October 15, 1900.*

See the case preceding.

[42] \*Mr. Justice **Brown** delivered the opinion of the court:

These three cases were brought against retail dealers, and defended by the Eisner & Mendelson Company, who imported and furnished the defendants with the water sold by them. The bills charged the defendants generally with unlawfully selling bitter water under labels simulating Saxlehner's blue and red label, and under the name "Hunyadi." The answer was substantially the 179 U. S.

same as that in the main case, and the same record of proofs was used.

In the case against the Siegel-Cooper Company there was no charge of an intentional fraud, and the court found there was no evidence of fraudulent conduct on its part, and dismissed the bill as to that company. As to the other two cases the court found that the clerks in charge of their stores, in response to special requests for Janos water, wrapped up and delivered Matyas water purchased of the Eisner & Mendelson Company. In other words, that they had palmed off the one for the other.

We think that an injunction should issue against all these defendants, but that, as the Siegel-Cooper Company appears to \*have acted [43] in good faith, and the sales of the others were small, they should not be required to account for gains and profits. The fact that the Siegel-Cooper Company acted innocently does not exonerate it from the charge of infringement. *Moet v. Couston*, 33 Beav. 578; *Millington v. Fox*, 3 Myl. & C. 338; *Edelsten v. Edelsten*, 1 DeG., J. & S. 185; *Browne*, Trademarks, § 386.

*The decrees of the Circuit Court of Appeals in these cases are also reversed*, and the cases remanded to the Circuit Court for the Southern District of New York for further proceedings, etc.

EMILIE SAXLEHNER

v.

ALEXANDER NIELSEN.

(See S. C. Reporter's ed. 43-45.)

*Trademarks—abandonment—laches.*

1. The laches of the owner of a trademark in the word "Hunyadi" is sufficient to defeat his rights therein, when by twenty years of inaction he has permitted the use of the word by infringers in this country who are using it under licenses from the Hungarian government, until the name has become generic as indicative of the whole class of medicinal waters for which it is used.
2. A right of action for fraudulent use of labels is not defeated, on the ground of laches, by failure for many years to assert it, when during that time the owner was making repeated, persistent, and for a long time unsuccessful, efforts in his own country to establish his rights.

[No. 33.]

*Argued and Submitted March 22, 23, 1900. Decided October 15, 1900.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing a decree of the Circuit Court on a bill for injunction against infringement of a trademark and labels. *Reversed.*

See same case below, 63 U. S. App. 144, 91 Fed. Rep. 1004, 34 C. C. A. 690.

Statement by Mr. Justice **Brown**:

- [43] \*This was a bill of similar character to those involved in the prior cases, and was brought to enjoin the defendant from selling water under the name of "Hunyadi Lajos," or any other name in which the word "Hunyadi" occurs, as well as selling such water in bottles or under capsules or labels resembling those of the plaintiff upon her bottles of "Hunyadi Janos" water. The answer pleaded abandonment and laches. The circuit court made a similar decree to that in the Eisner & Mendelson suit, enjoining the infringement of plaintiff's red and blue label, requiring an accounting for damages, and denying relief against the use of the name
- [44] "Hunyadi." The circuit court of appeals reversed this decree, and ordered the bill to be dismissed.

Messrs. **Antonio Knauth** and **John G. Johnson** argued the cause, and, with Mr. *Arthur von Briesen*, filed a brief for petitioner:

The evidence of the defendant utterly failed to establish the fact that either the label or the name of complainant's bitter water had lost its meaning. Falling far short in this, the evidence was without force as a defense, and was incompetent to prove any defense,—especially where the fraudulent practice by the complainant was proved.

*Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

There is no claim that the defendant has expended money or built up any business in good faith on the strength of anything that complainant did, and the only excuse which is offered is that there were others who did likewise. That this is no defense at all is well established.

*Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Cuervo v. Jacob Henkell Co.* 50 Fed. Rep. 471; *Gillott v. Esterbrook*, 47 Barb. 455; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784.

In deciding this case against complainant the courts below necessarily acted, not on the proofs offered in this case, but on the proofs offered in some other case to which this defendant was not a party, and which was not by stipulation connected with the present case in any shape whatever. This, we respectfully submit, the courts below had no power to do.

*Re Manderson*, 51 Fed. Rep. 501; *American Fibre Chamois Co. v. Buckskin Fibre Co.* 18 C. C. A. 662, 37 U. S. App. 742, 72 Fed. Rep. 508; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200.

An account of damages and profits has only been withheld when the defendant's infringement has been suffered to continue for years with full knowledge, and no reasonable effort has been made by the complainant to assert his rights against the same, on the ground of an implied acquiescence in the doings of the defendant. No such acquiescence being shown, but, on the contrary, a

long-continued contest about the same questions with defendant's principal in Hungary, a decree for profits and damages, such as granted by the circuit court, was therefore clearly justified, but should have been extended to the use of the name "Hunyadi" for the reasons above stated.

*Collins Co. v. Oliver Ames & Sons Corp.* 20 Blatchf. 542, 18 Fed. Rep. 561; *Estes v. Leslie*, 27 Fed. Rep. 22; *Saucyer v. Kellogg*, 9 Fed. Rep. 601; *Graham v. Plate*, 40 Cal. 598, 6 Am. Rep. 639; *Benkert v. Feder*, 34 Fed. Rep. 534; *Atlantic Mill. Co. v. Robinson*, 20 Fed. Rep. 217; *Atlantic Mill. Co. v. Rowland*, 27 Fed. Rep. 24.

Messrs. *Joseph H. Choate*, *Arthur von Briesen*, and *Antonio Knauth* filed a brief for petitioner on application for writ of certiorari.

Mr. **Louis C. Raegen** submitted the cause for respondent:

Saxlehner is restricted to the trademark by him registered in Hungary in 1873, to wit, to the words "Hunyadi Janos."

*Richter v. Anchor Remedy Co.* 52 Fed. Rep. 455.

The conduct of complainant and her predecessors and agents is such as to disentitle her to any relief in equity.

*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; *Leggett v. Standard Oil Co.* 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. Rep. 902; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

The laches of complainant and her predecessor in permitting the use of the word "Hunyadi" for a period of over ten years by numerous dealers in different Hunyadi waters disentitles her to an injunction and accounting.

*Richardson v. D. M. Osborne & Co.* 82 Fed. Rep. 95; *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. Rep. 936; *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966.

\*Mr. Justice **Brown** delivered the opinion [44] of the court:

The evidence in this case is much less complete than that in the cases just decided, although its general tendency is much the same. Plaintiff proves the adoption of the name "Hunyadi" by certificate of the municipal council of Buda, dated January 19, 1863, authorizing Saxlehner to give his spring the name of "Hunyadi Spring," and by other certificates of a similar character.

It was shown that Andreas Saxlehner had used uninterruptedly the trademark "Hunyadi Janos" ever since 1865; that in 1873 he had registered this trademark in Hungary, and that plaintiff had re-registered the same in 1890. It was admitted that, if the plaintiff had not been guilty of laches, ac-



quiescence, or abandonment, she would undoubtedly be entitled to the exclusive enjoyment of both name and label.

But the contract with the Apollinaris Company was also put in evidence, together with testimony showing that from 1886, when the Hunyadi Arpad water began to be imported, some fourteen different Hunyadi waters were put upon the American market without opposition on the part of Saxlehner or the Apollinaris Company, and that the name "Hunyadi" had become widely known in this country as applicable to Hungarian bitter waters. Of some of these waters the importations were as high as six or seven thousand cases a year. As stated in the former opinion, the use of the name "Hunyadi" had become generic in Hungary, and Saxlehner could not have been ignorant of this fact, or of the further fact that exportations of these waters were constantly being made to [45] foreign countries. He \*was, at least, put upon inquiry as to whether these waters were not being sold in America in competition with his own, and he should have either instructed the Apollinaris Company to prosecute the infringements, or instituted proceedings himself to vindicate his proprietary interest in the name. Under such circumstances we think it too late now to maintain an exclusive title on the part of the plaintiff to the name "Hunyadi," and that she has been guilty of laches which preclude her right to an injunction.

So far as the question of label is concerned, plaintiff's witnesses proved sales of the Hunyadi Janos water in this country since about 1870, first under a red and white label and afterwards under the red and blue label. Defendant's water does not come from the neighborhood of Buda-Pesth, but from a spring situated at Kocs, more than a hundred miles from that place, though the water is apparently of similar character. His label appears to have been designed originally by one Schmidthauer, in Hungary, where it was registered as a trademark in July, 1892, and introduced the same year into this country. The label is so obviously an imitation of the Saxlehner label that defendant makes no argument to the contrary, and the appearance of the two is so nearly alike that a casual purchaser would easily suppose he was purchasing the Hunyadi Janos water in buying that of the defendant. The record also shows that the trademark registered by Schmidthauer in July, 1892, as above stated, was canceled by the Gyor Chamber of Commerce and Industry on March 24, 1897. There seems to have been no excuse for the adoption of this label except the fact that so many dealers of bitter water in Hungary had seized upon Saxlehner's name and label that it was treated as public property. For the reasons stated in the former case, we think that defendant should be held accountable for this misappropriation.

*The decree of the Circuit Court of Appeals will therefore be reversed, and the case remanded to the Circuit Court for the Eastern*  
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District of New York with direction to reinstate its decree of July 18, 1898, and for further proceedings consonant with this opinion.

\*OSCAR R. LOOKER *et al.*, *Plffs. in Err.*, [46]  
v.

FRED A. MAYNARD, Attorney General of the State of Michigan, on the Relation of JOSEPH W. DUSENBURY and Will J. Dusenbury.

(See S. C. Reporter's ed. 46-54.)

*Constitutional law—impairing obligation of contract—reserved power to alter acts of incorporation—statutes authorizing stockholders to cumulate votes for directors.*

A statute permitting each stockholder of a corporation to cumulate his votes upon any one or more candidates for directors (Mich. Stat. 1885, chap. 112; Pub Acts 1885, p. 116) is within the power reserved by the state Constitution to its legislature to alter, amend, or repeal future acts of incorporation, and therefore does not impair the obligation of the contract made between the state and the corporation by its original organization.

[No. 4.]

*Submitted December 2, 1898. Decided October 15, 1900.*

IN ERROR to the Supreme Court of the State of Michigan to review a decision sustaining the constitutionality of a statute permitting stockholders to cumulate their votes for directors. *Affirmed.*

See same case below, *Atty. Gen. ex rel. Dusenbury v. Looker*, 111 Mich. 498, 69 N. W. 929.

Statement by Mr. Justice Gray:

This was an information in the nature of a quo warranto, filed August 1, 1896, in the supreme court of the state of Michigan, by Fred A. Maynard, attorney general of the state, at the relation of Joseph W. Dusenbury and Will J. Dusenbury, against Oscar R. Looker, Charles A. Kent, Will S. Green, William A. Moore, Louis H. Chamberlain, William C. Colburn, Benjamin J. Conrad, John J. Mooney and Michael J. Mooney, to try the rights of the defendants and of the relators respectively to the offices of members of the board of directors of the Michigan Mutual Life Insurance Company. The right to those offices was claimed by the defendants under the original articles of association of the company, under the general laws of Michigan; and by the relators under a statute subsequently enacted by the legislature of the state, which the defendants contended to be unconstitutional and void as impairing the obligation of the contract made between the state and the corporation by its original organization.

NOTE.—As to reserved power to alter, amend, or repeal corporate charters—see note to *Greenwood v. Union Freight R. Co.* 28 L. ed. U. S. 961.



The Constitution of Michigan adopted in 1850, art. 15, § 1, is as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed." 1 Charters and Constitutions, 1008.

[47] The general law of Michigan of March 30, 1869, entitled "An Act in Relation to Life Insurance Companies Transacting Business within This State," contained the following provisions:

By § 1 "any number of persons not less than thirteen may associate together and form an incorporated company for the purpose of making insurance upon the lives of individuals, and every insurance pertaining thereto, and to grant, purchase, and dispose of annuities."

By § 2 "the persons so associating shall subscribe articles of association, which shall contain . . . 4. The manner in which the corporate powers are to be exercised, the number of directors and other officers, and the manner of electing the same, and how many of the directors shall constitute a quorum, and the manner of filling all vacancies. . . . 7. Any terms and conditions of membership therein, which the corporators may have agreed upon, and which they may deem important to have set forth in such articles."

By § 5 "the articles of association shall be submitted to the attorney general for his examination, and, if found by him to be in compliance with this act, he shall so certify to the secretary of state." Stat. 1869, chap. 77; 1 Laws of Michigan of 1869, p. 124.

Under that statute the Michigan Mutual Life Insurance Company was duly organized July 3, 1870, with articles of association, the fourth of which provided as follows:

"The corporate powers of the company shall be exercised by a board of directors, which shall consist of twenty-one members, which may be increased at the option of the board to not more than forty. The first meeting for the election of directors shall be called by the present officers, and held as soon as practicable after these articles shall take effect. No person shall be eligible who is not owner of at least ten shares of the guarantee capital of the company, and at least two thirds of the directors shall be residents of the state of Michigan. The board, at their first meeting, shall divide themselves by lot into three equal classes, as near as may be, whose terms of office shall expire at the end of one, two, and three years respectively, and thereafter one third of the directors shall be chosen annually for the class whose term then expires, who shall hold office for three years, \*or until their successors

[48] are elected; but the first board of directors, whose terms shall not have expired previous to the last Tuesday in January, shall continue in office until the last Tuesday in January following. The election of directors shall be had at the annual meeting of the company, which shall be held on the last Tuesday in January, at the office of the com-

pany in Detroit. They shall be chosen by ballot, and a majority of all the votes cast shall elect. Every shareholder shall be entitled to one vote for directors for every share of guarantee capital standing in his name on the books of the company, and may vote in person or by proxy. And every policy holder insured in this company for the period of his natural life in the sum of not less than \$5,000 shall also be entitled to one vote in the annual election of directors, which vote must be given in person."

In 1885 the legislature of Michigan passed an act entitled "An Act to Secure the Minority of Stockholders, in Corporations Organized under General Laws, the Power of Electing a Representative Membership in Boards of Directors," the 1st section of which provided as follows: "In all elections for directors of any corporation organized under any general law of this state, other than municipal, every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there may be directors to be elected; or to cumulate said shares, and give one candidate as many votes as will equal the number of directors multiplied by the number of shares of his stock; or to distribute them on the same principles among as many candidates as he shall think fit. All such corporations shall elect their directors annually, and the entire number of directors shall be balloted for at one and the same time, and not separately." Stat. 1885, chap. 112; Public Acts of 1885, p. 116.

Directors were elected in accordance with the articles of association until the annual meeting of January 28, 1896, when, the whole number of directors being twenty-seven, of whom nine were elected annually, the whole number of votes for directors was 4893; the nine defendants received 3655 votes each; and Joseph W. Dusenbury, representing in his own right or by proxy \*1238 [49] shares, undertook, under the statute of 1885, to multiply the number of his shares by nine making the number 11,142, and, dividing this number equally, cast 5571 votes for himself and 5571 for Will J. Dusenbury; and, if his claim had been allowed, they two, the relators in this case, would have been elected directors. But his claim was rejected, his vote was allowed on 1238 shares only, and the nine defendants were declared elected, and assumed and have since exercised the offices of directors.

The supreme court of Michigan held the statute of 1885 to be constitutional and valid, and adjudged that the relators were elected directors, and should have been so declared. 111 Mich. 498, 69 N. W. 929. The defendants sued out this writ of error.

Mr. C. A. Kent submitted the cause for plaintiff in error:

Articles of association are generally contracts by the members.

Cook, Stock & Stockholders, § 492; *Zabriskie v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178, 90 Am. Dec. 617; *Snook v. Georgia Improv. Co.* 83 Ga. 61, 9 S. E. 1104; 1 *Morawetz, Priv. Corp.* §§ 43 et seq.



Where no power of change is reserved a minority representation provision of the state Constitution cannot apply.

*Hays v. Com. ex rel. McCutcheon*, 82 Pa. 518; *Baker's Appeal*, 109 Pa. 461; *State ex rel. Haeussler v. Greer*, 78 Mo. 188; *Smith v. Atchison, T. & S. F. R. Co.* 64 Fed. Rep. 272.

A charter given to a theological seminary, providing for its government by a number of trustees, who are authorized to fill vacancies, cannot, under the reservation of a power to amend, be changed by the legislature by adding sixteen new trustees.

*Sage v. Dillard*, 15 B. Mon. 340.

The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property, or of changing the object of the charter by taking from those having a right to select their officers that right, and placing it in the hands of those whose stock, by reason of the increased power conferred by the amendment, is enabled to control the corporation.

*Orr v. Bracken County*, 81 Ky. 593.

The object and purpose of a reserved power to amend or repeal corporate acts is for the benefit of the public, to be exercised by the state.

*Zabriskie v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178, 90 Am. Dec. 617.

While the state, if it reserves the power to do so, can alter and amend the charter, and the corporation itself cannot object to the alteration or amendment, yet the state has no power to make any material essential alteration in the contract between the members themselves and the corporation.

*Snook v. Georgia Improv. Co.* 83 Ga. 61, 9 S. E. 1104.

A contract between a building and loan association and its stockholders, valid when made, cannot be changed by an act of legislature.

*Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

Rights in the streets of a city, acquired by the exercise of the franchises of a corporation, cannot be taken away by any amendment or repeal, however broad may be the reservations.

*Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

Under a reservation of power to amend or repeal charters, the state may not disturb, effect, or impair rights, either of the corporation or of its shareholders, previously acquired while the corporate franchises were being legally exercised.

*Hill v. Glasgow R. Co.* 41 Fed. Rep. 610; *Southern P. Co. v. Railroad Comrs.* 78 Fed. Rep. 236; *Tomlinson v. Jessup*, 15 Wall. 458, 21 L. ed. 205; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961.

No brief was filed for defendants in error.

179 U. S. U. S., BOOK 45.

\*Mr. Justice Gray, after stating the case, [51] delivered the opinion of the court:

The single question in this case is whether a power, reserved by the Constitution of a state to its legislature, to alter, amend, or repeal future acts of incorporation, authorizes the legislature, in order (as declared in the title of the statute of Michigan now in question) "to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," to permit each stockholder to cumulate his votes upon any one or more candidates for directors.

By the decision in the leading case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629, it was established that a charter from the state to a private corporation created a contract within the meaning of the clause in the Constitution of the United States forbidding any state to pass any law impairing \*the obligation of contracts; and consequently that a statute of the state of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void. [52]

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was "perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter," took occasion to add: "If the legislature mean to claim such an authority, it must be reserved in the grant." 4 Wheat. 712, 4 L. ed. 677.

After that decision, many a state of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment, or repeal at the pleasure of the legislature. See *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 20, 21, 26 L. ed. 961, 965. The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs. *Sherman v. Smith*, 1 Black, 587, 17 L. ed. 163; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98;



*Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Sinking Fund Cases*, 99 U. S. 700, 720, 721, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496, 502; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

[53] \*As illustrations of the right of the legislature, exercising such a reserved power, to alter for the future the liability of stockholders to creditors of the corporation, or the mode of computing the votes of stockholders for directors, it will be sufficient to state two of the cases just cited.

The case of *Sherman v. Smith*, 1 Black, 587, 17 L. ed. 163, was as follows: The general banking act of New York of 1838, chap. 260, provided, in § 15 that any number of persons might associate to establish a bank, upon the terms and conditions and subject to the liabilities prescribed in this act; in § 23, that no shareholder of any association formed under this act should be individually liable for its debts, unless the articles of association signed by him should declare that the shareholder should be liable; and, in § 32, that the legislature might at any time alter or repeal this act. The articles of association of a corporation organized under this act in 1844 expressly provided that the shareholders should not be individually liable for its debts. By provisions of the Constitution of New York of 1846, art. 8, § 7, and of the general statute of 1849, chap. 226, the shareholders of all banks were made liable for debts contracted by the bank after January 1, 1850. This court unanimously held that these provisions were not unconstitutional as impairing the obligation of a contract.

The case of *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98, was this: By the Revised Statutes of New York of 1828, chap. 18, tit. 3, it was enacted that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." The Constitution of New York of 1846, art. 8, § 1, ordained as follows: "Corporations may be formed under general laws, but shall not be created by special act" except in certain cases. "All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." 2 Charters and Constitutions, 1363. In 1850 the legislature passed a general railroad act authorizing the formation of railroad corporations with thirteen directors, and providing that the subscribers to the articles of association and all who should become stockholders in the company should become a corporation, and

[54] "be subject to the provisions contained in" the aforesaid title of the Revised Statutes. Stat. 1850, chap. 140, § 1. In the same year a railroad corporation was organized under that act for the construction of a railroad from the city of Rochester to the town of Portage; and in 1851, by a statute amend-

ing the charter of the city of Rochester, that city was authorized to become a stockholder in the corporation, and to appoint four of the thirteen directors. Stat. 1851, chap. 389, § 24. In 1867 the legislature passed another statute, authorizing the city to appoint seven of the thirteen directors. Stat. 1867, chap. 59. This court upheld the validity of the latter statute, upon the ground that the reservation in the Constitution of 1846, and in the statutes of 1828 and 1850, of the power to alter or repeal the charter, clearly authorized the legislature to augment or diminish the number, or to change the apportionment, of the directors as the ends of justice or the best interests of all concerned might require. 15 Wall. 492, 498, 21 L. ed. 102, 104. The full extent and effect of the decision are clearly brought out by the opinion of two justices who dissented for the very reason that the agreement with respect to the number of directors which the city should elect was not a part of the charter of the company, but was an agreement between third parties, outside of and collateral to the charter, and which the legislature could not reserve the power to alter or repeal. 15 Wall. 499, 21 L. ed. 104. That case cannot be distinguished in principle from the case at bar.

Remembering that the *Dartmouth College Case* (which was the cause of the general introduction into the legislation of the several states of a provision reserving the power to alter, amend, or repeal acts of incorporation) concerned the right of a legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general power does not secure to the legislature the right to exercise it in this respect.

*Judgment affirmed.*

\*OREGON RAILWAY & NAVIGATION COMPANY, *Appt.*, [55]

*v.*

ROBERT BALFOUR *et al.*, Partners, Doing Business as Balfour, Guthrie, & Co., *et al.*

OREGON RAILWAY & NAVIGATION COMPANY and Oregon Short Line & Northern Railway Company, *Appts.*,

*v.*

ROBERT BALFOUR *et al.*, Partners, Doing Business as Balfour, Guthrie, & Co., *et al.*

(See S. C. Reporter's ed. 55-57.)

*Admiralty appeals—proceedings to limit liability of shipowners.*

Proceedings under the act of Congress to limit the liability of shipowners, and the rules of the Supreme Court in that regard, are admiralty cases within the meaning of the judicial act of March 3, 1891, § 6, making the judgments or decrees of the circuit court of appeals from admiralty cases final, from



which no appeal can be taken to the Supreme Court.

[Nos. 73, 74.]

Submitted October 9, 1900. Decided October 22, 1900.

**A** PPEALS from decrees of the United States Circuit Court of Appeals for the Ninth Circuit affirming decrees of the District Court for the District of Oregon in proceedings for limitation of the liability of shipowners. On motion to dismiss. *Dismissed.*

See same case below, 61 U. S. App. 150, 90 Fed. Rep. 295, 33 C. C. A. 57.

The facts are stated in the opinion.

Messrs. **W. W. Cotton** and **A. B. Browne** submitted the cause for appellants:

The rule limiting the liability of shipowners is applicable to all courts, both state and Federal, and the right to the limitation may be set up by the owner as a defense in any form of action in any court.

*The Manitoba*, 122 U. S. 97, *sub nom. Beatty v. Hanna*, 30 L. ed. 1095, 7 Sup. Ct. Rep. 1158; *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97.

A court of admiralty has not the characteristic powers of a court of equity.

*The Eclipse*, 135 U. S. 599, *sub nom. Rea v. The Eclipse*, 34 L. ed. 269, 10 Sup. Ct. Rep. 873.

This court has truly said that where a vessel is not surrendered to a trustee the proceeding to limit liability is an equitable action.

*Re Morrison*, 147 U. S. 34, *sub nom. Morrison v. United States Dist. Ct.* 37 L. ed. 67, 13 Sup. Ct. Rep. 246.

The words "admiralty" and "maritime" have not the same meaning, and should not, on familiar principles, be so construed.

Benedict, Admiralty, 3d ed. § 21.

If several words are used which may or may not bear the same meaning, each word is held to be used in different senses, as otherwise it would appear that there had been a simple redundancy of language to express the same idea, and this redundancy is not to be presumed.

*Arthur v. Morgan*, 112 U. S. 500, 28 L. ed. 827, 5 Sup. Ct. Rep. 241; *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. 1.

The words "admiralty" and "maritime" have been examined in two opinions delivered by justices of this court, in connection with the jurisdiction of district courts.

*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 378, 12 L. ed. 480; *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776.

The admiralty and maritime jurisdiction of the United States is to be determined as of the date of the Constitution.

*People's Ferry Co. v. Beers*, 20 How. 401, 15 L. ed. 964.

The judicial power of the United States 179 U. S.

cannot be enlarged by any act of Congress or by any rule of this court.

*The Lottawanna*, 21 Wall. 558, *sub nom. Rodd v. Heartt*, 22 L. ed. 654.

The nature and extent of the admiralty jurisdiction conferred by the Constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the state courts at the time the Federal Constitution was adopted.

*Ex parte Easton*, 95 U. S. 70, 24 L. ed. 373.

While the limited liability of shipowners was a rule of a modern maritime law of Europe, it was not adopted by the Civil Law, or by any of the ancient maritime codes constituting the foundation of the English admiralty law, and the rule has an existence in the United States and England solely by virtue of statute.

*Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585; *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The Rebecca*, 1 Ware, 188, Fed. Cas. No. 11,619; *Butler v. Boston & S. S. Co.* 130 U. S. 555, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

When this proceeding is commenced, the jurisdiction which is exercised is not the jurisdiction of a court of admiralty, but of a court of equity, and the case is not an admiralty case, but an equitable action.

*Re Morrison*, 147 U. S. 34, *sub nom. Morrison v. United States Dist. Ct.* 37 L. ed. 67, 13 Sup. Ct. Rep. 246.

Messrs. **George H. Williams** and **C. E. S. Wood** submitted the cause for appellees:

Section 6 of the act establishing the United States circuit courts of appeals provides that the decree of such court shall be final in admiralty cases.

*Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

Proceedings under the act of Congress limiting the liability of shipowners are cases in admiralty.

*Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585; *The Benefactor*, 103 U. S. 239, *sub nom. New York & W. S. S. Co. v. Mount*, 26 L. ed. 351; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Supreme Court Rules of Practice in Admiralty, 54-57.

\*Mr. Chief Justice **Fuller** delivered the [55] opinion of the court:

These were petitions for a limitation of liability of shipowners, filed in the district court of the United States for the district of Oregon, sitting in admiralty, which proceeded to decree in that court. From this decree appeals were prosecuted to the United States circuit court of appeals for the ninth circuit and the decree affirmed. 61 U. S. App. 150, 90 Fed. Rep. 295, 33 C. C. A. 57. From that decree appeals were taken to this court, which appellees now move to dismiss.

By the 6th section of the judiciary act of

[56] March 3, 1891, it is provided that the judgments or decrees of the circuit courts of appeals in admiralty cases shall be final; and no appeal to this court lies therefrom. If, then, proceedings under the act \*of Congress to limit the liability of shipowners, and the rules of this court in that regard, are admiralty cases, it follows that the motions to dismiss must be sustained.

By the 2d section of article 3 of the Constitution, the judicial power extends "to all cases of admiralty and maritime jurisdiction," the word "maritime" having been added, out of abundant caution, to preclude a narrow interpretation of the word "admiralty."

The jurisdiction to limit the liability of shipowners was conferred upon the district courts by the act of Congress of March 3, 1851 (9 Stat. at L. 635, chap. 43), carried forward into §§ 4282 to 4289 of the Revised Statutes.

It was not until December term, 1871, in the case of the *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585, that the court was called upon to interpret the act, and to adopt some general rules for the purpose of carrying it into effect, and this was done at that term. 13 Wall. xii., xiii., 20 L. ed. 926, 927; Rules of Practice in Admiralty, 54-58.

The power of Congress to pass the act of 1851, and the power of this court to prescribe rules regulating proceedings thereunder, were maintained in that case, and were recognized and reaffirmed in many subsequent cases. *The Benefactor*, 103 U. S. 239, sub nom. *New York & W. S. S. Co. v. Mount*, 26 L. ed. 351; *The Scotland*, 105 U. S. 24, sub nom. *National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Re Morrisson*, 147 U. S. 14, 34, sub nom. *Morrison v. United States Dist. Ct.* 37 L. ed. 60, 67, 13 Sup. Ct. Rep. 246. In the latter case the proceeding is styled "an equitable action," but not in any sense as inconsistent with the admiralty jurisdiction.

In these cases the provisions of the act and of the rules are fully set forth, explained, and commented on, and need not be repeated. As decisive of the question before us it will be sufficient to give the following extracts from the opinion of the court, delivered by Mr. Justice Bradley, in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*:

"The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; \*and if this were not so, the subject-matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to shipowners its benefits, was, therefore, strictly within the powers conferred

upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own. . . . In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals. . . . We see no reason to modify these views, and, in our judgment, the proper district court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts."

Clearly, then, these were admiralty cases; the decrees of the Circuit Court of Appeals were made final by the statute; and *the appeals must be dismissed*.

\*DANIEL WILEY, Plff. in Err., [55]

v.  
D. L. SINKLER, T. D. Lanigan, and Benjamin Elfe.

(See S. C. Reporter's ed. 58-67.)

*Error to circuit court—constitutional question—right to vote for member of Congress—jurisdiction of circuit court—amount in dispute—sufficiency of pleading—right of unregistered voter to contest statute.*

1. The right to vote for members of the Congress of the United States has its foundation in the Constitution of the United States, and therefore a case involving the question may be brought directly from the circuit court to the Supreme Court, under the act of Congress of March 3, 1891, chap. 517, § 5, cl. 4 (26 Stat. at L. 828).
2. An action against election officers to recover damages for the rejection of a vote for a member of the House of Representatives for the United States, in which the damages are laid at the sum of \$2,500, is within the jurisdiction of the circuit court of the United States, concurrent with the courts of the state.
3. The amount of damages which plaintiff shall recover in an action for rejecting his vote for a member of Congress is peculiarly appropriate for the determination of a jury, and therefore when the damages are laid at the sum of \$2,500, no opinion of the court upon that subject can justify it in holding that the amount in controversy is less than

NOTE.—As to how far the right to vote is absolute—see *State ex rel. Allison v. Blake* (N. J. L.) 25 L. R. A. 480 and note.

As to jurisdiction of circuit court as determined by the amount in controversy—see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennant-Stribling Shoe Co. v. Roper*, 36 C. C. A. 469.



the sum or value of \$2,000, so as to be insufficient to support the jurisdiction of the circuit court of the United States.

4. An allegation that the plaintiff was a duly qualified elector, but without any allegation that he was ever registered as such, is insufficient to state a cause of action for unlawfully rejecting his vote, under S. C. Const. art. 8, § 3, and Rev. Stat. 1893, § 132, making it necessary to be registered in order to be entitled to vote.
5. A voter who does not allege that he ever was registered or ever made any application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect required a longer residence in the county than was required by the Constitution of the state, and otherwise unreasonably impeded the exercise of the constitutional right of voting.

[No. 2.]

*Submitted October 11, 1898. Ordered for oral argument October 24, 1898. Argued December 8, 1899. Decided October 15, 1900.*

**I**N ERROR to the Circuit Court of the United States for the District of South Carolina to review a decision dismissing a complaint in an action to recover damages for rejecting a vote for member of Congress. *Affirmed.*

Statement by Mr. Justice Gray:

[58] \*This was an action brought March 11, 1895, in the circuit court of the United States for the district of South Carolina, by a resident of the city of Charleston in that state, against the board of managers of a general election at a ward and precinct in that city, to recover damages in the sum of \$2,500 for wrongfully and wilfully rejecting his vote for a member of the House of Representatives of the United States for the state of South Carolina on November 6, 1894. The allegations of the complaint were as follows:

"I. That the plaintiff is and was on the 6th day of November, 1894, a resident of the city and county of Charleston, in the state of South Carolina; and that he had been a resident of said state for a period of more than twelve months next preceding said 6th day of November, 1894, and a resident of said city and county for more than sixty days next preceding said day; and that under the Constitution and laws of the said state of South Carolina and the Constitution and laws of the United States the said plaintiff is, and was at the time aforesaid, twenty-one years of age, and is and was in every other respect a duly qualified elector of said state, and is and was on the said \*6th day of November, 1894, entitled to vote for a member of the House of Representatives of the United States from said state of South Carolina.

[59] "II. That the defendants were on the day and year aforesaid the board of managers of 179 U. S.

the Federal election, at the first election precinct in the sixth ward of said city of Charleston, in said county and state; that, as the plaintiff has been informed and believes, the said defendants were duly appointed and qualified as such managers; and that they were present at the polling place in the said election precinct on the said 6th day of November, 1894, and during all the time the polls were opened on said day were there, acting as such board of managers of the Federal election.

"III. That the proper election precinct at which the said plaintiff was entitled to vote is the said first precinct in the sixth ward of the city and county of Charleston, in the state aforesaid; and that on the said 6th day of November, 1894, and while the polls were open for voting purposes, the said plaintiff presented himself at the polling place in said election precinct, and then and there offered to vote and cast his ballot for one of the candidates for the office of member of the House of Representatives of the United States for the state of South Carolina in the Fifty-fourth Congress; and the plaintiff further avers that he then and there had ready the proof of his qualifications as such Federal elector as aforesaid.

"IV. That the said defendants unlawfully, wilfully, and injuriously refused to permit the said plaintiff to vote at said precinct and at said Federal election which was there held according to law, on said 6th day of November, 1894, for one of the candidates for member of said House of Representatives of the United States for the state aforesaid; and wrongfully and wilfully, and without any lawful cause or excuse, rejected the plaintiff's said vote; to his damage \$2,500.

"Wherefore the plaintiff demands judgment against the defendants for the said sum of \$2,500, and for the costs of this action."

The defendants demurred to the complaint upon the following grounds:

\*First. That the court had no jurisdiction [60] of the action, because it did not affirmatively appear on the face of the complaint that a Federal question was involved; and because it appeared on the face of the complaint that a verdict for \$2,000 would be so excessive that the court would be required to set it aside.

Second. That the complaint did not state facts sufficient to constitute a cause of action, because, by § 2008 of the Revised Statutes of the United States, an action must be brought for a penalty, and not for damages; and because the complaint did not state facts sufficient to constitute a cause of action, either under that statute, or at common law.

The court, without considering the other grounds, sustained the demurrer and dismissed the complaint because it did not state facts sufficient to constitute a cause of action, in that it failed to state that the plaintiff was a duly registered voter of the state of South Carolina. The plaintiff sued out a writ of error from this court.

The material parts of the Constitution and 85



laws of South Carolina, referred to in argument, are stated in the margin.†

**Mr. Charles A. Douglass** argued the cause and filed a brief for plaintiff in error:

A registration act, to be valid, must be a thing of regulation simply, and the regulation must be necessary and reasonable, and must secure and facilitate the right of suffrage, and not impair, abridge, or destroy it.

*Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Brightly*, Lead. Cas. on Elections; *Cooley*, Const. Lim. p. 757; *Monroe v. Collins*, 17 Ohio St. 665; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; 6 Am. & Eng. Enc. Law, p. 287; *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *Perry v. Whittaker*, 71 N. C. 475; *State ex rel. Wood v. Baker*, 38 Wis. 71; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *Owensboro v. Hickman*, 90 Ky. 629, 10 L. R. A. 224, 14 S. W. 688; *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; *State ex rel. Stearns v. Corner*, 22 Neb. 265, 34 N. W. 499; *Morris v. Powell*, 125 Ind. 281, 9 L. R. A. 326, 25 N. E. 221; *White v. Multnomah County Comrs.* 13 Or. 317, 57 Am. Rep. 20, 10 Pac. 484; *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832, 3 N. E. 538.

A registration law requiring a voter to be qualified to vote thirty days before the election, in order to register, is void.

†In the Constitution of 1868 the 1st article, entitled "Declaration of Rights," contains the following provisions:

"Sec. 31. All elections shall be free and open, and every inhabitant of this commonwealth, possessing the qualifications provided for in this Constitution, shall have an equal right to elect officers and be elected to fill public office."

"Sec. 33. The right of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or improper conduct."

The 8th article of the same Constitution, entitled "Rights of Suffrage," contains the following provisions:

"Sec. 2. Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution, without distinction of race, color, or former condition, who shall be a resident of this state at the time of the adoption of this Constitution, or who shall thereafter reside in this state one year, and in the county in which he offers to vote sixty days, next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any elections: *Provided*, that no person shall be allowed to vote or hold office who is now or hereafter may be disqualified therefor by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: *Provided*, further, that no person while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, shall be allowed to vote or hold office."

"Sec. 8. It shall be the duty of the general assembly to provide from time to time for the registration of all electors."

*Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *State ex rel. Knowlton v. Williams*, 5 Wis. 308; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *Kilham v. Ward*, 2 Mass. 236; *Bridge v. Lincoln*, 14 Mass. 367.

The legislature cannot add to the constitutional qualification of electors.

*McCafferty v. Guyer*, 59 Pa. 109; *Green v. Shumway*, 39 N. Y. 418; *Brown v. Grover*, 6 Bush, 1; *Cooley*, Const. Lim. p. 753; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Monroe v. Collins*, 17 Ohio St. 665; *People ex rel. Van Bokkelen v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465.

A registration act which requires a previous registration except in the case of one becoming qualified between the last day of registration and the day of election, and prohibits anyone not registered from voting at that election, is unconstitutional.

*Dells v. Kennedy*, 49 Wis. 555, 6 N. W. 246, 381, 35 Am. Rep. 786; *Owensboro v. Hickman*, 90 Ky. 629, 10 L. R. A. 224, 14 S. W. 688; *Atty. Gen. v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388.

**Mr. W. A. Barber** argued the cause, and filed a brief for defendant in error:

The circuit court is without jurisdiction, because no Federal question appears on the face of the complaint.

*Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 812.

The inquiry into the jurisdiction of the

"Sec. 7. Every person entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the county where he shall have resided sixty days previous to such election, except as otherwise provided in this Constitution or the Constitution and laws of the United States."

"Sec. 8. The general assembly shall never pass any law that will deprive any of the citizens of this state of the right of suffrage, except for treason, murder, robbery, or duelling, whereof the person shall have been duly tried and convicted." This section was amended in 1882 by substituting, for the word "robbery," the words "burglary, larceny, perjury, forgery, or any other infamous crime."

The Revised Statutes of South Carolina of 1893 contain the following provisions:

"Sec. 162. The general elections for Federal, state, and county officers in this state shall be held on the 1st Tuesday following the 1st Monday in November in every second year, reckoning from the year one thousand eight hundred and seventy."

"Sec. 131. Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in the Constitution, without distinction of race, color, or former condition, who shall have been a resident of the state for one year, and in the county in which he offers to vote for sixty days, next preceding any general election, shall be entitled to vote: *Provided*, that no person, while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, or who shall have been convicted of treason, murder, burglary, larceny, perjury, forgery, or any other infamous crime, or duelling, shall be allowed to vote."

"Sec. 132. All electors of the state shall be registered; and no person shall be allowed to



circuit court is limited to the facts appearing on the record in the first instance.

*Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 143, 37 L. ed. 1032, 14 Sup. Ct. Rep. 35; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

The Constitution of the United States does not confer the right of suffrage upon anyone.

*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

The right of suffrage is a privilege which the elector enjoys under the Constitution and laws of his state.

*United States v. Cruikshank*, 92 U. S. 549, 23 L. ed. 590; *United States v. Petersburg Judges of Election*, 1 Hughes, 94, Fed. Cas. No. 16,036; *United States v. Crosby*, 1 Hughes, 456, Fed. Cas. No. 14,893; *Ex parte Siebold*, 100 U. S. 394, 25 L. ed. 725.

A guaranty against discrimination on account of race, color, or previous condition is the only new constitutional right vested in citizens of the United States by the 14th and 15th Amendments.

*United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

Subject to the limitations contained in the Federal Constitution, the elective franchise is under the control of the sovereign

power of the state expressed in constitutions or statutes properly enacted.

*Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *Cooley, Const. Lim.* p. 752.

Where registration laws have been held unconstitutional they were enacted under a power included in the general authority of the legislature to provide for the orderly exercise of the right of suffrage.

*Monroe v. Collins*, 17 Ohio St. 665; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Patterson v. Barlow*, 60 Pa. 75; *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *State ex rel. Wood v. Baker*, 38 Wis. 71; *Kinneen v. Wells*, 144 Mass. 894, 59 Am. Rep. 105, 11 N. E. 916; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632.

The legislature is the sole judge of the reasonableness of a registration law passed in pursuance of the authority conferred by the Constitution.

*State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L. R. A. 124, 14 So. 394.

A registration law is valid though it requires the applicant to give his age, occupation, place of residence as well as the township from which he removed, and his full name.

*State ex rel. Harris v. Scarborough*, 110 N. C. 232, 14 S. E. 737.

\*Mr. Justice Gray, after stating the case [61] as above, delivered the opinion of the court:

This case involves the construction and application of the Constitution of the United

States, which provides that no person shall vote at any election hereafter to be held, unless he shall have been heretofore registered in conformity with the requirements of chapter 7 of the General Statutes of 1882, and acts amendatory thereof, or shall be registered as herein required."

Sections 133-136 provide for the appointment of a supervisor and two assistant supervisors of registration in each county, and establish registration precincts.

"Sec. 137. After every general election the registration books shall be opened, for registration of such persons as shall thereafter become entitled to register, on the 1st Monday in each month, until the 1st day of July preceding a general election, when the same shall be closed until such general election shall have taken place."

Section 138 requires the books of registration to be deposited and safely kept in the office of a certain clerk or registrar.

"Sec. 139. The supervisor shall determine as to the legal qualifications of all applicants for registration by summary process, requiring oath, evidence, or both, if he deem proper, subject to revision by the assistant supervisors and himself in all cases where he has refused to register an applicant. From their decision any applicant who is rejected shall have the right to a review thereof by the circuit court, provided he give notice in writing to the supervisor of his application for such review, and the grounds thereof, within five days from the date of his rejection, and commence his proceedings within ten days from the service of said notice.

"Sec. 140. Any person coming of age, and otherwise qualified as an elector, may appear before the supervisor on any day on which the books are opened as aforesaid, and make oath

(which the supervisor is hereby authorized to administer) as to his name, age, occupation, and place of residence; and if the supervisor find him qualified, he shall enter his name upon the registration book of the precinct in which he resides. Such person shall have the right of appeal, as provided in the last section, if the supervisor shall not find him qualified.

"Sec. 141. In case a person shall not be of age to qualify him as an elector on the day of the closing of the books of registration before any general election, but shall be of such age as will qualify him as such elector before the said general election, and shall appear before the supervisor of registration and take oath thereto, the supervisor, if he shall find him qualified, shall enter his name upon the registration book as aforesaid."

Section 142 provides that "each elector registered as aforesaid shall thereupon be furnished by the supervisor with a certificate which shall contain a statement of his age, occupation, and place of residence, as entered in the said registration book, and which certificate shall be signed by the said supervisor; and no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate;" and the form of such certificate is prescribed.

By sections 146-149 an elector who changes his place of residence must surrender his certificate of registration and take out a new certificate; and by section 150, if an elector loses his certificate he may, upon application made at least thirty days before the next general election, and upon complying with certain stringent provisions as to proof of the loss, obtain a new certificate.



[62] States, and is therefore rightly brought directly from the circuit court of the United States \*to this court, under the act of March 3, 1891, chap. 517, § 5, cl. 4 (26 Stat. at L. 828).

The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States.

[63] \*This is clearly and amply set forth in *Ex parte Yarborough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, in which this court, speaking by Mr. Justice Miller, upheld a conviction in a circuit court of the United States under §§ 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress, and answered the proposition "that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively," as follows:

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: 'The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Art. 1, § 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and \*the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state." 110 U. S. 663, 28 L. ed. 278, 4 Sup. Ct. Rep. 152.

[64] The court then, referring to the statement of Chief Justice Waite in *Minor v. Happersett*, 21 Wall. 162, 178, 22 L. ed. 627, 631, that "the Constitution of the United States does not confer the right of suffrage upon anyone," explained that statement as follows: "But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification of voters for members of Congress that which prevails in the state where the voting is to be done; therefore, said the opinion, the right is not definitely conferred

on any person or class of persons by the Constitution alone, because you have to look to the law of the state for the description of the class. But the court did not intend to say that, when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." 110 U. S. 664, 28 L. ed. 278, 4 Sup. Ct. Rep. 152.

The circuit court of the United States has jurisdiction, concurrent with the courts of the state, of any action under the Constitution, laws, or treaties of the United States, in which the matter in dispute exceeds the sum or value of \$2,000. Act of August 13, 1893, chap. 866 (25 Stat. at L. 433).

This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the Constitution and laws of the state of South Carolina and the Constitution and laws of the United States, a duly qualified \*elector of the state, shows that the action is brought under the Constitution and laws of the United States. [65]

The damages are laid at the sum of \$2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 674; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

The circuit court therefore clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint.

The objection that the only remedy in that court was by suit for a penalty under § 2008 of the Revised Statutes is answered by the repeal of that section, before this action was brought, by the act of Congress of February 8, 1894, chap. 25 (28 Stat. at L. 36).

But the objection that the complaint failed to state that the plaintiff was a duly registered voter of the state of South Carolina (which was the ground of the judgment below in favor of the defendants) is a more serious one.

By the Constitution of South Carolina, every male citizen of the age of twenty-one years and upwards, who has resided in the state for one year, and in the county where he offers to vote for sixty days, next preceding any election, and is not disqualified by the Constitution of the United States, nor



a lunatic or a prisoner, nor been convicted of an infamous crime or of dueling, is entitled to vote for all officers elected by the people. Art. 1, § 31; art. 8, §§ 2, 8. That Constitution, in art. 8, § 3, also makes it the duty of the legislature to provide from time to time for the registration of all electors.

[66] The Revised Statutes of South Carolina of 1893 provide, in § 131, that every man not laboring under the disabilities named in the Constitution of the state (repeating all the qualifications and the disabilities mentioned in that Constitution) shall be entitled to vote; and further provide, in § 132, that all electors of the state shall be registered, and that no person shall be allowed to vote at any election unless theretofore registered as required by those statutes or by previous laws.

The Constitution and the laws of the state thus require that, in order to entitle anyone to have his vote received at any election, he must not only have the requisite qualifications of an elector, but he must have been registered. By elementary rules of pleading, both these essential requisites must be distinctly alleged by the plaintiff in any action against the managers of an election for refusing his vote. *Murphy v. Ramsey*, 114 U. S. 15, 37, 29 L. ed. 47, 55, 5 Sup. Ct. Rep. 747; *Blanchard v. Stearns*, 5 Met. 298, 302.

The complaint in this case alleges that the plaintiff was a duly qualified elector; but it contains no allegation that he was ever registered as such. Because of this omission the complaint does not state facts sufficient to constitute a cause of action.

It was argued, in behalf of the plaintiff, that the registration act of South Carolina was unconstitutional because it allowed for registration only one day in each month between the day of a general election in November and the 1st day of July before the next general election; required the registration books to be closed from such 1st day of July for four months, until the ensuing election day; and thus in effect required each voter to reside in the county for one hundred and twenty days (whereas the Constitution required only sixty days) before the election, and otherwise unreasonably impeded the exercise of the constitutional right of voting; that the only exception allowed was in the case of voters coming of age during those four months, and there was no exception in the case of electors who, by reason of sickness or absence or other good and sufficient cause, did not or could not have registered before the 1st day of July.

In the case in the supreme court of South Carolina, of *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, cited at the bar, the Chief Justice expressed his opinion that the registration act of the state was unconstitutional; but the majority of the judges declined to express any opinion upon that question, because they thought it unnecessary for the decision. Nor should this court undertake to decide it in the present case.

[67] Passing by the difficulty of subjecting election officers to an action for damages for refusing a vote which the statute under which they are appointed forbids them to

receive it is by no means clear, taking into consideration all the constitutional and statutory provisions upon the subject, that the construction contended for is the true construction of the statute.

But, even upon that construction, the plaintiff does not show that he is in a position to impugn the constitutionality of the statute. It is only on the day when his vote was refused, that he alleges that he had resided in the state for a year and in the county for sixty days, and was of age and otherwise a qualified elector. He does not allege when he first became qualified. So far as appears, he may have become of age and otherwise qualified but a few days before the election day on which he tendered his vote, in which case he would confessedly, by the specific provision of § 141, have been entitled to apply for registration. Yet he does not allege that he ever was registered, or made any application to be registered.

The provisions of the statutes of 1893 requiring registered voters to obtain certificates from the supervisors, the provisions for registration in earlier statutes, and the provisions of the statute of December 24, 1894, for calling a constitutional convention, enacted since the date of the election here in question, were largely commented on, and their validity impugned, in the argument for the plaintiff in error. But the validity of none of those provisions is involved in the decision of this case.

*Judgment affirmed.*

\*WILBERFORCE SULLY, Trustee, et al., [68]  
Plffs. in Err.,  
v.

AMERICAN NATIONAL BANK et al.

(See S. C. Reporter's ed. 68.)

*Motion to retax costs—interpreting former decree.*

A decree of reversal as to one of several plaintiffs in error, with costs, is interpreted to allow only the costs of the successful plaintiff in error.

[No. 266 of October Term, 1899.]

*Submitted October 9, 1900. Decided October 22, 1900.*

IN ERROR to review a judgment of the Supreme Court of the State of Tennessee. Motion to retax costs *granted*.

The facts are stated in the opinion.

Mr. E. J. Baxter submitted for motion.

Mr. T. S. Webb submitted the cause for the Travelers Insurance Company:

Taxation of costs is merely an itemized statement and summing up by the clerk of the costs properly and legally allowable according to the schedule of fees, and does not involve an adjudication.

2 Bouvier, Law Dict. 579.

The so-called motion to reform the de-

crec as to taxation of costs is really a petition to rehear the cause and to set aside the decree of May 28, 1900, after the adjournment of the term of the court at which said decree was rendered, and cannot be entertained by the court.

Supreme Court Rule No. 30; *Bushnell v. Crooke Min. & Smelting Co.* 150 U. S. 82, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22; *Williams v. Conger*, 131 U. S. 390, 33 L. ed. 201, 9 Sup. Ct. Rep. 793; *Brooks v. Burlington & S. W. R. Co.* 102 U. S. 107, 26 L. ed. 91.

The alleged reason for not making the application within time will not take the case out of the rule.

*Bushnell v. Crooke Min. & Smelting Co.* 150 U. S. 82, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22.

Mr. R. E. L. Mountcastle submitted the cause for Wilberforce Sully and Mrs. Myton:

After the term has ended, all final judgments and decrees of the court pass beyond its control unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can only be corrected by such proceeding by writ of error or appeal as may be allowed in a court which by law can review the decision.

*Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167.

Mr. Samuel C. Williams submitted the cause for the American National Bank:

The court will not add to or modify a decree of a term that is closed.

Supreme Court rule 30; *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799; *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9.

But if the court meant to decree that only A. B. Carhart should recover costs, and if that intention, by reason of clerical mistake, is not definitely defined, or if the decree is misconstrued by the clerk in issuing process thereunder, the court will see that the true decree is known and executed.

*Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9.

[68] \*Mr. Justice Peckham delivered the opinion of the court:

This is in substance a motion to retax costs in this case.

Upon the day of the final adjournment of the court, May 28, 1900, the cause was decided, and a decree entered reversing the judgment of the supreme court of Tennessee as to the plaintiff in error Carhart, who was one of several plaintiffs in error, with costs to be paid by the American National Bank. Subsequently to the adjournment all the costs of this court were taxed against the bank, which now prays for a retaxation.

The decree of this court has been misinterpreted. It does not mean that all the costs in this court are to be paid by the bank, but only the costs of the plaintiff in error Car-

hart, in regard to whom alone the judgment of the court below was reversed.

The motion to retax the costs is granted, and the taxation modified to that extent.

\*JAMES KNOTT, Petitioner,

v.

BOTANY WORSTED MILLS and Henry P. Winter and Charles F. Smillie.

(See S. C. Reporter's ed. 69-77.)

*Harter act—negligence in loading or stowage of cargo—voyage of foreign vessel from foreign port to United States—stipulations in bill of lading—law of ship's flag.*

1. Damage to wool stowed on the forward side of a temporary wooden bulkhead, by drainage from sugar stowed aft of the bulkhead, when it results from the fact that for a short time the vessel was trimmed by the head after discharging a part of the cargo, until she was again trimmed by the stern at another port, arises from negligence in loading or stowage of the cargo, which makes the vessel liable under the Harter act of February 13, 1893, chap. 105, § 1 (27 Stat. at L. 445), notwithstanding any stipulations to the contrary in the bills of lading; and it is not a damage from fault or error in the navigation or management of the ship.
2. A stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified and overridden by the Harter act of February 13, 1893, chap. 105, § 1 (27 Stat. at L. 445), which prohibits contracts against liability for negligence in loading and stowing the cargo.

[No. 5.]

Argued October 12, 13, 1899. Decided October 22, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decree affirming a decision of the District Court of the United States for the Southern District of New York for damage to a cargo. *Affirmed.*

See same case below, 51 U. S. App. 467, 82 Fed. Rep. 471, 27 C. C. A. 326.

The facts are stated in the opinion.

Mr. J. Parker Kirlin argued the cause, and Messrs. Convers & Kirlin filed a brief for petitioner:

The loss was within the exception of the bills of lading.

*Lawrence v. Minturn*, 17 How. 100, 15 L. ed. 58; *The Duero*, L. R. 2 Adm. & Eccl. 393; *Fonsceca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 110, 27 N. E. 766; *The Glenochil* [1896] P. 10.

Where it appears expressly that the parties have contracted with reference to a foreign law, such law prima facie should be applied in expounding the contract.

*Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Pritchard v. Norton*, 106 U. S. 124,



27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *The Oranmore*, 24 Fed. Rep. 922; *The Trinacria*, 42 Fed. Rep. 863; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408; *Greer v. Poole*, L. R. 5 Q. B. Div. 272; *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589; *Hamlyn v. Talisker Distillery* [1894] A. C. 202; *Millar v. Heinrich*, 4 Campb. 155; *Este v. Smyth*, 23 L. J. Ch. N. S. 705, 18 Beav. 122; *Byam v. Byam*, 19 Beav. 58; *Westlake*, Private International Law, § 371; *Van Schaick v. Edwards*, 2 Johns. Cas. 355.

There is nothing in our public policy which prohibits foreigners, or parties contracting abroad, from providing that their rights and obligations touching matters done or to be done without our jurisdiction shall be governed by a foreign law.

*The Trinacria*, 42 Fed. Rep. 863; *Baetjer v. La Compagnie Générale Transatlantique*, 59 Fed. Rep. 789.

The other cases in the lower courts rest upon the ground that negligence clauses coupled with a stipulation for foreign law which would give them validity cannot be enforced when made in this country,—

*The Brantford City*, 29 Fed. Rep. 373; *The Energia*, 56 Fed. Rep. 124; *Brauer v. Compania Navigacion La Flecha*, 57 Fed. Rep. 403; *The Iowa*, 50 Fed. Rep. 561.

— or where the negligent act relates to that part of the contract to be performed within our jurisdiction.

*The Glenmavis*, 69 Fed. Rep. 472.

A negligence clause in a contract made here, stipulating for English law, and to be performed mainly on the high seas and in England, should be upheld by our courts.

*The Oranmore*, 24 Fed. Rep. 922.

Where the contract was made here, but the negligence occurred beyond our jurisdiction, the foreign law will be applied if the parties have evinced a clear intention in their contract to be governed by it.

*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The English cases on the question whether a foreign contract contrary to public policy can be enforced in England have arisen where the breach involved arose in the performance of some part of the agreement in England.

*Hope v. Hope*, 8 De G. M. & G. 731; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Hamlyn v. Talisker Distillery* [1894] A. C. 202.

Our state court cases hold that the law with respect to which the parties have expressly or presumptively contracted applies in the construction of international or interstate contracts, even though opposed to the public policy of the forum and invalid if made there.

*Fonscca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 110, 27 N. E. 766; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 179 U. S.

217, 5 L. R. A. 508, 18 Atl. 503; *Dugan v. Lewis*, 79 Tex. 246, 12 L. R. A. 93, 14 S. W. 1024.

It is competent for either party to contract himself out of the benefits of the statute.

*The Silvia*, 15 C. C. A. 362, 35 U. S. App. 395, 68 Fed. Rep. 230; *Hine v. New York & B. Co.* 20 C. C. A. 63, 38 U. S. App. 520, 73 Fed. Rep. 852; *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357; *Bovill v. Wood*, 2 Maule & S. 23; *Wilson v. McIntosh* [1894] A. C. 129; *Rumsey v. North-Eastern R. Co.* 14 C. B. N. S. 641.

The court will not refuse to sanction such a contract merely because it may be opposed to public policy, if it be otherwise valid.

*Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Tullis v. Jacson* [1892] 3 Ch. 441; *Wallis v. Smith*, L. R. 21 Ch. Div. 243; *Underwood v. Barker* [1899] 1 Ch. 300; *Holmes*, Common Law, 205; *Tallis v. Tallis*, 1 El. & Bl. 391.

If the Harter act applies to the case, the damage resulted from "faults or errors in navigation or in the management of said vessel," and was within the protection of its 3d section.

*The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; *The Sandfield*, 79 Fed. Rep. 371, 34 C. C. A. 612, 61 U. S. App. 385, 92 Fed. Rep. 663; *The Mexican Prince*, 82 Fed. Rep. 484; *The British King*, 89 Fed. Rep. 872; *Lawrence v. Minturn*, 17 How. 100, 15 L. ed. 58; *The Argo*, Swabey, Adm. 462; *The Etona*, 64 Fed. Rep. 880, 18 C. C. A. 380, 38 U. S. App. 50, 71 Fed. Rep. 895; *The Glenochil* [1896] P. 10; *The Ferro* [1893] P. 38; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408.

*Mr. Wilhelmus Mynderse* argued the cause, and *Messrs. Butler, Notman, Joline, & Mynderse* filed a brief for respondents Winter and Smillie:

There is no valid provision in the bill of lading subjecting the contract to the law of Great Britain.

*Lewisohn v. National S. S. Co.* 56 Fed. Rep. 602; *The Silvia*, 15 C. C. A. 362, 35 U. S. App. 395, 68 Fed. Rep. 230; *The Glenmavis*, 69 Fed. Rep. 472; *The Brantford City*, 29 Fed. Rep. 373; *The Hugo*, 57 Fed. Rep. 403; *The Etona*, 64 Fed. Rep. 880, 18 C. C. A. 380, 38 U. S. App. 50, 71 Fed. Rep. 895; *The Guildhall*, 58 Fed. Rep. 796; *The Energia*, 56 Fed. Rep. 124, 13 C. C. A. 653, 35 U. S. App. 6, 66 Fed. Rep. 604; *The Iowa*, 50 Fed. Rep. 561.

If the Harter act is not considered controlling, then the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

*New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627.

Even if the Harter act does not prohibit the insertion, in bills of lading issued in a foreign port, of clauses limiting liability for negligence, such clauses do not afford

protection to the shipowner in the light of proved negligence.

*Ibid.*; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

Unseaworthiness may relate to a condition of loading as well as to a condition of the hull.

Carver, *Carriage by Sea*, 2d ed. § 18.

In order to secure exemption from the consequences of errors in navigation or management, the shipowner must exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied. This is a duty which falls upon the shipowner in port, and which he must thoroughly perform in each port.

*The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

Messrs. Black & Kneeland filed a brief for respondent the Botany Worsted Mills:

The 3d section of the Harter act applies both in terms and intent to foreign vessels and to a shipment made at a foreign port.

*The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

The principle that every man may renounce a benefit introduced in his own favor has, however, this important limitation,—that he cannot enter into a valid prospective agreement to waive rights which the law has declared public policy requires should exist.

*Kncettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357.

Stipulations by a carrier for exemption from liability for negligence are invalid as in contravention of public policy, and will not be enforced by the courts.

*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The exception, in the bill of lading, of liability for damages resulting from negligent stowage, is not validated by the stipulation that the contract shall be governed by the law of the flag.

*The Iowa*, 50 Fed. Rep. 561; *The Energia*, 56 Fed. Rep. 124, 13 C. C. A. 653, 35 U. S. App. 6, 66 Fed. Rep. 604; *Lewisohn v. National S. S. Co.* 56 Fed. Rep. 602; *The Hugo*, 57 Fed. Rep. 403; *The Guildhall*, 58 Fed. Rep. 796; *The Glenmavis*, 69 Fed. Rep. 472.

Even had the appellant been able to prove that the exception relied on was valid by the Argentine law, the court should not enforce it.

*Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Thatcher v. Morris*, 11 N. Y. 438.

When it is once determined that a contract is contrary to public policy, even the English courts will refuse to enforce it, notwithstanding the fact that it was valid where made, when any part was to be performed within the jurisdiction.

*Hope v. Hope*, 8 De G. M. & G. 731; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Hamlyn v. Talisker Distillery* [1894] A. C. 202.

The manifest intention of the Harter act is to hold the shipowner to the exercise of the utmost diligence in providing and loading his vessel so she may carry the cargo safely; and the exemptions which it provides are conditional upon the fulfilment of this obligation.

*Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408.

The term "management," as used in the Harter act, should not be held to cover or include any act or omission primarily connected with the care of the cargo.

*Carmichael v. Liverpool Sailing Ship-Owners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *The Ferro* [1893] P. 38; *The Glenochil* [1896] P. 10; *The Whitlieburn*, 89 Fed. Rep. 526.

\*Mr. Justice Gray delivered the opinion [69] of the court:

The Botany Worsted Mills, a corporation of New Jersey, and Winter & Smillie, a firm of merchants in the city of New York, \*re-[70] spectively owners of two separate lots of bales of wool, shipped at Buenos Ayres for New York on board the steamship Portuguese Prince, severally filed libels in admiralty *in personam* in the district court of the United States for the southern district of New York, against James Knott, the owner of the vessel, to recover for damage caused to the wool by contact with drainage from wet sugar which also formed part of her cargo.

The Portuguese Prince was a British vessel belonging to a line trading between New York and ports in the River Plata, Brazil, and the West Indies, loading and discharging cargo and having a resident agent at each port. The bills of lading of the wool, signed at Buenos Ayres December 21, 1894, gave her liberty to call at any port or ports to receive and discharge cargo, and for any other purpose whatever; and purported to exempt the carrier from liability for "negligence of masters or mariners;" "sweating, rust, natural decay, leakage, or breakage, and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell, or evaporation from, them;" "or any other peril of the seas, rivers, navigation, or of land transit, of whatsoever nature or kind; and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after or during the voyage, or for whose acts the shipowner would otherwise be liable; or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Each bill of lading also contained the following clause: "This contract shall be governed by the law of the flag of the ship carrying the goods, except that general aver-



age shall be adjusted according to York-Antwerp Rules 1890."

[71] The facts of the case are substantially undisputed. The bales of wool of the libellants were taken on board at Buenos Ayres, December 21-24, 1894, and were stowed on end, with proper dunnage, between decks near the bow, and forward of a temporary \*wooden bulkhead, which was not tight. The vessel, after touching at other ports, touched on February 19, 1895, at Pernambuco, and there took on board 200 tons of wet sugar (from which there is always drainage), which was stowed, with proper dunnage, between decks, aft of the wooden bulkhead. At that time the vessel was trimmed by the stern, and all drainage from the sugar, flowing aft, was carried off by the scuppers, which were sufficient for the purpose when the vessel was down by the stern, or on even keel in calm weather. There was no provision for carrying off the drainage in case it ran forward. She discharged other cargo at Para; and on March 10, when she left that port, she was 2 feet down by the head. She continued in this trim until she took on additional cargo at Port of Spain, where the error in trim was corrected, and she left that port on March 18, loaded 1 foot by the stern. It was agreed by the parties that there was no damage to the wool by sugar drainage until she was trimmed by the head at Para; that the wool was damaged, by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain, and not afterwards; that, after she was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way forward; and that the court might draw inferences.

The district court entered a decree for the libellants. 76 Fed. Rep. 582. That decree was affirmed by the circuit court of appeals. 51 U. S. App. 467, 82 Fed. Rep. 471, 27 C. C. A. 326. The appellant then obtained a writ of certiorari from this court. 168 U. S. 711, 18 Sup. Ct. Rep. 950.

Before the act of Congress of February 13, 1893, chap. 105 (27 Stat. at L. 445), known as the Harter act, it was the settled law of this country, as declared by this court, that common carriers, by land or sea, could not by any form of contract exempt themselves from responsibility for loss or damage arising from negligence of their servants, and that any stipulation for such exemption was void as against public policy; although the courts in England and in some of the states held otherwise. *New York O. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Compania De Navigacion La Flecha v. Brauer*, 168 U. S. 104, 117, 118, 42 L. ed. 398, 404, 405, 18 Sup. Ct. Rep. 12. In many low-  
[72] er courts of the United States \*it has been held, independently of the Harter act, that a stipulation that a contract should be governed by the law of England in this respect was void, and could not be enforced in a court of the United States; but the point has not been decided by this court. Nor is 179 U. S.

it necessary for us now to decide that point, because these bills of lading were issued since the Harter act, and we are of opinion that the case is governed by the express provisions of that act.

Upon the facts of this case there can be no doubt that the ship was seaworthy, and that the damage to the wool was caused by drainage from the wet sugar through negligence of those in charge of the ship and cargo. The questions upon which the decision of the case turns are two:

First. Whether this damage to the wool was "loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of cargo, within the 1st section of the Harter act; or was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," within the 3d section of that act.

Second. Do the words, in the 1st section, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," include a foreign vessel transporting merchandise from a foreign port to a port of the United States?

Section 1 of that act is as follows: "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import, inserted in bills of lading or shipping receipts, shall be null and void and of no effect." This section, in all cases coming within its provisions, overrides and nullifies any such stipulations in a bill of lading. *Calderon v. Atlas S. S. Co.* 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588.

\*By § 3, on the other hand, "if the owner [73] of any vessel transporting merchandise or property to or from any port in the United States" shall exercise due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel nor her owner, agent, or charterer "shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," etc. This section does but relax the warranty of seaworthiness in the particulars specified in the section. *The Carib Prince*, 170 U. S. 655, *sub nom. Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; *The Irrawaddy*, 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831.

We fully concur with the courts below that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or management of the ship, for the reasons stated by the district judge, and ap-



proved by the circuit court of appeals, as follows:

"The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head. There was no fault or defect in the vessel herself. She was constructed in the usual way, and was sufficient. But on sailing from Para she was a little down by the head, through inattention, during the changes in the loading, to the effect these changes made in the trim of the ship and in the flow of the sugar drainage. She was not down by the head more than frequently happens. It in no way affected her seagoing qualities; nor did the vessel herself cause any damage to the wool. The damage was caused by the drainage of the wet sugar alone. So that no question of the unseaworthiness of the ship arises. The ship herself was as seaworthy when she left Para as when she sailed from Pernambuco. The negligence consisted in stowing the wool far forward, without taking care subsequently that changes of loading should not bring the ship down by the head. I must therefore regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship. . . . The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim, or on the sugar drainage. . . . Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the 1st section. The ship and her owner must therefore answer for this damage, and the 3d section is inapplicable." 76 Fed. Rep. 583-585; 51 U. S. App. 473, 82 Fed. Rep. 471, 27 C. C. A. 326.

In *The Glenochil* [1896] Prob. 10, on which the appellant much relied, the negligence which was held to be within the 3d section of the Harter act was, as said by Sir Francis Jeune, "a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her." He pointed out that the 1st and 3d sections of the act might be reconciled by the construction, "first, that the act prevents exemptions in the case of direct want of care in respect of the cargo, and, secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the

vessel, and not with the cargo." And he added that the court had had the same sort of question before it in the case of *The Ferro* [1893] Prob. 38, and he adhered to what he there said, "that mere stowage is an altogether different matter from the management of the vessel." And Sir Gorell Barnes delivered a concurring opinion to the same effect.

The like distinction was recognized by this court in the recent case of *The Silvia*, 171 U. S. 462, 466, 43 L. ed. 241, 243, 19 Sup. Ct. Rep. 7.

The remaining question is whether the 1st section of the Harter act applies to a foreign vessel on a voyage from a foreign port to a port in the United States.

The power of Congress to include such cases in this enactment cannot be denied in a court of the United States. The point in \*controversy is whether, upon the proper [75] construction of the act, Congress has done so. That the 3d section does extend to such a vessel on such a voyage has been already decided by this court. *The Silvia*, above cited; *The Chattahoochee*, 173 U. S. 540, 550, 551, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491.

It is true that the words of that section are not exactly the same in this respect, being "any vessel transporting merchandise or property to or from any port in the United States," whereas the corresponding words in the 1st section are "any vessel transporting merchandise or property from or between ports of the United States and foreign ports."

But the two phrases, as applied to the subject-matter, are precisely equivalent, and are both equally applicable to a foreign voyage that ends, and to one that begins, in this country. In their usual and natural meaning, the words "from any port in the United States" include all voyages, whether domestic or foreign, which begin in this country; the words "to any port in the United States" include all voyages, whether domestic or foreign, which end in this country; and the words "between ports of the United States and foreign ports" include all foreign voyages which either begin or end here. The words of the 3d section, "to or from any port in the United States," express in the simplest and most direct form the intention to include voyages hither as well as voyages hence. And we find insuperable difficulty in the way of giving a different meaning to the words of the 1st section, "from or between ports of the United States and foreign ports." The words "from ports of the United States" would of themselves be sufficient to cover all voyages which begin here, whether they end in a domestic or in a foreign port; and the words "between ports of the United States and foreign ports" no more appropriately designate foreign voyages beginning here than such voyages beginning abroad. The phrase of the 1st section is slightly elliptical; but it appears to us to have exactly the same meaning as if the ellipsis had been supplied by repeating the words "ports of the United States," so as to read "any vessel



[76] transporting merchandise or property from ports of the United States, or between ports of the United States and foreign ports." And "no reason has been suggested why a foreign vessel should come within the benefit of the 3d section relaxing the warranty of seaworthiness, and not come within the prohibition of the 1st section affirming the unlawfulness of stipulations against liability for negligence.

Attention was called at the bar to the fact that in the act, as originally passed by the House of Representatives, the words of the 3d section were "any vessel transporting merchandise or property between ports in the United States of America and foreign ports," and that for those words the Senate substituted the words as they now stand in the act; and it was argued that the change in this section, leaving unchanged the corresponding clauses in the 1st and other sections of the act, showed that those sections were not supposed or intended to include vessels bound from foreign ports to ports of the United States. But the argument fails to notice that the 3d section, as it originally stood, did not contain the words "from or," but covered only voyages "between ports in the United States and foreign ports;" and the more reasonable inference is that the change was made for the purpose of bringing domestic voyages within this section. See 24 Congr. Rec. 147-149, 173, 1181, 1291, 1292.

Attention was also called to the 4th section of the act, which makes it the duty of the owner, master, or agent of "any vessel transporting merchandise or property from or between ports of the United States" to issue to shippers bills of lading containing a certain description of the goods; and to the 5th section, which provides that, "for a violation of any of the provisions of this act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding \$2,000," and the amount of the fine and costs shall be a lien upon the vessel, and she may be libelled therefor in any district court of the United States within whose jurisdiction she may be found. It was argued that this provision imposing a penalty would cover a refusal to give a bill of lading without the clauses prohibited by the 1st section, and could not extend to acts done in a foreign

[77] port out of the jurisdiction of the United States. But whether that be so or not (which we are not required in this case to decide), it affords no sufficient reason for refusing to give full effect, according to what appears to us to be their manifest meaning, to the positive words of the 1st section, which enact, as to "any vessel" transporting merchandise or property "between ports of the United States and foreign ports," that all stipulations relieving the carrier from liability for loss or damage arising from negligence in the loading or stowage of the cargo shall not only be unlawful, but "shall be null and void and of no effect."

This express provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag.

*Decree affirmed.*

WILLIAM W. HUBBELL, *App't.*,  
v.

UNITED STATES.

(See S. C. Reporter's ed. 77-86.)

*Patents—for improvements in metallic cartridges—amendment of claims—comparison with rejected claims—infringing devices—material differences—different combinations reaching same result.*

1. The claim for a patent as allowed must be read and interpreted with reference to a claim that has been rejected and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices.
2. The claim of the Hubbell patent, No. 212,313, for improvement in metallic cartridges, which specifies as part of the claimant's combination "an anvil over the fulminate provided with two or more openings, whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," makes the relative position of the vents and the walls of the fulminate chamber a material part of the patent, since the examiners had refused to allow the claim until the vents were thus distinctly located.
3. Reloading cartridges the vents of which are wholly over the fulminate chamber, and do not lead directly to the powder chamber, but lead to a channel cut across the upper face of the anvil and by this to a hole in the base of the powder chamber, so that the explosive force of the fulminate enters the powder chamber in a central stream, do not infringe the Hubbell patent, No. 212,313, for an improvement in metallic cartridges, the distinguishing feature of which is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that this chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a larger area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge.
4. The fact that a few loose grains of powder fall down through the base of the powder chamber of a reloading cartridge, and lie loosely in the groove across the upper face of the anvil, so that they come directly in contact with the flame of the fulminate before the latter enters the powder chamber, when they are not relied upon and do not in fact operate as a means of igniting the charge in the powder chamber, will not make a cartridge which is so constructed that the

NOTE.—Upon the question what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent—see note to *Royer v. Coupe*, 38 L. ed. U. S. 1073.



explosive force of the fulminate enters the powder chamber in a central stream infringe the Hubbell patent, No. 212,313, of which the distinguishing feature is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that the explosive force of the fulminate does not enter the powder chamber in a central stream, but in a diffused body into the base of the powder charge.

5. Combinations are not identical because intended to obtain the same result, unless the devices or mechanical means by which the desired result is secured are the same.

[No. 19.]

*Argued January 9, 10, 1900. Decided October 22, 1900.*

**A** PPEAL from a judgment of the Court of Claims dismissing a petition claiming infringement by the United States of a patent for metallic cartridges. *Affirmed.*

See same case below, 20 Ct. Cl. 354.

Statement by Mr. Justice Shiras:

[77] \*On December 28, 1878, William Wheeler Hubbell filed in the United States Patent Office an application for a patent for an improvement in metallic cartridges, and on February 18, 1879, letters patent No. 212,313 were granted and issued to him.

[78] \*On April 19, 1883, Hubbell, the patentee, filed a petition in the court of claims against the United States, alleging that the latter were using his patented methods in circumstances that warranted a claim for compensation. This case was numbered in the court of claims as No. 13,793, and was so proceeded in that on June 1, 1885, judgment was entered in the court of claims dismissing the petition. 20 Ct. Cl. 354. In August, 1885, an application for allowance of an appeal from that judgment to this court was filed. Pending this application Hubbell brought another suit against the United States in the court of claims by filing a petition, No. 16,261, on June 11, 1888, presenting substantially similar issues to those asserted in the first suit.

On December 23, 1895, judgment was entered by the court of claims dismissing the petition in the second case. 31 Ct. Cl. 464. On March 20, 1896, an application for allowance of an appeal from this judgment to this court was filed, and on July 6, 1896, this appeal was allowed. On May 31, 1898, the judgment of the court of claims dismissing the petition in the second case was approved by this court. 171 U. S. 203, 43 L. ed. 136, 13 Sup. Ct. Rep. 828.

On June 7, 1898, the application for allowance of appeal in the first case was allowed, and on May 31, 1898, a petition was allowed to be filed in this court for a rehearing in the second case. The appeal in the first case and the petition for a rehearing in the second case were argued together in this court on January 9, 1900.

**Mr. Frederic D. McKenney** argued the cause, and, with **Mr. J. Nota McGill**, filed a brief for appellant:

It is not necessary that two machines shall be precisely similar in construction, to be identical. Two devices are identical when they perform substantially the same function in substantially the same way, to obtain the same result.

*Cantrell v. Wallick*, 117 U. S. 689, 29 L. ed. 1017, 6 Sup. Ct. Rep. 970.

If, in an improved device, the combination covered by an earlier patent be employed, infringement exists.

*Elizabeth v. American Nicholson Pavement Co.* 97 U. S. 126, 24 L. ed. 1000; *Shaver v. Skinner Mfg. Co.* 30 Fed. Rep. 68; *Pitts v. Wemple*, 1 Biss. 87, Fed. Cas. No. 11,194; *Carter v. Baker*, 1 Sawy. 512, Fed. Cas. No. 2,472; *Morey v. Lockwood*, 8 Wall. 230, 19 L. ed. 339; *Filley v. Littlefield Stove Co.* 30 Fed. Rep. 434.

The true test of infringement is, Would the subsequent device, if prior to the patent, constitute an anticipation?

*Peters v. Active Mfg. Co.* 129 U. S. 530, 32 L. ed. 738, 9 Sup. Ct. Rep. 389; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 30 L. ed. 942, 7 Sup. Ct. Rep. 1034; *Grant v. Walter*, 148 U. S. 554, 37 L. ed. 557, 13 Sup. Ct. Rep. 699; *Gordon v. Warder*, 150 U. S. 47, 37 L. ed. 992, 14 Sup. Ct. Rep. 32.

Experiments, unsuccessful experiments, abandonment, and nonuser are not anticipatory.

*Gamewell Fire Alarm Teleg. Co. v. Municipal Signal Co.* 10 C. C. A. 184, 21 U. S. App. 157, 61 Fed. Rep. 948; *Elizabeth v. American Nicholson Pavement Co.* 97 U. S. 126, 24 L. ed. 1000; *Whetley v. Swayne*, 7 Wall. 685, 19 L. ed. 199; *Seymour v. Osborne*, 11 Wall. 516, 20 L. ed. 33; *The Cornplanter Patent*, 23 Wall. 181, *sub nom.* *Brown v. Guild*, 23 L. ed. 161; *Gayler v. Wilder*, 10 How. 477, 13 L. ed. 504.

The sure test, and one that a jury should be guided by in all cases of this kind, is whether or not the defendant's machine, whatever may be its form or mechanical construction, has incorporated within it the principle, or the combination, or the novel ideas which constitute the improvement to be found in plaintiff's machine. If it does, no matter what may be its mechanical construction or form, it is an infringement, an appropriation of the ideas of another, simply in a different form.

*Blanchard v. Beers*, 2 Blatchf. 411, Fed. Cas. No. 1,506.

Prior patents not set up in the answer cannot be introduced in evidence to invalidate the claim of the patent on the ground of want of novelty, when the claim is properly construed.

*Grier v. Wilt*, 120 U. S. 412, 30 L. ed. 712, 7 Sup. Ct. Rep. 718.

It has been repeatedly held that a charge of infringement may be made out, even though the letter of the claims of the prior patent be avoided.

*Machine Co. v. Murphy*, 97 U. S. 120, *sub* 179 U. S.



*nom. Union Paper Bag Mach. Co. v. Murphy*, 24 L. ed. 935; *Elizabeth v. American Nicholson Pavement Co.* 97 U. S. 137, 24 L. ed. 1005; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Hoyt v. Horne*, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922.

Mr. George S. Boutwell also argued the cause, and, with Messrs. F. P. Dewees and William W. Hubbell, filed a further brief for appellant.

Mr. Frederic D. McKenney filed a separate supplemental brief for appellant:

The court of claims has jurisdiction to entertain claims and demands of this character, and to render a money judgment in favor of the claimant.

*United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *United States v. Berdan Fire-arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

The right of recovery in cases like that at bar has been repeatedly affirmed by the court of claims.

*Hubbell v. United States*, 20 Ct. Cl. 354; *McKeever v. United States*, 14 Ct. Cl. 396; *Forehand v. United States*, 23 Ct. Cl. 477.

The policy of the War Department of late years towards inventors has been one of neutrality, neither denying nor admitting legal rights, but taking inventions to perfect government arms, leaving inventors free to seek redress without prejudice before other tribunals than an executive department. Where an inventor is in constant communication with the ordnance officers, exhibiting his inventions and urging their adoption, and they, without accepting or rejecting his propositions, use the device covered by his patent, a contract will be implied, and an action thereon will be within the jurisdiction of this court.

*Berdan Fire Arms Mfg. Co. v. United States*, 26 Ct. Cl. 48; *Pasqueau v. United States*, 26 Ct. Cl. 509.

Mr. Charles C. Binney argued the cause, and, with Assistant Attorney General Pradt, filed a brief for appellee:

The understanding of the applicant and the Patent Office is of some importance as evidence upon the question of the interpretation of the language used.

*Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. ed. 149.

This understanding of the parties is especially important where the applicant for a patent for a combination has been compelled by the rejection of his original application to narrow his claim by the introduction of a new element or of limitations or provisos. In such a case he cannot afterwards contend that his patent should be interpreted as if the element so introduced were not an essential feature of the combination, or that the limitations or provisos should not be strictly construed against him.

*Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 29 L. ed. 67, 5 Sup. Ct. Rep. 1021; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493; *Sutter v. Robinson*, 119 U. S. 530, 30 L. ed. 492, 7 Sup. Ct. Rep. 376; *Crawford v. Heysinger*, 123 U. S. 589, 31 L. 179 U. S. U. S. Book 45.

ed. 269, 8 Sup. Ct. Rep. 396; *Roemer v. Peddie*, 132 U. S. 313, 33 L. ed. 382, 10 Sup. Ct. Rep. 98; *Dobson v. Lees*, 137 U. S. 258, 34 L. ed. 652, 11 Sup. Ct. Rep. 71; *Knapp v. Morss*, 150 U. S. 221, 37 L. ed. 1059, 14 Sup. Ct. Rep. 81; *McCarty v. Lehigh Valley R. Co.* 160 U. S. 110, 40 L. ed. 358, 16 Sup. Ct. Rep. 240.

Similarly, where a claim has been rejected, and such rejection acquiesced in by the applicant, this fact is important as estopping him from contending that the remaining claims, or any of them, should be so construed as to cover the subject-matter of the rejected claim.

*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627.

To determine the proper construction to be placed upon the claims of a patent, it is therefore necessary to consider the action of the Patent Office upon the original application of the patentee.

*Knapp v. Morss*, 150 U. S. 221, 37 L. ed. 1059, 14 Sup. Ct. Rep. 81.

Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot, after the issue of his patent, broaden his claim by dropping the element which he was compelled to include in order to secure his patent.

*Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493; *Leggett v. Avery*, 101 U. S. 256, 25 L. ed. 865.

In patents for combinations of mechanism, limitations and provisos imposed by the inventor—especially such as were introduced into an application after it had been persistently rejected—must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.

*Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 29 L. ed. 67, 5 Sup. Ct. Rep. 1021.

Mr. Justice Shiras, delivered the opinion of the court:

It is contended, on behalf of the appellant, that we should regard the present case and the case disposed of upon the former appeal, in 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828, as constituting substantially one controversy, and that we should give the appellant the benefit of the new or additional facts which, it is claimed, were made to appear by the amended findings in the first case. It is claimed, on the part of the United States, that the former decision of this court was a final adjudication of the controversy, that its finality was not affected by the subsequent allowance by the trial court of an appeal from the former judgment, and that, at all events, the additional findings were, in substance, not different from those previously made, and, even if now considered, show no sufficient grounds for reversing the judgment of the court of claims in the present case, or that of this court on the first appeal.

Whether if the additional findings of the trial court had presented a new and mer-



itorious case, this would afford a sufficient reason for this court to set aside its previous judgment, and to enter upon a consideration of the controversy *de novo*, we do not decide, as, even upon such an assumption, we agree with the court below in thinking that the new findings did not make a new or different case, or impair the legal foundation of the judgment rendered in the case in which they were made.

Those findings, as we find them printed in the record of the case at No. 198 of the October term 1897, of this court, consist partly of matters connected with the claim on account of the manufacture and use of the cup-anvil cartridge, and, as the claimant filed a waiver of that claim, such parts of the findings have no relevancy now. Other portions of the additional findings bear on the number of cartridges made by the United States, so as to afford a basis for estimating the damages, if the claimant should recover, and do not affect the legal questions involved. Other of the findings allowed reference to certain drawings filed by the claimant in previous applications made by him in the Patent Office, which may have some relevancy as disclosing the history of the art, but do not appear to materially affect the construction of the claim finally allowed by the Patent Office, and the same may be said of some verbal amendments allowed to the findings previously made.

[80] \*An examination of the history of the appellant's claim, as disclosed in the file wrapper and contents, shows that, in order to get his patent, he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Leggett v. Avery*, 101 U. S. 256, 25 L. ed. 865; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493; *Knapp v. Morss*, 150 U. S. 227, 37 L. ed. 1061, 14 Sup. Ct. Rep. 81.

It is quite true that, where the differences between the claim as made and as allowed consist of mere changes of expression, having substantially the same meaning, such changes, made to meet the views of the examiners, ought not to be permitted to defeat a meritorious claimant. While not allowed to revive a rejected claim by a broad construction of the claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted. The specification, as amended, contained the following description:

"The distinguishing feature of my invention is the organized construction to carry into complete effect the expressed principles of operation of the fulminate of mercury or detonating powder and the powder charge. In this organization the fulminate, although the superior explosive force, is contracted into a diminished or small central chamber, and fills it. The flange and head of the metallic case are solid, all in one piece. This

chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a large area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge. To effect this, the central anvil piece has no central aperture, is as wide as the fulminate-filled chamber, and the perforations are at the extreme outer sides of this fulminate, for two purposes: one is to diffuse the fire from this center most thoroughly; the other is to have an unperforated anvil over and against the fulminate, as it rests solid in its chamber, to receive the central blow of a \*striker and obtain complete resistance by the anvil bar, and yet have free escapement for the explosive force at once from beneath the anvil plate without any chamber or space for it to expand into under the plate. This assures a certain ignition, security of the anvil plate to keep its position, and a complete combustion of the powder charge from the base forward, as it impels the bullet out of the gun."

[81]

The claims made in the application were as follows:

"1st. The circular plate E, constructed with central solid resisting piece i, and two or more side perforations k k, substantially as described, applied within a metal case, with cylinder and rear end solid and tight, thereby requiring the insertion of the plate and charge and priming from the front, igniting the charge and remaining firetight in firing as described.

"2d. The circular plate E, constructed as described, in combination with the circular disc D, and metal solid firetight case A, substantially as shown and described.

"3d. A circular metallic tight-fitting plate, perforated into a central fulminate chamber, leaving a central solid or unperforated bar over the fulminate chamber, within a solid firetight metal case, substantially as set forth."

The examiners rejected these claims on reference to prior patents. Thereupon the claimant, having amended his specification as above, substituted for the three claims above copied the following:

"What I claim as new and desire to secure by letters patent is—

"The construction and arrangement of the chamber of fulminate, anvil, plate, perforations, and case, with the central constructed filled chamber of fulminate powder in contact and between the base of the case and the circular anvil plate, with central anvil bar and two or more side perforations, extending from the extreme sides of the chamber of fulminate into the base of the powder charge, whereby the smallest area of resistance is presented to the fulminate explosion, and the fire is diffused in the base of the charge of powder, and the greatest resistance is presented by the front face of the plate to the powder \*charge, consuming the powder and securing the plate as and by the means described."

[82]



The examiners held that the construction described in the amended specification involved patentable novelty, and that a specific and well-defined claim might be allowed, but not the amended claim, it being "vague, indefinite, and ambiguous." The claimant thereupon withdrew the above amended claim, and substituted another, which was finally allowed, in the following terms:

"What I claim as new and desire to secure by letters patent is—

"In the bottom of a solid metallic flange cartridge case or shell the combination of a circular base inclosing a central chamber of fulminate provided with two or more openings, whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge, substantially as described."

It is obvious that this is a claim for a combination, none of the elements or constituent parts of which is claimed to be new, but whose merit consists in such an adjustment and relation of the parts as to produce the desired effect.

"In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." *Fay v. Cordesman*, 109 U. S. 408, 27 L. ed. 979, 3 Sup. Ct. Rep. 236.

"In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers." *Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 29 L. ed. 67, 5 Sup. Ct. Rep. 1021.

[83] "If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal." *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493.

When the rejected claims and the one finally allowed are compared, it will be perceived that they all describe the combination as consisting of a circular base, containing a central chamber of fulminate, the anvil over it, with two or more perforations to permit the fire or explosive force of the fulminate to be communicated to the powder charge. What, then, was the difference or modification which resulted in the allowance of a claim? We agree with the court below in finding that difference in the position of

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the apertures or vents. The examiners refused to allow the claim until the claimant distinctly located the vents as "openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," thereby making the relative position of the vents and the walls of the fulminate chamber a material part of the claimant's patent. Breech-loading metallic cartridges were not new, and it was the opinion of the examiners that, in merely claiming "a circular metallic tight-fitting plate perforated with a central fulminate chamber, leaving a central solid or unperforated bar over the fulminate chamber, within a solid firetight metal case," the claimant was anticipated by the patents of Moffat, 53,168, March 13, 1866; of Tibbals, 90,607, May 25, 1869; and by an English patent, 2,906, 1865. It was not until the claimant specifically claimed, as part of his combination, "an anvil over the fulminate provided with two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," that the patent was allowed. Whether the examiners were right or wrong in so holding we are not to inquire, as the claimant did not appeal, but amended his claim and accepted a grant thereof; thereby putting himself within the range of the authorities which hold that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially \*such as were introduced [84] into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.

"It may be observed . . . that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim." Per Mr. Justice Bradley in *Union Water-Meter Co. v. Deeper*, 101 U. S. 332, 337, 25 L. ed. 1024, 1026; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 429, 38 L. ed. 501, 502, 14 Sup. Ct. Rep. 627.

With these principles of construction in view, we are constrained to concur with the court below in holding that the cartridges made and used by the government were not within the description contained in the appellant's claim.

The government cartridges alleged to be within the appellant's patent are of two kinds, one called the "cup-anvil cartridge," the other the "reloading cartridge." As the appellant has withdrawn his claim for infringement of the former, we have only to do with the latter or reloading cartridge. It is



thus described in the sixth finding of the court below:

"This cartridge is a hollow metallic shell, rimmed around the base with a pocket in the exterior of the center of the base; through the center of the top of this pocket, supposing the cartridge to be stood upon its base or closed end, is pierced a single aperture or hole to carry the fulminate flame to the black powder chamber. This cartridge contains only the black powder and the bullet. Any one of the several different kinds of primers may be used in it; the one used by the United States and alleged to infringe claimant's rights is a circular metallic cup, into which is put the fulminate; above this is fastened a disk or cover having a groove on its upper side, being the diameter of the circle; at each end of this groove a small piece or notch is cut out of it; through the holes thus formed the flame from the fulminate escapes; if this primer is placed in the chamber of the re-loading \*cartridge, with the closed end of the cup outwards and the grooved end against the top of the chamber, the flame from the fulminate when exploded would pass through these holes or notches, thence along the groove to the central aperture in the cartridge case or shell, thence to the black powder chamber through this single aperture. The entire area of each of the holes or notches in the disk is over the fulminate chamber, and the portion of the disk between the holes is the anvil." [20 Ct. Cl. 363].

This finding is claimed by the appellant to be incorrect in several respects, and particularly in its statement that "the portion of the disk between the holes is the anvil."

But even if we were permitted as an appellate court to depart from the findings of fact made by the trial court, we do not perceive that the particulars in which this finding is objected to really affect the case as presented to us. Even if we were to adopt the description of the government's cartridge given by the appellant, it still appears that there is an essential difference between the two types of cartridge. Without accepting or rejecting the government's contention that the government's cartridge is outside primed and the appellant's inside primed, and wherein it is claimed that for reloading purposes an outside primed cartridge is superior, it is sufficient to say that the difference in the shape and position of the vents, whereby the explosive force of the fulminate is communicated to the powder charge, is obvious.

The distinguishing feature of the appellant's cartridge is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate; but in the reloading cartridge of the government the vents are wholly over the fulminate chamber, do not lead directly to the powder chamber, but lead to a channel cut across the upper face of the anvil, and by this to a hole in the base of the powder chamber.

By this latter construction the explosive force of the fulminate enters the powder chamber in a central stream. But the appellant specifies, as a distinguishing feature,

that the fulminate "chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a \*larger area [86] of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge."

It may be, as the appellant contends, that his method of communicating the explosive force of the fulminate to the powder charge is an improvement on previous methods, and is superior in efficacy to that used in the government's cartridges; but our inquiry is not as to the merits of the patent in suit, but is confined to the question whether it covers, in legal contemplation, the defendant's cartridge.

Some contention is made, in argument, that because it is stated that some grains of powder may and do fall down through the base of the defendant's powder chamber, and lie loosely in the groove across the upper face of the anvil, therefore it must be concluded that such loose grains of powder come directly in contact with the flame of the fulminate before the latter enters the powder chamber. But such a fact, if it be a fact, appears to be immaterial. It is not pretended that these few loose grains of powder are relied on, or in fact operate, as a means of igniting the charge in the powder chamber.

Nor can we accept the contention that these two combinations are identical because they are intended to obtain the same result. What we have to consider is not whether the end sought to be effected is the same, but whether the devices or mechanical means by which the desired result is secured are the same.

We do not consider it necessary to consider a further suggestion, contained in the opinion of the court below, that, even if the relative position of the vents and the wall of the fulminate chamber be not a material part of the claimant's patent, still the claimant cannot recover because the other characteristics of his invention, found in the cartridge now used by the defendants, were introduced by them prior to the application for or issue of the patent.

*The decree of the Court of Claims, dismissing the claimant's petition, is affirmed.*

WILLIAM W. HUBBELL, Appt.,  
v.

UNITED STATES.

(See S. C. Reporter's ed. 86.)

*Petition for rehearing.*

[No. 198, Oct. Term, 1897.]

*Leave granted to submit petition for rehearing May, 31, 1898. Denied October 22, 1900.*



ON PETITION for a rehearing of the decision in 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828, affirming a judgment of the Court of Claims dismissing a petition against the United States for infringement of a patent. *Petition denied.*

See same case below, 31 Ct. Cl. 464.

See, further, the statement of facts in the case preceding.

[87] \*GOOD SHOT, an Indian, *Plff. in Err.*,

v.  
UNITED STATES.

(See S. C. Reporter's ed. 87-89.)

*Writ of error in case of capital crime—certified question—withdrawal—certiorari.*

1. A conviction for murder punishable with death is a conviction for a capital crime of which the Supreme Court, and not the circuit court of appeals, has jurisdiction on writ of error, although the jury have qualified the judgment by rendering a verdict "without capital punishment."
2. An answer to a question certified by the circuit court of appeals respecting its jurisdiction may be given, although the certificate has been recalled, where the answer to the question is against the jurisdiction of the circuit court of appeals, and will result in the dismissal of the writ of error from that court, which is the same result that would follow the dismissal of the certificate.
3. Certiorari cannot properly be issued to require the circuit court of appeals to send up a cause over which it has no jurisdiction for determination on the merits, when it has not rendered any decision in the case, but has merely certified the question of its jurisdiction.

[No. 447.]

*Submitted October 22, 1900. Decided October 29, 1900.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit on a question as to its jurisdiction on a conviction for murder without capital punishment. *Its jurisdiction denied.*

The facts are stated in the opinion.

Messrs. **Melvin Grigsby** and **S. H. Wright** submitted the cause for plaintiff in error.

Assistant Attorney General **Hoyt** submitted the cause for defendant in error.

[87] \*Mr. Chief Justice **Fuller** delivered the opinion of the court:

Good Shot, an Indian, was indicted in the district court of the United States for the district of South Dakota for the murder of Emily Good Shot, and, the indictment having been remitted to the circuit court, was arraigned and pleaded not guilty; was tried;

NOTE.—On certifying cases to the United States Supreme Court; certiorari from Supreme Court—see note to *Lau Ow Bew v. United States*, 1 C. C. A. 5.

As to certiorari in United States courts—see note to *Clark v. Hackett*, 17 L. ed. U. S. 69. 179 U. S.

found "guilty as charged in the indictment, without capital punishment;" was sentenced to imprisonment at hard labor in the penitentiary at Sioux Falls, in the state of South Dakota, for life; and a writ of error was duly sued out of the circuit court of appeals for the eighth circuit to review the judgment of the circuit court. The United States moved to dismiss the writ for want of jurisdiction, whereupon the circuit court of appeals certified to this court, on facts stated, the following question: "Has this circuit court of appeals jurisdiction to review upon writ of error the trial, judgment, and sentence of an Indian to imprisonment for life, founded upon a verdict rendered on a trial of an indictment of the Indian for murder, by which verdict the jury find the defendant \*'guilty as charged in the indictment, without capital punishment?'" [88]

The certificate was duly transmitted to the clerk of this court, but not filed until October 15, 1900; and on October 17, Good Shot filed a petition praying that a certiorari might be issued requiring the entire record and cause to be sent up from the circuit court of appeals. On the same day a certified transcript of an order of the circuit court of appeals, entered October 15, purporting to vacate and annul the order certifying the case, and to recall the certificate, in view of the decision of this court in *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944, was filed.

In the case referred to we held that a conviction for murder punishable with death was not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualified the punishment, and that, in such circumstances, this court had jurisdiction under § 5 of the judiciary act of March 3, 1891, providing therefor "in cases of conviction of a capital crime." It followed that circuit courts of appeals did not have jurisdiction.

If we should dismiss the certificate because of the action of the circuit court of appeals on October 15, or if we answer the question certified, the same result is reached, namely, the dismissal of the writ of error below. And in the posture of the case disclosed by the record, we think the better course is to answer the question, which we do necessarily in the negative.

As the circuit court of appeals did not have jurisdiction, the application for a certiorari must be denied. That writ may be issued by this court to the circuit courts of appeals under § 6 of the act of March 3, 1891, on application, and ordinarily after judgment, in cases in which judgments are made final in those courts by the section, and also where questions of law have been certified to this court by those courts for their guidance in disposing of such cases.

In this case there is no judgment in the circuit court of appeals, and the sole question certified relates to the jurisdiction of that court, and it having been determined that jurisdiction does not exist, the writ of certiorari cannot properly be issued \*to require the court to send up a cause over which [89]

It has no jurisdiction for determination on the merits. The remedy is by writ of error from this court to the circuit court.

*The question certified will be answered in the negative, and the petition for certiorari will be denied.*

So ordered.

**AMERICAN SUGAR REFINING COMPANY, Plff. in Err.,**  
v.

**STATE OF LOUISIANA et al.**

(See S. C. Reporter's ed. 89-95.)

*Writ of error—motion to dismiss—constitutional law—discrimination in taxes as a denial of equal protection of laws.*

1. A motion to dismiss a writ of error to a state court must be denied where the protection of the 14th Amendment is invoked in the answer, and the defense is, at least, plausible upon its face.
2. A manufacturer engaged in the business of refining sugar is not denied the equal protection of the laws because of the discrimination made by La. Const. 1879, art. 206, imposing a license tax upon manufacturers engaged in such business, but exempting from the tax those who refine the products of their own plantations.

[No. 38.]

*Submitted October 10, 1900. Decided November 5, 1900.*

ON WRIT OF ERROR to the Supreme Court of Louisiana to review a decision sustaining the constitutionality of a license tax on manufacturers engaged in the business of refining sugar. *Affirmed.*

See same case below, 51 La. Ann. 562, 25 So. 447.

Statement by Mr. Justice **Brown**:

[89] \*This was a petition filed in the civil district court for the parish of Orleans by John Brewster, tax collector, against the American Sugar Refining Company, a corporation engaged in the business of refining sugar and molasses, to recover the sum of \$3,500 per year as a state license tax for the years 1892 to 1897, inclusive, alleged to be due under a statute of Louisiana enacted in 1890, entitled "An Act to Levy, Collect, and Enforce Payment of an Annual License Tax upon all Persons, Associations of Persons, or Business Firms and Corporations Pursuing any Trade, Profession, Vocation, Calling, or Business, Except Those Who are Expressly Excepted from Such License Tax by Articles 206 and 207 of the Constitution."

By the 9th section it is enacted "that for carrying on each business of . . . refin-

ing sugar and molasses . . . the license shall be based on the gross annual receipts of each person, association of persons, business firm, or corporation engaged in said business as follows: Provided, that this section shall not apply to planters and farmers grinding and refining their own sugar and molasses; . . . and provided, further, that it shall not apply to those planters who granulate syrup for other planters during the rolling season."

First class. When the said gross actual receipts are \$2,500,000 and over the license shall be \$3,500.

This act was passed in pursuance of article 206 of the state Constitution of 1879, which reads as follows:

"Art. 206. The general assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations, and callings. All persons, associations of persons, and corporations pursuing any trade, profession, business, or calling may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural, and mining pursuits and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco and cigars, and cotton-seed oil. No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes."

Defense: First, that the business of refining sugar and molasses is exempt from the payment of any license tax, because it is one of those manufactures enumerated in article 206 as entitled to exemption. Second, that the act of 1890 "violates the Constitution of the United States, and is void in so far as it attempts to impose a license tax on this defendant, because said act denies to this defendant the equal protection of the laws of the state, inasmuch as said act does not impose equally a license tax on all persons engaged in the business of refining sugar and molasses, but discriminates in favor of planters who refine their own sugar and molasses, and in favor of planters who granulate syrups for other planters during the rolling season."

The court, being of opinion that the business carried on by the defendant company was that of a manufacturer, dismissed the petition. On appeal to the supreme court, that court was of opinion that the defendant was not entitled to exemption under article 207 of the Constitution (not now in question), which exempted certain manufacturers, and ordered a judgment \*for \$3,500, with interest and costs, for the license tax for the year 1897. But, upon the attention of the court being called by a petition for rehearing to article 206 of the Constitution, above quoted, that court delivered a new opinion

**NOTE.**—As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

On Federal jurisdiction over state courts; necessity of Federal question—see notes to 102

*Hambin v. Western Land Co.* 37 L. ed. U. S. 267; and *Kipley v. Illinois ex rel. Akin.* 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



to the effect that the defendant was not a manufacturer, and therefore not entitled to an exemption by article 206, and that the exemption of planters who refine their own sugar did not deprive the defendant of the equal protection of the laws. It further revised its judgment, and held the state entitled to recover for each of the years from 1892 to 1897, and rendered judgment for the sum of \$3,500, for each of said years. Whereupon defendant sued out a writ of error from this court.

**Messrs. John E. Parsons and Charles Carroll** submitted the cause for plaintiff in error; **Mr. Joseph Carroll** was with them on the brief:

The act No. 150 of the general assembly of Louisiana of 1890 is in conflict with the 14th Amendment to the Constitution of the United States, in that it seeks to create an illegal discrimination against sugar refiners who are not planters.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Northern P. R. Co. v. Walker*, 47 Fed. Rep. 681; *McHenry v. Alford*, 168 U. S. 666, 42 L. ed. 620, 18 Sup. Ct. Rep. 242; *Re Grice*, 79 Fed. Rep. 627; *Union Sewer-Pipe Co. v. Connelly*, 99 Fed. Rep. 354; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *San Bernardino County v. Southern P. R. Co.* 118 U. S. 422, 30 L. ed. 127, 6 Sup. Ct. Rep. 1144.

**Mr. E. Howard McCaleb** submitted the cause for defendants in error:

The decision of the supreme court of Louisiana, resting upon a non-Federal question, is of itself sufficient to support the judgment.

*Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *White v. Leovy*, 174 U. S. 95, 43 L. ed. 909, 19 Sup. Ct. Rep. 604; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *California v. Holladay*, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

There is color for a motion to dismiss, which presents for consideration this motion to affirm, even if it should be held that the Federal question is not as frivolous as we maintain.

*East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; *Douglas v. Wallace*, 161 U. S. 346, 40 L. ed. 727, 16 Sup. Ct. Rep. 485; *Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446.

The 14th Amendment was not intended to compel the states to adopt an iron rule of equality as to taxation, or to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to 179 U. S.

which it operates or the subjects sought to be attained. It is enough that there is no discrimination in favor of one as against another of the same class.

*Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 187, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734.

\***Mr. Justice Brown** delivered the opinion [91] of the court:

Motion was made to dismiss this writ of error upon the ground that the case did not present a Federal question, inasmuch as the question of illegal discrimination "was not the principal matter litigated, but was put in the record for the purpose of obtaining this writ of error." As, however, the protection of the 14th Amendment was invoked in the answer, and, as this defense is at least plausible upon its face, the motion to dismiss must be denied; but, the case having also been submitted upon the merits, we shall proceed to discuss the constitutional objection to the act.

It is scarcely necessary to say that the question whether the defendant were a manufacturer within the meaning of the Louisiana Constitution is one dependent upon the construction of that Constitution, and that the interpretation given to it by the state supreme court, raising, as it does, no question of contract, is obligatory upon this court; but as that court held the defendant liable upon the ground that it was engaged in the business of refining sugar, the further question is presented \*whether it is denied the [92] equal protection of the laws because of the exemption from the tax of planters grinding and refining their own sugar and molasses.

The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of cit-



izens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves, or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whisky, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm,—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth.

[93] With reference to the analogous right of importation, it was said by this court at an early day, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, that the right to sell was an incident to the right to import foreign goods, and that a license tax upon the sale of imported goods, while still in the hands of the importer in \*their original packages, was in conflict with that provision of the Constitution which prohibits a state from laying an impost or duty upon imports.

Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by act of August 2, 1813, a license tax upon the retailers of wines and spirits, for the purpose of providing for the expense of the war with Great Britain, it was further enacted by an act of February 8, 1815 (3 Stat. at L. 205, chap. 40), that it should not be construed "to extend to vine dressers who sell at the place where the same is made, wine of their own growth; nor shall any vine dresser for vending solely at the place where the same is made, wine of his own growth, be compelled to take out license as a retailer of wine." So, too, in the internal revenue act of 1862 (12 Stat. at L. 432, chap. 119), a license tax was imposed (§ 64) upon retail dealers in all goods, wares, and merchandise, but with a proviso, in § 66, that the act should not be construed "to require a license for the sale of goods, wares, and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced; to vintners who sell, at the place where the same is made, wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or

making up of medicines for sick, lame, or diseased persons." Another paragraph of the same section (64) exempts distillers who sell the products of their own stills, from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved, these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds.

So, too, this court has had repeated occasion to sustain discriminations founded upon reasons much more obscure than this. Thus, in *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734, a municipal ordinance was sustained declaring that no car or vehicle of any kind "belonging to or used by the Richmond, Fredericksburg, & Potomac Railroad Company shall be drawn or propelled by steam" upon a certain street, although no other company was named in the ordinance, the court held \*that as no other [94] corporation had the right to run locomotives in that street, no other corporation could be in a like situation, and that the ordinance, while apparently limited in its operation, was general in its effect, as it applied to all who could do what was prohibited. "All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all." In *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, it was decided that the equal protection clause did not prohibit a state from requiring, for the admission within its limits of a corporation of another state, such conditions as it chooses, though in that case it exacted a license tax from such corporations, which it did not exact from corporations of its own creation. In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, it was said that this clause did not forbid special legislation, "and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." To the same effect is *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 541, 9 Sup. Ct. Rep. 192.

The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. "All



such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution." See also *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

In *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with railroad or steamboat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See also *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

The judgment of the Supreme Court of the State of Louisiana is affirmed.

Mr. Justice **Harlan** concurred in the result.

Mr. Justice **White** did not participate in the decision of this case.

[96] \*UNITED STATES and the Kiowa and Comanche Indians, *Appts.*,

v.

THOMAS C. ANDREWS.

(See S. C. Reporter's ed. 96-99.)

*Claims for Indian depredations—claimant as trespasser—finding of lower court.*

A finding of the court of claims that the prop-  
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erty of the claimant was taken and carried away by Indians while he was travelling in an Indian reservation, over a certain trail, "the same being an established trail, en route from Texas to a market in Kansas," is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States, and therefore shows that he was not a trespasser, but was lawfully on the reservation at the time when his property was taken.

[No. 423.]

Submitted October 15, 1900. Decided November 5, 1900.

A PPEAL from a decision of the Court of Claims in favor of a claimant against the United States and Indians for Indian depredations. *Affirmed.*

The facts are stated in the opinion.

Assistant Attorney General **Thompson** submitted the cause for appellants. Mr. P. J. Finn was with him on the brief.

Mr. **Silas Hare** submitted the cause for appellee.

\*Mr. Justice **Peckham** delivered the opinion [96] of the court:

The claimant, Thomas C. Andrews, filed his claim in the court of claims against the United States and the above-named Indians to recover the value of certain cattle destroyed by the latter in June, 1877, in the Indian territory. The claim was filed pursuant to the provisions of the act of Congress of March 3, 1891, entitled, "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations." \*26 Stat. at L. 851, chap. 538. The property was alleged to have been of the value of \$9,225. [97]

The only defense set up was that the claimant at the date of the alleged depredation was wrongfully and unlawfully within the Indian country, and was a trespasser, and therefore could not recover.

After a trial, judgment was given against the United States and the Indians for the sum of \$8,300, and the court made the following finding:

"In June, 1877, while the claimant, with a large number of cattle, was traveling over the Chisom trail, the same being an established trail en route from Texas to a market in Kansas, and while camped on the Washita river, on the Kiowa and Comanche Indian reservation, in the Indian territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of \$8,300.

"Said property was taken as aforesaid, without just cause or provocation on the part of the owner or the agent in charge, and has never been returned or paid for."

The government contends that the claimant was a trespasser by reason of the provisions of the treaty between the United States and these Indians, proclaimed August 25, 1868 (15 Stat. at L. 581), and because by § 17 of the act of 1834 (4 Stat. at L. 729,

chap. 161), it is provided that the liability of the government for property taken by Indians, in the Indian territory, shall arise only when the owner of the property taken was lawfully within such territory.

The 2d article of the treaty, after describing certain lands in the Indian territory thereby set apart for the absolute and undisturbed use and occupation of the tribes named, provides as follows:

[98] "And the United States now solemnly agrees that no persons except those herein authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, \*settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians."

By the 11th article it is, among other things, provided that—

"In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement . . . further expressly agree—

"3d. That they will not attack any persons at home, nor traveling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

"6th. They withdraw all pretense of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean; and they will not, in future, object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribes whatever amount of damage may be assessed by three disinterested commissioners, to be appointed by the President for that purpose; one of said commissioners to be a chief or headman of the tribes."

The question now before us is whether upon the facts found by the court of claims the claimant was lawfully within the territory at the time the Indians destroyed or took away his property.

[99] While the government, by the 2d article of the treaty of 1868, agreed that no one should be permitted to pass over, settle upon, or reside in the territory described in that article, yet in the subsequent article (11) exceptions were made. By the 3d and 6th subdivisions of that article the Indian tribes agreed not to attack persons or cattle, and not to oppose the construction of roads or other works of utility or necessity which might be permitted by the laws of the United States. When \*they took the property of the claimant, consisting of cattle, they violated their agreement.

The finding of the court below, that the property of the claimant was taken and carried away while he was traveling in the In-

dian reservation, over the Chisom trail, the same being an established trail *en route* from Texas to a market in Kansas, is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States.

We understand that by the use in the finding of the word "trail," in connection with the balance of the finding, is meant a way, road, or path suitable for the purpose of driving cattle over or along on their way to a market. In the territory named, a trail along which to drive cattle from Texas to Kansas would certainly be a work of utility or necessity within the meaning of article 11, subdivision 6, of the treaty. It would be a road which the government would naturally seek to provide and obtain permission to lay out or to keep in use for the convenience of its citizens who would have occasion to use it for the purpose indicated in the finding. In order to reverse this judgment we would have to presume that the court, in using the words "established trail," meant a trail that was not legally or properly established; this we cannot do, nor can we presume that the trail was established by a user which did not amount to a legal user, and so did not establish a legal trail. Being properly established, it was properly used by the claimant for the purpose stated.

While the finding might have been more definite and therefore more satisfactory, yet within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe it as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid. An established trail, in this case, means a legally established trail, and we must presume the court below so intended. The claimant was, therefore, lawfully within the territory, and was not a trespasser at the time his property was taken.

*Judgment affirmed.*

\*GEORGE W. CROSSMAN and Herman Sielcken, *Petitioners*,

*v.*

WILLIAM BURRILL and Others, *Owners of the Bark Kate Burrill.*

(See S. C. Reporter's ed. 100-115.)

*Demurrage—liability of charterers—effect of cesser clause—delay in unloading caused by public enemy.*

1. The cesser clause of a charter party saying: "Charterers' responsibility to cease

NOTE.—For general discussion of demurrage—see notes to *The Conqueror*, 41 L. ed. U. S. 937, and *Randall v. Sprague*, 21 C. C. A. 337.

On unloading cargo—see *Rolfe v. Boskenna Bay* (C. C. S. D. N. Y.) 6 L. R. A. 172, and note.

As to effect of strikes on the liability for delay in unloading vessel—see *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* (C. C. App. 8th C.) 35 L. B. A. 623, and note.

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when vessel is loaded and bills of lading are signed,"—does not relieve the charterers from liability for demurrage under provisions of the charter requiring them to pay demurrage for any delay in delivery by their fault or that of their agent, and declaring that the vessel is to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, where the bills of lading, which do not mention demurrage or refer to any other provisions of the charter than those concerning freight and average, have been assigned, and the delay in unloading is made by the assignees of the bills of lading, who thereby became consignees of the cargo, since the rights of the shipowners against those consignees depend altogether upon the contract created by the bills of lading, except so far as that contract refers to the charter party.

2. A clause in a charter party for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.
3. A detention of a vessel for unloading, which is caused, not by any act of the shipowners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by "default" of the charterers within the meaning of a charter party stipulating for demurrage in case of their default.

[No. 26.]

*Argued March 14, 1900. Decided November 5, 1900.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing a decree of the District Court for the Southern District of New York dismissing a libel *in personam* for demurrage. *Reversed.*

See same case below, 62 U. S. App. 368, 91 Fed. Rep. 543, 33 C. C. A. 663.

The facts are stated in the opinion.

Mr. **Everett P. Wheeler** argued the cause and filed a brief for petitioners:

The clause as to discharging is a mutual agreement, binding both upon shipowner and consignees. The ship must discharge; the consignee must receive.

*Ford v. Cotesworth*, L. R. 4 Q. B. 127, Affirmed, L. R. 5 Q. B. 544; *Cunningham v. Dunn*, L. R. 3 C. P. Div. 443; *Dahl v. Nelson*, L. R. 6 App. Cas. 38; *Carsanago v. Wheeler*, 16 Fed. Rep. 248; *The Spartan*, 25 Fed. Rep. 44.

There is no liability for demurrage where the vessel is prevented from receiving cargo by the authorities at the port at which the cargo is to be taken on board. Under such circumstances the ship is excused.

*White v. Steamship Winchester Co.* 23 Scottish L. R. 342.

*Vis major* is a valid defense in all actions upon contract, unless it appear that there was an absolute agreement to perform at all events. This court held it a defense in an action for rent.

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*Gates v. Goodloe*, 101 U. S. 612, 25 L. ed. 895.

Wherever the delivery of goods is prevented by a superior force which the contractor cannot control or prevent, he is excused.

*Geismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 7 N. E. 828.

Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

*Baily v. De Crespigny*, L. R. 4 Q. B. 180.

The word "impossible" in such cases is not used in a strict mathematical sense, but with reference to the course of business and its practical conduct.

*Dahl v. Nelson*, L. R. 6 App. Cas. 38; *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645.

The clause requiring the "vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers," was inserted with reference to the conditions which might prevail at Rio, and to provide that the discharge need not go on unless the anchorage ground should continue safe.

*Carlton S. S. Co. v. Castle Mail Packets Co.* [1898] A. C. 486, Affirming [1897] 2 Q. B. 485.

The courts below failed to discriminate between cases like the present, where the delay was in discharging and the discharge was not made by the charterer, and cases where the delay was that of the charterer in loading.

*Clink v. Radford* [1891] 1 Q. B. 625.

The conduct of the parties is always cogent evidence of the construction to be given to their contracts.

*Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 269, 24 L. ed. 410; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *General Mut. Ins. Co. v. Sherwood*, 14 How. 362, 14 L. ed. 456; *Woolsey v. Funke*, 121 N. Y. 87, 24 N. E. 191; *Reid v. Sprague*, 72 N. Y. 457; *Nicoll v. Sands*, 131 N. Y. 19, 29 N. E. 818.

The captain waived the lien by surrendering the lumber.

4,885 Bags of Linseed, 1 Black, 108, sub nom. *Sears v. Wills*, 17 L. ed. 35.

Mr. **Lawrence Kneeland** argued the cause and filed a brief for respondents:

The captain was bound to sign the bills of lading as presented by the charterer.

*Hansen v. Harrold Bros.* [1894] 1 Q. B. 612.

The bill of lading, not incorporating or referring to the charter provision as to demurrage, imposed no obligation upon the indorsee, who received the cargo under it, to pay the charter demurrage.

4,885 Bags of Linseed, 1 Black, 108, sub nom. *Sears v. Wills*, 17 L. ed. 35; *The H. G. Johnson*, 48 Fed. Rep. 696; *Chappel v. Comfort*, 10 C. B. N. S. 810; *Smith v. Sieveking*, 5 El. & Bl. 589; *Fry v. Chartered Mercantile Bank*, L. R. 1 C. P. 689; *Gray v. Carr*, L. R.

6 Q. B. 522; *Dayton v. Parke*, 142 N. Y. 391, 37 N. E. 642.

The distinction between these cases and cases where "all other conditions as per charter party" is inserted in the bill of lading is a recognized one.

*Porteus v. Watney*, L. R. 3 Q. B. Div. 534.

The various provisions of the charter party are contradictory in form, but contemplated a lien by the shipowner for the demurrage; and its proper construction, as a whole, required that the "cesser clause" should apply only so far as the charterers had secured to the shipowner a lien coextensive with the charterers' liability.

*Hutton v. De Belaunzaran*, 26 Fed. Rep. 780; *Gray v. Carr*, L. R. 6 Q. B. 522; *Francesco v. Massey*, L. R. 8 Exch. 101; *Kish v. Cory*, L. R. 10 Q. B. 553; *Clink v. Radford* [1891] 1 Q. B. 625; *Hansen v. Harrold Bros.* [1894] 1 Q. B. 612; *Brankelow S. S. Co. v. Canton Ins. Co.* [1899] 2 Q. B. 178.

The charterers were under an absolute engagement to designate a safe anchorage at which the vessel could discharge.

*Ogden v. Graham*, 1 Best & S. 773, 31 L. J. Q. B. N. S. 26; *Sleeper v. Puig*, 17 Blatchf. 36, Fed. Cas. No. 12,941; *Davies v. McVeagh*, L. R. 4 Exch. Div. 265.

It is not necessary that the failure of the charterers to receive the cargo should be due to negligence on their part, to constitute default. "Default," as used in the charter party, means failure or omission.

Century Dictionary; 1 Abbott, Law Dict. p. 376; 1 Burrill, Law Dict. p. 459; *Sixteen Hundred Tons of Nitrate of Soda v. McLeod*, 10 C. C. A. 115, 15 U. S. App. 369, 61 Fed. Rep. 849; *Booye v. A Cargo of Dry Boards*, 42 Fed. Rep. 335.

To escape liability the charterers must show that they were prevented from discharging the cargo by the wrongful act or omission of the owner, or of those for whom he is responsible.

*Budgett v. Binnington*, L. R. 25 Q. B. Div. 320.

By the charter the number of lay days given to discharge the cargo is fixed by computation. The cargo to be unloaded was 514,255 feet, and the rate of discharge was to be 20,000 feet per day. The number of lay days was therefore fixed at twenty-six days, and with the like effect as if that number of days had been stated.

*Hall v. Eastwick*, 1 Low. Dec. 456, Fed. Cas. No. 5,930; *Carver, Carriage by Sea*, § 610; *Postlethwaite v. Freeland*, L. R. 5 App. Cas. 617.

When the time for discharge is stipulated in the charter, or is fixed by it so that it can be calculated beforehand, there is an absolute agreement on the part of the charterer to discharge her within that time, and he takes the risk of all unforeseen circumstances.

*Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L. R. A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. Rep. 919; *Davis v. Wallace*, 3 Cliff. 131, Fed. Cas. No. 3,657; *The Argos*, L. R. 5 P. C. 161; *Thiis v.*

*Byers*, L. R. 1 Q. B. Div. 244; *Davies v. McVeagh*, L. R. 4 Exch. Div. 265; *Postlethwaite v. Freeland*, L. R. 5 App. Cas. 617; *Leer v. Yates*, 3 Taunt. 387; *Porteus v. Whatney*, L. R. 3 Q. B. Div. 534; *Straker v. Kidd*, L. R. 3 Q. B. Div. 226; *Randall v. Lynch*, 2 Campb. 352; *Barker v. Hodgson*, 3 Maule & S. 267; *Barrett v. Dutton*, 4 Campb. 333; *Bessey v. Evans*, 4 Campb. 131; *Grant v. Coverdale*, L. R. 9 App. Cas. 470; *Budgett v. Binnington*, L. R. 25 Q. B. Div. 320; *Budgett v. Binnington* [1891] 1 Q. B. 36.

\*Mr. Justice Gray delivered the opinion of [102] the court:

This case comes up by writ of certiorari issued by this court to review a decree in admiralty of the circuit court of appeals for the second circuit, which reversed a decree of the district court of the United States for the southern district of New York; and appears by the record to have been in substance as follows:

A libel in admiralty *in personam* was filed in the district court of the United States for the southern district of New York by the owners of the bark *Kate Burrill* against her charterers to recover fifty-three days' demurrage for her detention at Rio Janeiro in Brazil, in unloading a cargo of lumber shipped for that port from Pensacola in Florida, under a charter party dated March 7, 1893, by which the charterers were to pay a stipulated rate of freight on proper delivery of the cargo at the port of discharge, and which contained these other provisions:

"Cargo to be furnished at port of loading at the average rate of not less than 20,000 superficial feet per running day, Sundays excepted; and to be discharged at port of destination at the average rate of not less than 20,000 superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, fifty-nine  $\frac{46}{100}$  dollars United States gold (or its equivalent) per day, day by day, shall be paid by the said party of the \*second [103] part, or agent, to the said party of the first part, or agent.

"The cargo to be received at the port of loading within reach of ship's tackles, and to be delivered at port of discharge according to the custom of said port. Vessel to discharge at safe anchorage ground in Rio Bay designated by charterers.

"The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage.



Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed."

The libel alleged, in the 4th article, that the vessel was loaded with the cargo of lumber at Pensacola, and sailed thence for Rio Janeiro, where she arrived about August 30, 1893; and, in the 5th article, "that on September 4, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Companhia Industrial do Brazil, the agent of the respondents at said port of Rio, who received the said cargo;" but that the vessel did not complete the discharge until November 28, 1893, being a period of fifty-three days beyond the twenty-six days, Sundays exclusive, allowed for the discharge by the charter.

The libel was allowed to be amended in the circuit court of appeals, by alleging "that at the time of giving the notice of her readiness to discharge her cargo, mentioned in the 5th article, the said vessel was in fact ready to discharge upon the charterers designating a safe anchorage for that purpose;" by setting forth more particularly the times of the delay and suspension of the discharge of the cargo, and by alleging that during all those times the vessel was ready and willing to discharge the same; and by further alleging that there had been no payment or accord and satisfaction of the claim for demurrage.

[104] \*Among the defenses set up in the district court, and more fully, but with no substantial difference, in an amended answer filed by leave in the circuit court of appeals, and to the sufficiency of each of which defenses the libellant filed exceptions in either court, were those which are here numbered, for convenience, as the exceptions were numbered in the circuit court of appeals, and which were stated in the amended answer as follows:

Second. "That the charter party referred to in the libel contained a clause providing that the vessel should have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading; that said vessel was fully laden, as alleged in the 4th article of the libel, and that thereafter, and long prior to September 4, 1893 (the date upon which it is alleged in the 5th article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo), bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, a copy of which is annexed hereto, and made part hereof; and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo; and that thereupon all liability of these respondents to the owners of said vessel under said charter party ceased, and it became the duty of the master and owner of said vessel, upon the failure, alleged in the 5th article

of said libel, of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of said charter party." The bills of lading (as appears by the copy annexed to the answer) state that the lumber had been shipped by the respondents, and was to be delivered "unto order or to their assigns, they paying freight for the said lumber as per charter party dated 7th March, 1893, and average accustomed."

Third. "That when said vessel arrived at Rio Janeiro the \*owners of said cargo used [105] all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libellants were prevented from discharging the same, and the respondents were prevented from receiving the same, any sooner than they did, by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo, or to receive it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of the respondents; that the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay, and recognized the necessity therefor."

Fourth. "That when the said cargo was delivered, the said agents of the libellants accepted and received from the said consignee the sum of five hundred and fifteen pounds, six shillings, and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter party, and an account was made and stated between the said agents of the libellants and the said consignees respecting all claims under the charter party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof."

The district court, understanding the facts stated in the answer to have been admitted, sustained the second exception, overruled the third and fourth exceptions, denied a motion to withdraw these exceptions and to amend the libel, and dismissed the libel. 65 Fed. Rep. 104.

The libellants appealed to the circuit court of appeals, which, after allowing amendments of the libel and answer, sustained the second and third exceptions, and overruled the fourth exception, and authorized proofs to be taken upon the defense of \*payment and accord and satisfaction; and afterwards, being satisfied upon proofs so taken that there [106]



had been no payment or accord and satisfaction of the claim for demurrage, entered a decree for the libellants. 35 U. S. App. 608, 69 Fed. Rep. 747, 16 C. C. A. 381; 62 U. S. App. 368, 91 Fed. Rep. 543, 33 C. C. A. 663.

The respondents thereupon applied for and obtained a writ of certiorari from this court.

The libellants' claim for demurrage is based on the provisions of the charter party, by which, after the vessel is ready to discharge her cargo of lumber at the port of destination, and written notice thereof given to the charterers, they agree to discharge the lumber "at the average rate of not less than 20,000 superficial feet per running day, Sundays excepted," and to pay a certain sum, by way of demurrage, "for each and every day's detention by default of" the charterers or their agents.

The charter party further requires "the bills of lading to be signed as presented, without prejudice to this charter," and contains these clauses: "Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

After the vessel had been loaded, bills of lading were duly signed by the master, by the terms of which the cargo was to be delivered to the charterers or their assigns, "they paying freight as per charter party," "and average accustomed,"—referring to the charter by its date, but not mentioning demurrage.

The first question to be considered is how far the claim of the shipowners against the charterers for demurrage is affected by what is commonly called the cesser clause in the charter party, "Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

The circuit court of appeals, approving and adopting in this particular the opinion of the district judge, held that the cesser clause afforded no defense to the libel; and we have no doubt of the correctness of that conclusion.

The charter party, like many mercantile instruments in common use, is drawn up in brief and disjointed sentences, and must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause taken by itself.

The question here is how the clause providing that the charterers' responsibility shall cease when the vessel is loaded and bills of lading are signed is to be reconciled with the other provisions of the charter, which not only require the charterers to pay freight on delivery of the cargo, and demurrage for any delay in such delivery by fault of the charterers or their agent, but declare that the vessel is to have an absolute lien upon the cargo for both freight and demurrage.

The true rule of construction of the cesser clause, in such a connection, has been settled by a series of English decisions in which that excellent commercial lawyer, Lord Esher, lately master of the rolls, took a leading part; and is well summed up, with the rea-

sons supporting it, by himself and other judges, in two recent cases in the court of appeal. *Clink v. Radford* [1891] 1 Q. B. 625; *Hansen v. Harrold* [1894] 1 Q. B. 612.

In *Clink v. Radford* Lord Esher said:

"In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." Lord Justice Bowen said:

"There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability, without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason \*which is obvious to commercial minds, and [108] which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." And Lord Justice Fry added: "The rule that we are prima facie to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as coextensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter party the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; and there would then come a lien clause which did not recreate that liability in anybody else." [1891] 1 Q. B. 627, 629, 632.

In *Hansen v. Harrold* Lord Esher said that he thought that *Clink v. Radford* "was a right decision based upon sound mercantile reasons;" and, after quoting the passages above cited from the opinions in that case, added: "It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true, that where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers are able to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which



is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability." [1894] 1 Q. B. 617, 618.

In short, in a charter party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.

[109] In the case at bar, the provision of the charter party, which "requires 'the bills of lading to be signed as presented, without prejudice to this charter,'" while it obliges the master to sign bills of lading upon request of the charterers, does not mean that the bills of lading, or the consignee holding them, shall be subject to all the provisions of the charter, but only that the obligations of the charterers to the ship and her owners are not to be affected by the bills of lading so signed. *Gledstanes v. Allen* (1852) 12 C. B. 202. The bills of lading, as already mentioned, provide only for "paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed." They do not mention demurrage, or refer to any provisions of the charter, other than those concerning freight and average. It is well settled that a bill of lading in such a form does not subject an indorsee thereof, who receives the goods under it, to any of those other provisions of the charter. It does not give him notice of, or render him liable to, the specific provisions of the charter, which require a discharge of a certain quantity of lumber per day, or, in default thereof, the payment of a specific sum for a longer detention of the vessel; but he is entitled to take the goods within a reasonable time after arrival, and is liable to pay damages for undue delay in taking them, according to the ordinary rules of law which govern in the absence of specific agreement. *Chappel v. Comford* (1861) 10 C. B. N. S. 802; *Gray v. Carr* (1871) L. R. 6 Q. B. 522; *Porteus v. Watney* (1878) L. R. 3 Q. B. Div. 534, 537; *Serraino v. Campbell* [1891] 1 Q. B. 283; *Dayton v. Parke* (1894) 142 N. Y. 391, 37 N. E. 642.

In *McLean v. Fleming* (1871) L. R. 2 H. L. Sc. App. Cas. 128, on which the charterers relied at the argument in this court, the sole ground on which the indorsees of the bills of lading were held to be bound by the provisions of the charter party was that they were the persons who had originally authorized the chartering of the ship. See L. R. 2 H. L. Sc. App. Cas. 133, 134, 136; s. c. L. R. 6 Q. B. 559, 560. No such fact was pleaded in the case at bar.

The only facts stated in the answer upon this point are that, after the vessel was fully laden, and long before the notice to the charterers that she was ready to discharge, bills of lading acknowledging that the lumber had [110] been shipped by the respondents, "and was to be delivered to their order or assigns, "they 179 U. S.

paying freight for the said lumber as per charter party," were signed by the master of the vessel, and "were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to" the partnership of da Cruz & Filho, "who thereby became consignees of the cargo."

Upon this state of facts, the rights of the shipowners against those consignees depended altogether on the contract created by the bills of lading, except so far as that contract referred to the charter party. *Bags of Linseed* (1861) 1 Black, 108, *sub nom. Sears v. Wills*, 17 L. ed. 35. As observed by Mr. Justice Peckham, when delivering a judgment of the court of appeals of the state of New York, in regard to a bill of lading containing a clause exactly like that in the bills of lading in the case at bar: "It would be a wide stretch to hold that by this language of the bill of lading, which plainly referred only to the provisions of the charter party as to the freight money, a consignee would become liable to demurrage if he accepted the cargo under such a bill." *Dayton v. Parke*, 142 N. Y. 391, 400, 37 N. E. 642.

The necessary consequence is that the responsibility of the charterers to the shipowners for demurrage according to the charter party is not affected by the cesser clause.

The other principal question is of the validity of the defense that the delay in discharging the cargo was caused by the acts of the public enemy, and not by any default of the charterers.

Upon this question the courts below differed in opinion, the district court holding that the defense pleaded was a good one, and the circuit court of appeals holding that it was not.

This defense, as set up in the amended answer filed in the circuit court of appeals, is that, when the vessel arrived at Rio Janeiro, the owners of the cargo used all reasonable diligence in and about receiving and removing it; that the shipowners were prevented from discharging the cargo, and the respondents were prevented from receiving it, any sooner than they did, "by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil; and that the \*fir-[111] ing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of the respondents."

We are of opinion that, under a charter party expressed in such terms, the defense of *vis major*, as thus pleaded, affords a complete answer to the claim for demurrage.

It is to be remembered that by the terms of this charter party it is only for "deten-



tion by default of" the charterers or their agent that they agree to pay the amount of demurrage specified in the charter.

A detention which is caused, not by any act of the shipowners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by "default" of the charterers, in any just sense of the word.

In *Towle v. Kettell* (1849) 5 Cush. 18, the supreme judicial court of Massachusetts, in an opinion delivered by Mr. Justice Fletcher, with the concurrence of Chief Justice Shaw and Justices Wilde and Dewey, held that, under a similar provision in a charter party, the charterers were not liable for demurrage while the vessel was detained in quarantine by order of a foreign government.

The circuit court of appeals, in support of the opposite conclusion, quoted from an opinion delivered by Mr. Justice Clifford, in the circuit court of the United States for the district of Massachusetts, the following passage: "The settled rule is, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. . . . Where the contract

[112] is that the ship shall be "unladen within a certain number of days, it is no defense to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations or government restraints." *Davis v. Wallace* (1868) 3 Cliff. 123, 131, Fed. Cas. No. 3,657. But in none of the authorities cited, either by the learned justice in that case, or by the circuit court of appeals in this, in support of this general statement, was the liability of the charterers for demurrage restricted to the case of their default. In *Davis v. Wallace*, indeed, their liability was so restricted; but the defense was a crowded state of the docks, and no question of port regulations or government restraints was before the court.

In *Thacher v. Boston Gaslight Co.* (1874) 2 Low. Dec. 361, 363, Fed. Cas. No. 13,850, Judge Lowell, while following that decision in a similar case, said that the decisions in *Towle v. Kettell* and in *Davis v. Wallace* "are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which by its operation upon other vessels has caused a crowded state of the docks." And he distinctly recognized that a failure of contract on the part of the charterer, "caused by a direct and immediate *vis major*, or something like it," would not be a "default" within the meaning of the charter party.

In *Davis v. Pendergast* (1879) 16 Blatchf.

565, 567, Fed. Cas. No. 3,647, Chief Justice Waite, speaking of a similar provision, said: "The respondents, in effect, agree that no more than forty-five running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made."

The case of *Sixteen Hundred Tons of Nitrate of Soda* (1894) 15 U. S. App. 369, 61 Fed. Rep. 849, 10 C. C. A. 115, in the circuit court of appeals for the ninth circuit, upon which these libellants much rely, falls far short of supporting their claim. In that case the clause in question was in the same words as in this case; the charterers sent the vessel, for the purpose of loading a cargo of nitrate of soda which they had purchased, to a port in Chili, during the existence of a civil war \*there, and while the port was in [113] the possession of the insurgents; the sellers declined for a time to deliver the cargo, because they feared that if the export duty, which by the law of Chili was payable upon all such cargoes, was paid by them to the insurgents, they might remain liable for it to the rightful government. It was held that the charterers were liable for the stipulated demurrage during the delay so occasioned. The court, speaking of the word "default" in the charter, said: "The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers." "But there was no interference upon the part of the Chilean government, or upon the part of any armed force, to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessel's tackle." 15 U. S. App. 374, 376, 61 Fed. Rep. 851, 853, 10 C. C. A. 118, 119.

In the case at bar, the defense of *vis major*, as pleaded in the answer, was that the shipowners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy; to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the government of Brazil: that the firing between those vessels and those forts made it impossible to discharge or to receive the cargo from the vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers.

The *vis major* so pleaded was, in the words of opinions above cited, a "superior force acting directly upon the discharge of the cargo;" "a direct and immediate *vis major*;" an "unusual and extraordinary interruption that could not have been anticipated when the contract was made;" "a sudden and unforeseen interruption or prevention of the



[114] act itself of loading or discharging, not occurring through the connivance or fault \*of the charterers;" and an "interference on the part of an armed force, preventing the handling or moving of the cargo."

Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage under this charter party.

The circuit court of appeals therefore erred in sustaining the exception, in the nature of a demurrer, to that article of the answer which set up the defense of *vis major*; and for this reason its decree for the libellants must be reversed. The decree of the district court, which dismissed the libel, must also be reversed, and the case remanded to the district court, in order that both parties may have an opportunity to introduce proofs upon the issue presented by that article.

In the brief of the libellants in this court, it is suggested that the allegations of that article of the answer were not in fact true; and reference is made to the master's deposition, taken after the delivery of the principal opinion in the circuit court of appeals, in which he testified that during all the time that the vessel lay at the wharf, and until the completion of the discharge, there was no firing in the harbor, or other act of hostilities, which prevented her discharge of the cargo or its reception by the consignees.

But on the same page of the brief it is admitted that "this question having been heard on the exception to the sufficiency of the defense, the question as to the truth of the allegations of the answer was not before the court." And this is conclusively established by its opinions and decrees. The principal opinion shows that it took up, in the first instance, the questions of law raised by the exceptions to the answer, because their determination might relieve the parties from the delay and expense of introducing proof. 35 U. S. App. 620, 69 Fed. Rep. 747, 16 C. C. A. 381. By the decree thereupon made and set out in the record, the third exception, as well as the second, was sustained upon the ground that the article of the answer to which it related was "insufficient in the law to constitute a defense;" and the fourth exception was overruled. In short, the defenses of the cesser clause and of *vis major* were both held to be insufficient [115] as matter of \*law, so that no evidence in support of either of them was competent, and no evidence to contradict either was necessary or material.

The only questions of fact left open for the introduction of proofs were those of payment, and of accord and satisfaction, presented by the remaining article of the answer. That the circuit court of appeals understood such to be the condition of the case is apparent from its supplemental opinion, after proofs had been taken, in which it observed that "most of the questions arising upon this appeal have been disposed of by this court upon a former occasion (35 U. S. App. 608, 69 Fed. Rep. 747, 16 C. C. A. 381), 179 U. S. U. S., Book 45

and it remains to be considered whether the defenses of payment and accord and satisfaction are sustained by the proofs;" and then proceeded, upon an examination of the proofs, to hold that those defenses were not sustained as to the claim for demurrage, and to enter a decree for the libellants in accordance with its former opinion. 62 U. S. App. 368, 91 Fed. Rep. 543, 33 C. C. A. 663.

The questions of payment, and of accord and satisfaction, need no extended notice. They are pure questions of fact, depending on conflicting evidence and on the peculiar circumstances of the case; upon which, had they been the only questions presented by the record, a writ of certiorari would not have been granted; which appear to this court, upon examination of the proofs, to have been rightly decided by the circuit court of appeals; and which it would serve no useful purpose to discuss.

But for the reasons above stated, in considering the effect of the defense of *vis major*—

*The decrees of the Circuit Court of Appeals and of the District Court are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this court.*

Mr. Justice McKenna was not present at the argument, and took no part in the decision of this case.

\*JAMES M. SIGAFUS, *Plff. in Err.*, [116]  
v.

DUDLEY PORTER *et al.*

(See S. C. Reporter's ed. 116-126.)

*Damages—in case of deceit—measured by actual loss, not by expected fruits of unrealized speculation.*

1. The denial of a motion to dismiss a complaint cannot be assigned as error if the defendant did not rest, but introduced evidence.
2. The measure of damages in an action for deceit in the sale of property is not the difference between the value of the property as it proved to be and as it would have been if as represented, but is the difference between the real value of the property at the date of sale and the price paid, with interest thereon, together with such outlays as were legitimately attributable to defendant's conduct, since the damages are limited to the direct pecuniary loss, if any, of the plaintiff, and will not cover the expected fruits of an unrealized speculation.

[No. 8.]

*Argued April 21, 24, 1899. Ordered for re-argument May 15, 1899. Reargued November 15, 16, 1899. Decided October 29, 1900.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to bring up the entire record

from the Circuit Court of Appeals in an action to recover damages for deceit. *Reversed*.

See same case below, 51 U. S. App. 693, 84 Fed. Rep. 430, 28 C. C. A. 443; and also (on motions to amend certificate) 56 U. S. App. 62, 85 Fed. Rep. 689, 29 C. C. A. 391.

The facts are stated in the opinion.

*Messrs. Edmund Wetmore* and *Henry B. Johnson* argued the cause and filed a brief for plaintiff in error:

The intrinsic, and not the market, value of the property at the time of the fraudulent sale, is to be taken in measuring damages; and the damage is the price paid, less the actual value of the thing bought.

*Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; *Peek v. Derry*, L. R. 37 Ch. Div. 541; *Sedgw. Damages*, § 778.

The case of *Smith v. Bolles* has been followed repeatedly in the Federal courts.

*Atwater v. Whiteman*, 41 Fed. Rep. 427; *The Normannia*, 62 Fed. Rep. 469; *Wilson v. New United States Cattle Ranch Co.* 20 C. C. A. 241, 36 U. S. App. 634, 73 Fed. Rep. 994; *Rockefeller v. Merritt*, 35 L. R. A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. Rep. 909.

The same rule has been applied in the following cases, among others in the several state courts.

*Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 554; *Greenwood v. Pierce*, 58 Tex. 130; *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Reynolds v. Franklin*, 44 Minn. 30, 46 N. W. 139; *Alden v. Wright*, 47 Minn. 225, 49 N. W. 767; *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Hallam v. Todhunter*, 24 Iowa, 166; *Hiner v. Richter*, 51 Ill. 299; *Clayton v. O'Conner*, 35 Ga. 193; *Markel v. Moudy*, 11 Neb. 213, 7 N. W. 853; *Howes v. Axtell*, 74 Iowa, 400, 37 N. W. 974.

*Mr. Albert Stickney* argued the cause and filed a brief for defendants in error:

The measure of damages in actions for deceit is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be.

*Morse v. Hutchins*, 102 Mass. 439; *Krumm v. Beach*, 96 N. Y. 398.

The universality of the acceptance of the rule is shown by the following line of authorities:

*Whitney v. Allaire*, 1 N. Y. 305; *Miller v. Barber*, 66 N. Y. 558; *Hubbell v. Meigs*, 50 N. Y. 480; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123; *Pierce v. Tierseh*, 40 Ohio St. 168; *Lunn v. Shermer*, 93 N. C. 164; *Shinabarger v. Shelton*, 41 Mo. App. 147; *Gunther v. Ullrich*, 82 Wis. 222, 52 N. W. 88; *Wright v. Roach*, 57 Me. 600; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618; *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56; *Budlong v. Cunningham*, 11 Ill. App. 28; *Johnston v. Beeney*, 5 Ill. App. 604, 9 Ill. App. 64; *Antle v. Seaton*, 32 Ill. App. 437, 137 Ill. 410, 27 N. E. 691; *Drew v. Beall*, 62 Ill. 164;

*Stiles v. White*, 11 Met. 356, 45 Am. Dec. 214; *Harvey v. Hadley*, 87 Cal. 557, 26 Pac. 792; *Murray v. Jennings*, 42 Conn. 12, 19 Am. Rep. 527; *Thompson v. Burgey*, 36 Pa. 403; *Stetson v. Croskey*, 52 Pa. 230; *Bowman v. Parker*, 40 Vt. 410; *Noyes v. Blodgett*, 58 N. H. 502; *Gates v. Reynolds*, 13 Iowa, 1; *Moberly v. Alexander*, 19 Iowa, 162; *White v. Smith*, 54 Iowa, 233, 6 N. W. 284; *Page v. Wells*, 37 Mich. 415; *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702; *Stockham v. Cheney*, 62 Mich. 10, 28 N. W. 692; *Campbell v. Hillman*, 15 B. Mon. 508, 61 Am. Dec. 195; *Estell v. Myers*, 56 Miss. 800; *Young v. Filley*, 19 Neb. 543, 26 N. W. 256; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467; *Anslryn v. Frank*, 8 Mo. App. 242; *Tracey v. Gunn*, 29 Kan. 508.

The following were cases of warranty where the same rule of damages was applied:

*Clare v. Maynard*, 7 Car. & P. 741; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Seigworth v. Leffel*, 76 Pa. 476; *Jones v. Just*, L. R. 3 Q. B. 197; *Callanan v. Brown*, 31 Iowa, 333; *Masted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Tuttle v. Brown*, 4 Gray, 457, 64 Am. Dec. 80; *Peterkin v. Martin*, 30 La. Ann. 894; *Foster v. Baer*, 7 La. Ann. 613; *Slaughter v. McRae*, 3 La. Ann. 455.

The court in *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, had no intention of departing from the established rule.

*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 718.

The decision in *Smith v. Bolles*, rightly interpreted, must be held to be a decision, only that the measure of damages is not the difference between the represented value and the contract price.

\**Mr. Justice Harlan* delivered the opinion [117] of the court:

This action was brought to recover damages for deceit alleged to have been practised by Sigafus, the plaintiff in error, upon Porter, Hobson, and Morse, the defendants in error, in the sale by the former to the latter of a gold mine in California, known as the Good Hope Consolidated Gold Lode Mining Claim (consisting of the San Jacinto and Good Hope Quartz locations), and as the Annex, adjoining the Good Hope mine on the south.

The complaint alleged that the defendant, Sigafus, was president of the Good Hope Consolidated Gold Mining Company, a corporation of California possessing the legal title to the property in question, and that with the exception of a few shares standing in the name of his son-in-law he owned its entire capital stock, and was in fact the sole beneficial owner of the mine and the lands and property appurtenant thereto;

That prior to December 28th, 1893, the defendant, representing his own interests and those of the company, as well as those of his son-in-law, and acting by one William H. Griffith, entered into negotiations with the



plaintiffs for the sale of the mine, mining claims, and their appurtenances;

That in the course of such negotiations the defendant falsely and fraudulently, and with intent to deceive and defraud the plaintiffs, represented to them that the lands and mines and mining claims contained a large and valuable vein of gold-bearing ore, large and valuable deposits of gold, and that all of the gold-bearing quartz would average in milling more than \$16 per ton;

[118] That he laid before the plaintiffs a false and fraudulent report or statement in writing in regard to the lands and mines and mining claims, made by one Burnham, who was therein represented to be an independent and disinterested mining engineer and expert, and to have made a careful and complete examination in the premises, which report or statement in substance stated that the pay streak in the mine had an average width of 2 feet, that 2,434 tons of ore from the mine had been milled and yielded an average value in gold of \$23.78 per ton, that the mine had been operated and the ore taken therefrom had been \*milled for two years or more and had yielded, in gold, an average of \$23.78 per ton; that the value of the bullion produced from the mine for the twelve months ending with January, 1892, inclusive, was \$57,879.78, and the total expense of production \$15,500; that the estimated total bullion product from the mine after its discovery down to on or about February 1st, 1892, was \$317,879.78; that beyond all doubt the ore averaged at least \$18 per ton in gold; that the mine contained 44,733 tons of gold ore in reserve, of the net value of \$805,186, and also 37,333 tons of gold ore in sight, of the net value of \$761,094, and that the mines and mining claims had a very large prospective value in addition thereto; that the gold-bearing vein in the mine was a permanent and lasting one, and that the property under energetic management should produce from \$30,000 to \$40,000 per month net, and keep the development even with the output; together with other statements of fact in regard to the property, each and all of which were false and fraudulent, representing said report to be just, accurate, and true, although knowing the same to be false and fraudulent;

That, during the course of a mill run of the mine made by the plaintiffs for the purpose of testing the value of the ores contained therein, the defendant falsely and fraudulently, and with intent thereby to deceive and defraud them, placed and caused to be placed in and among the ores to be reduced in the mill run, exceptionally rich specimens of ore that were not part of the ordinary production of the mine, and placed and caused to be placed therein large quantities of exceptionally rich ore that had been mined on the premises, but reserved by him over a long period of time, and which contained gold far in excess of the average amount carried by the ore produced from the mine, and caused false and fraudulent representations to be made as to the amount of ore run through the mill at that time, un-

derstating the same, with the intent and result that a much larger production of gold might seem to be produced from the ore reduced than was just and true; and,

That the defendant falsely and fraudulently, and with intent thereby to deceive and defraud the plaintiffs, represented to them that certain portions of the mine, from which all the \*valuable ore had been extract- [119] ed, were still solid and untouched, and blocked up the entrance to such excavations with timber, which he falsely and fraudulently stated was placed in the mine for the purpose of support, and that it was dangerous to remove the same, with the intent and result of thereby preventing the plaintiffs and their representatives from investigating the condition of the mine; and falsely and fraudulently, and with the intent to thereby deceive and defraud the plaintiffs, changed certain bullion returns as to past production, misstating the quantities of ore producing the bullion so as to show a much larger and richer production of gold from the ore mined than had in fact been made.

It was alleged that all these representations were made and all these acts were done and caused to be done in the full knowledge that they were false and fraudulent and calculated to deceive and defraud, and with the intent and result that the same should be communicated to the plaintiffs, and thereby deceive and defraud them, inducing the belief that the land, mine, and mining claim were worth at least the sum of \$1,000,000.

The complaint further alleged that if said representations, reports, and mill run had been true and accurate, the property would have been reasonably worth \$1,000,000, whereas, as the defendants knew at the time, it was worth practically little or nothing; that, relying upon the representations, reports, and mill run mentioned, the plaintiffs purchased the property for the sum of \$400,000, paying \$150,000 in cash, and executing notes and mortgages upon the property to the amount of \$225,000, as part of the price; and had paid, laid out, and expended large sums of money on the property in the attempt to develop it.

The plaintiffs therefore claimed that they had suffered damage to the amount of \$1,000,000, for which they prayed judgment.

The defendant denied each and every allegation of the complaint. He specifically denied that he ever made any representations to the plaintiffs, directly or indirectly, through Griffith or at all, in reference to the property, or that he ever sold it to or received any money from them on account of it.

\*It may here be stated that there was evi- [120] dence in the case tending to show that the negotiations for the property were between the plaintiffs and Griffith, and it was a question whether Griffith was to be deemed in any sense an agent of Sigafus in the sale of the property to the plaintiffs. It was also a question whether the defendant did or caused to be done anything that was calculated to mislead and deceive, or did in fact mislead and deceive, the plaintiffs in their prelimi-



ary examination of the property by an expert, whereby they were induced to think that it had a value which, within the defendant's knowledge, it did not really possess.

There was a verdict in favor of the plaintiffs for \$330,275. A motion for new trial having been denied, judgment was entered for the amount of the verdict. The case was carried to the circuit court of appeals, and that court, while sustaining the rulings of the trial court on questions involving the admission and exclusion of evidence, left certain points undisposed of in order that the question raised by them could be certified to this court. The circuit court of appeals—Judge Lacombe delivering the opinion of the court—among other things said: “The only remaining assignments of error are the twenty-sixth, to so much of the charge as instructed the jury that the ‘measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented,’ and the twenty-eighth, to the refusal to charge substantially that the measure of damages is the money plaintiffs had paid out for the mine with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it. In view of the recent opinion in *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, this court desires the instruction of the Supreme Court for its proper decision of the question arising upon these two assignments of error. A certificate in the form required by the act of March 3d, 1891, . . . has therefore been prepared and will be forwarded to the Supreme Court. The fact that instructions are thus desired as to a single question out of the many arising upon this writ of error affords no sufficient ground for withholding the decision of this court as to the other questions in the cause. *Compton v. Wabash* [121] \**R. Co.* 31 U. S. App. 486, 68 Fed. Rep. 263, 15 C. C. A. 397. This opinion is therefore placed on file, and when instructions are received as to the questions certified the cause will be finally disposed of.” 51 U. S. App. 693, 708, 84 Fed. Rep. 430, 439, 28 C. C. A. 443, 453.

This case was heard here upon the question certified from the circuit court of appeals. But after it was argued and submitted, this court directed the entire record to be sent up, and the case is now before us upon writ of certiorari.

1. At the trial in the circuit court, the evidence in behalf of the plaintiffs being closed, the defendant moved to dismiss the complaint upon several grounds, one of which was that the contract in relation to the property in question was alone with Griffith. That motion was denied, and the defendant then introduced evidence in his behalf. The circuit court of appeals properly held that as the defendant did not rest upon the denial of his motion to dismiss, but introduced evidence, he could not assign the refusal to dismiss as error. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 116

405, 12 Sup. Ct. Rep. 591; *Union P. R. Co. v. Daniels*, 152 U. S. 685, *sub nom. Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Runkle v. Burnham*, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837.

2. After calling attention to the material issues of fact, and after stating the general propositions of law upon which, when applied to the evidence, the rights of the parties depended, the circuit court charged the jury:

“The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented. You may find that the plaintiffs were influenced by one or more, and not by all, of the representations, and to the extent that the plaintiffs have been injured by one of several misrepresentations, they are entitled to recover for that; that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs.”

To the giving of this instruction the defendant took an exception.

The defendant asked that the jury be instructed as follows:

“If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of \*the defendant; and the value of the mine if the same had been as represented affords no proper element of recovery. The value of the mine when plaintiffs bought it must be applied in reducing and extinguishing the plaintiffs' loss.” [122]

The circuit court refused to give this instruction, and to such refusal the defendant took an exception.

The question presented by the charge to the jury touching the measure of damages has been heretofore determined by this court in *Smith v. Bolles*, 132 U. S. 125, 129, 33 L. ed. 279, 281, 10 Sup. Ct. Rep. 39. That was an action to recover damages for alleged fraudulent representations in the sale of 4,000 shares of mining stock at the price of \$1.50 per share, that is, \$6,000. The petition alleged that the stock was wholly worthless, but would have been worth at least \$10 per share, that is, \$40,000, if it had been as represented by defendant. The prayer was for \$40,000 as damages arising from the sale of shares of stock for which only \$6,000 was paid. The trial court instructed the jury that “the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence.”

This court held that instruction to be erroneous. Speaking by the Chief Justice we said: “The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; 179 U. S.



nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the

[123] evidence that the defendant was \*guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, affords, therefore, no proper element of recovery."

These principles have been applied in numerous cases in the Federal courts. *Atwater v. Whitcman*, 41 Fed. Rep. 427, 428; *Glaspell v. Northern P. R. Co.* 43 Fed. Rep. 900, 904; *The Normannia*, 62 Fed. Rep. 469, 481; *Wilson v. New United States Cattle Ranch Co.* 36 U. S. App. 634, 73 Fed. Rep. 994, 997, 20 C. C. A. 244; *Rockefeller v. Merritt*, 40 U. S. App. 666, 674, 35 L. R. A. 633, 76 Fed. Rep. 909, 22 C. C. A. 608. In the case last cited Judge Sanborn said: "The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property, is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation."

Substantially the rule announced in *Smith v. Bolles* has been applied in the following cases in state courts: *Reynolds v. Franklin*, 44 Minn. 30, 31, 46 N. W. 139; *Redding v. Godwin*, 44 Minn. 355, 358, 46 N. W. 563; *Wallace v. Hollowell*, 56 Minn. 501, 507, 58 N. W. 292; *Woolenslagle v. Runals*, 76 Mich. 545, 553, 43 N. W. 454; *Buschman v. Codd*, 52 Md. 202, 209; *Greenwood v. Pierce*, 58 Tex. 130, 133; *Howes v. Axtell*, 74 Iowa, 400, 402, 37 N. W. 974; *Hugh v. Berret*, 148 Pa. 263, 23 Atl. 1004. In the last-named case—which was an action to recover damages for deceit in the sale of shares of stock in a mining corporation—the supreme court of Pennsylvania said: "The remaining question is, What is the proper measure of the plaintiff's damages? His damages should equal the loss which the deceit which

the jury have found was practised \*upon him[124] inflicted. The loss, in the transaction before us, is the difference between the real value of the stock at the time of the sale and the fictitious value at which the buyer was induced to purchase. . . . His actual loss does not include the extravagant dreams which prove illusory, but the money he has parted with without receiving an equivalent therefor."

The same principle was recognized by the English court of appeal in the leading case of *Peek v. Derry*, L. R. 37 Ch. Div. 541, 591, 594. That was an action to recover damages for the fraudulent representations of the defendant whereby the plaintiff was induced to take shares in a certain company at the price of £4,000. The question of the proper measure of damages in such a case was directly presented and considered. Lord Justice Cotton said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4,000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4,000. The loss therefore must be the difference between his £4,000 and the then value of the shares." Sir James Hannen, referring to the question of damages, said in the same case: "The question is, How much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4,000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got." Lord Justice Lopes said: "The question in this case is, What is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true measure of his damage? In my opinion it is the difference between the £4,000 he paid and the real value of the shares after they were allotted." The case having been carried to the House of Lords, the judgment therein was reversed, but not upon grounds at all affecting the ruling made in the court of appeal upon the question of the proper measure of damages. *Derry v. Peek*, L. R. 14 App. Cas. 337.

\*There are adjudged cases holding to the [125] broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. So, in the present case (taking it to be as set out in the plaintiffs' pleadings), although the



defendant agreed to take, and the plaintiffs agreed to pay, \$400,000 for the property in question, the latter—according to some cases, interpreting literally the words used in them—could retain the property and recover by way of damages the difference between its real value at the date of purchase and the sum of \$1,000,000, which the plaintiffs alleged it would have been worth at that time if the representations of the defendant concerning it had been true. We held in *Smith v. Bolles* that such was not the proper measure of damages, that case being like this in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith v. Bolles*. Upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled to have—if the evidence sustained the allegation of false and fraudulent representations upon which they were entitled to rely and upon which they in fact relied—a verdict and judgment representing in damages the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering "the expected fruits of an unrealized speculation." If the plaintiffs were inveigled by the fraud of the defendant into purchasing this mining property, a judgment of the character just indicated would make them whole on account of the loss they sustained. More they are not entitled to have at the hands of the law in this action.

[126] Many other questions have been discussed by counsel, but as \*they may not arise upon another trial, we deem it unnecessary now to consider them.

It results that the trial court erred upon the question of the measure of damages applicable to the case. *Its judgment must be reversed*, with directions for a new trial and for further proceedings consistent with the principles of this opinion.

It is so ordered.

Mr. Justice **Brown** and Mr. Justice **Peckham** dissented.

**IN THE MATTER OF JOSÉ JUAN VIDAL**, José Gual y Silven, Julian Villodas Gullod, Julio S. Bruno, Juan Francisco Rivera, Manuel L. Aguiar, Augustin Calimano, Fabriciano Cuevas, Modesto Bird y Leon, Manuel Lopez Collazo, Tomas Vasquez Rivera, Luis E. Castagnet Cintron, Sergio de la Mata Dalmau, Domingo Pales Anes, and Joaquin Fernandez Colon, *Petitioners*.

(See S. C. Reporter's ed. 126, 127.)

**Certiorari—to review proceedings of military tribunal.**

**NOTE.**—As to certiorari from United States Supreme Court—see note to *Lau Ow Bew v. United States*, 1 C. C. A. 5.

On certiorari in United States courts—see note to *Clark v. Hackett*, 17 L. ed. U. S. 69.

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The proceedings of military tribunals cannot be reviewed by the Supreme Court of the United States by certiorari, under U. S. Rev. Stat. § 716, giving that court power to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usage and principles of law; and the question of the issue of the writ in the exercise of inherent general power cannot arise in respect of such tribunals, since they are not courts with jurisdiction in law or equity, within the meaning of those terms as used in U. S. Const. art. 3.

[No. —, Original.]

*Submitted April 23, 1900. Decided November 12, 1900.*

**A** PPLICATION for leave to file petition for Writ of Certiorari to the Judges of the Provisional Court of the Department of Porto Rico. *Denied*.

The facts are stated in the opinion.

**Messrs. Frederic D. McKenney, Wayne MacVeagh, and Francis H. Dexter** submitted the cause in support of application:

The issuance of a writ of certiorari is authorized in all proper cases by U. S. Rev. Stat. § 716.

*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

The court has power to issue a writ of certiorari in a proper case, notwithstanding it has no power to review and revise the proceedings complained of, by writ of error or appeal.

*Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

The decisions of courts-martial cannot be reviewed by this court on writ of error or appeal; yet the power of the court in an original proceeding to inquire into the legality of a detention under a court-martial sentence has never been seriously doubted.

*Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213.

**Solicitor General Richards** submitted the cause in opposition:

This court has only such appellate jurisdiction as has been conferred by Congress, and in the exercise of such as has been conferred can proceed only in the manner which the law prescribes.

*Dourousseau v. United States*, 6 Cranch 307, 3 L. ed. 232; *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589; *United States v. Young*, 94 U. S. 258, 24 L. ed. 153.

Power to review by certiorari, under the act of 1891, by the Supreme Court, is a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 179 U. S.



13 Sup. Ct. Rep. 758; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 1004.

To justify such unprecedented action as the issuance of the writs prayed for in these cases, the circumstances must imperatively demand the form of interposition.

*Re Chetwood*, 165 U. S. 462, 41 L. ed. 788, 17 Sup. Ct. Rep. 385.

**(126)** \*Mr. Chief Justice Fuller delivered the opinion of the court:

This was an application for leave to file a petition for certiorari to review the proceedings of a tribunal established by a General Order, numbered 88, of Brigadier-General Davis, of the United States Army, then commanding the Department of Porto Rico and the supreme military authority in that island, in the nature of a quo warranto to oust

**(127)** Vidal and others from \*the municipal offices of the town of Guayama. The application was submitted April 23, 1900, and, as usual, time was given for a brief in opposition, which was presented April 30.

Section 716 of the Revised Statutes, brought forward from § 14 of the judiciary act of 1789, provides: "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

This court is not thereby empowered to review the proceedings of military tribunals by certiorari. Nor are such tribunals courts with jurisdiction in law or equity, within the meaning of those terms as used in the 3d article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them.

By act of Congress of April 12, 1900 (31 Stat. at L. 77, chap. 191), taking effect by its terms on the 1st of May, the tribunal in question was, as the act states, discontinued, and a United States district court established as its successor, authorized to take possession of its records and to take jurisdiction of all cases and proceedings pending therein.

The result is, from either point of view, that this application cannot be entertained. *Leave denied.*

CHARLES A. CHAPIN, *Plff. in Err.*,  
v.

RUTH I. FYE, by Her Next Friend, Henry W. Fye.

(See S. C. Reporter's ed. 127-130.)

*Error to state court—failure to raise Federal question in court below.*

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

179 U. S.

A constitutional question which will give jurisdiction to the Supreme Court of the United States on writ of error to a state court is not raised by a contention in the state court that the state law in question violates the 5th and 7th Amendments of the Federal Constitution, and a contention, made in the assignment of errors in the Supreme Court of the United States, that the law violates the 14th Amendment, since the constitutional question must be raised in the state court, and the reference to the 5th and 7th Amendments is insufficient for that purpose because those amendments have no application to the powers of the state.

[No. 182.]

*Submitted October 29, 1900. Decided November 19, 1900.*

ERROR to the Circuit Court of Kalamazoo County, State of Michigan, to review a decision sustaining the constitutionality of a state statute. On motions to dismiss or affirm. *Dismissed.*

See same case in supreme court of Michigan, 80 N. W. 797.

The facts are stated in the opinion.

Messrs. N. H. Stewart and Benton Hanchett submitted the cause for plaintiff in error:

The claim which constitutes the Federal question which is presented to this court is sufficiently set up in the state supreme court.

It is held to be sufficient that the claim is made in the assignments of error to the state court.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It was the intention of the assignments of error to assert the protection given by due process of law under such provisions of the Constitution of the United States as provide for such protection. No set form of words is required to be used in making the claim, in order to give this court jurisdiction to consider the claim.

*California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Chapman v. Goodnow*, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 426, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *The Victory*, 6 Wall. 382, *sub nom. The Victory v. Boylan*, 18 L. ed. 848; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

The action in the state court was a decision adverse to this claim, as the judgment of the court which was rendered in the case could not have been given without deciding it.

*Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Chapman v. Goodnow*, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Roby v.*



*Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

Mr. Victor M. Gore submitted the cause for defendant in error:

There is no Federal question in the record, and for that reason the writ of error must be dismissed.

*Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Santa Cruz County Supers. v. Santa Cruz R. Co.* 111 U. S. 361, 28 L. ed. 456, 4 Sup. Ct. Rep. 474; *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; *Davidson v. Connelly*, 154 U. S. 589, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1200.

It is not sufficient to show that the Federal question might have occurred, or such a decision might have been made in the trial court. This court has repeatedly ruled that such questions must appear affirmatively upon the record, and that such rulings were made.

*M'Kinney v. Carroll*, 12 Pet. 66, 9 L. ed. 1002; *Phelps v. Mayer*, 15 How. 160, 14 L. ed. 643; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

At the trial no title, right, privilege, or immunity was set up or claimed under the Constitution, laws, or treaties of the United States, and therefore no such claim can be reviewed here.

*Kansas Endowment Asso. v. Kansas*, 120 U. S. 103, *sub nom. Endowment & Benev. Asso. v. Kansas*, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Spies v. Illinois*, 123 U. S. 131, *sub nom. Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Gray v. Coan*, 154 U. S. 589, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1168.

The objections based upon "inconsistency" with the 5th and 7th Amendments of the United States Constitution cannot be sustained for two reasons: (1) Because such objection was not made before judgment was entered; (2) because the 5th and 7th Amendments impose no restrictions upon the states.

*Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Livingston v. Moore*, 7 Pet. 551, 8 L. ed. 781; *Twitcheil v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816; *Spies v. Illinois*, 123 U. S. 131, *sub nom. Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *McElvaine v. Brush*, 142 U. S. 158, 35 L. ed. 973, 12 Sup. Ct. Rep. 156.

The particular provision of the Constitution relied upon must be pointed out to the state court, as well as the right claimed under it, and must have received the consideration of the state court.

*Farney v. Towle*, 1 Black, 350, 17 L. ed. 216; *The Victory*, 6 Wall. 382, *sub nom. The Victory v. Boylan*, 18 L. ed. 848.

The jurisdiction of this court extends only to a review of the judgment as it stands in the record.

*Susquehanna Boom Co. v. West Branch Boom Co.* 110 U. S. 57, 28 L. ed. 69, 3 Sup.

Ct. Rep. 438; *Brown v. Colorado*, 106 U. S. 97, 27 L. ed. 133, 1 Sup. Ct. Rep. 175.

The only mention of the 14th Amendment in the proceedings is found in the brief of counsel for defendant below, and this vague reference is quoted in the assignment of errors. But jurisdiction cannot be conferred upon this court by any claim "in brief of counsel."

*Worthy v. Moore County Comrs.* 9 Wall. 611, *sub nom. Worthy v. Barrett*, 19 L. ed. 565.

It does not appear, either by express averment or by necessary intendment from any matter stated in the case, nor does any entry on the record of the cause show, that any of the questions of which this court is entitled to take cognizance, under the terms of the 25th section of the judiciary act, arose in the cause and were actually decided by that (the state) court.

*Christ Church v. Philadelphia County*, 20 How. 26, 15 L. ed. 802; *Clark v. Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

To give this court jurisdiction, it is imperative that a Federal question be specifically set up or claimed in the state court at the proper time, in the proper way, and that the decision of such court was against the right thus set up or claimed.

U. S. Rev. Stat. § 709; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Ausburo v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Chicago & N. W. R. Co. v. Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725; *Levy v. San Francisco Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769.

\*Mr. Chief Justice Fuller delivered the [128] opinion of the court:

This was an action of trespass on the case to recover for personal injuries inflicted on Ruth I. Fye by a dog owned and kept by Chapin, and was based on a statute of the state of Michigan, approved March 28, 1850, which provided that the owner or keeper of any dog injuring any person as set forth should be liable to the person injured "in double the amount of damages sustained, to be recovered in an action of trespass or on the case;" and also that "if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the



amount of damages proved and costs of suit."

The declaration counted on the statute, and asked to have plaintiff's damages doubled by virtue thereof; and the trial having resulted in a verdict of \$10,000 in plaintiff's favor, the circuit court, on motion of her counsel, entered judgment for double the amount, namely, \$20,000. Defendant moved for a new trial, and assigned, among various grounds therefor, that the statute in question was unconstitutional because in violation of the Constitution of Michigan, and "in violation of the constitutional rights of citizens to have public trial in civil cases in courts of record." The motion for new trial was denied, and defendant filed twenty-two exceptions, the eighteenth and nineteenth of which were that the statute was in violation of the 5th and 7th Amendments to the Constitution of the United States. The case was then carried to the supreme court of the state, and ninety-eight errors were assigned, the ninety-fourth, ninety-fifth, and ninety-sixth being to the effect that the statute was inconsistent with the ordinance of 1787 for [129] the government \*of the Northwest Territory, and with the 5th and 6th Amendments, securing due process of law and the right of trial by jury.

The supreme court required plaintiff to remit \$10,000, and, this being done, affirmed the judgment, as so modified, for \$10,000.

As to the contention that the act was unconstitutional "in that it confers upon the circuit judge power to act as a chancellor in a suit at law in so far as he exercises the authority to double the damages," the supreme court, without referring to the Federal Constitution, held that it was competent for the legislature to provide for doubling damages in this class of cases, and that the latter portion of the section should be construed to mean that the court, acting through all of its instrumentalities, which included the jury, should ascertain the damages as in ordinary cases, and that, as so construed, the act was valid. 80 N. W. 797.

This writ of error was then allowed, and errors assigned in this court, embracing alleged errors committed by the supreme court in disregarding certain paragraphs of the brief of counsel in that court which, it was said, asserted the statute to be in contravention of the 14th Amendment. Motions to dismiss or affirm were submitted.

The validity of the provision creating the liability for double damages is not denied, but the contention seems to be that the statute authorizes the trial judge to determine independently "the amount of the damages proved," and is therefore unconstitutional. But this need not be discussed, as we think the writ must be dismissed for want of jurisdiction. If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare. In this case plaintiff, after judgment, excepted to the denial of his motion for a new trial on the ground, among others, that the statute in question was in viola-

tion of the 5th and 7th Amendments to the Constitution, and repeated that contention in the assignment of errors in the supreme court, adding also that the statute was inconsistent \*with the ordinance of 1787. But [130] the ordinance of 1787 was superseded by the adoption of the Constitution of the United States, and of the state, and the 5th and 7th Amendments were intended to operate solely on the Federal government, and contain no restrictions on the powers of the state. The only reference to the 14th Amendment is in the assignment of errors in this court, where it is stated that the state supreme court disregarded certain portions of counsel's brief alleged to have treated of that subject. This did not meet the requirements of § 709 of the Revised Statutes. *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Dewey v. Des Moines*, 173 U. S. 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 633, 44 L. ed. 302, 20 Sup. Ct. Rep. 205.

*Writ of error dismissed.*

Mr. Justice **Brown** dissenting:

It appears in this case that defendant intended to claim the benefit of the "due process of law" clause of the 14th Amendment, but inadvertently pitched his claim upon the 5th Amendment, which also contains a similar clause, but is only applicable to proceedings in the Federal courts. The mistake is so obvious I think the court should have disregarded it, and passed upon the merits.

\*CHESAPEAKE & OHIO RAILWAY COM-[131]  
PANY, *Plff. in Err.*,  
v.

LUCY DIXON, Administratrix of Alexander Dixon; Deceased, R. H. Chalkey, and William Sidles.

(See S. C. Reporter's ed. 131-141.)

*Removal of causes—joint action against employer and employees—no separable controversy.*

An action against a railroad company and two of its employees, charging them with concurrent negligence in killing a person at a railroad crossing, is joint, and not several, and therefore cannot be removed into a Federal court by the railroad company on the ground of diverse citizenship, when the employees are citizens of the same state as the plaintiff.

NOTE.—On removal of cause generally—see notes to *Whelan v. New York, L. E. & W. R. Co.* (C. C. N. D. Ohio) 1 L. R. A. 65; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 846, and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

As to removal of causes in cases of separable controversy—see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.* 35 C. C. A. 153; *Sloane v. Anderson*, 29 L. ed. U. S. 899; *Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A.* 38 L. ed. U. S. 195.



[No. 40.]

*Argued October 10, 1900. Decided November 19, 1900.*

**I**N ERROR to the Court of Appeals of the State of Kentucky to review a decision affirming a judgment denying an application for the removal of the action to a Federal court. *Affirmed.*

See same case below, 20 Ky. L. Rep. 792, 47 S. W. 615.

Statement by Mr. Chief Justice **Fuller**:

October 19, 1894, Lucy Dixon, as administratrix of Alexander Dixon, brought her action against the Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles in the circuit court of Boyd county, Kentucky, by petition, which alleged:—

"That Alexander Dixon departed this life intestate on 22d day of September, 1894, while a resident of and domiciled in Boyd county, Kentucky; that by an order of the Boyd county court, made and entered on the — day of September, 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified, and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked 'A.'

"She says that the defendant the Chesapeake & Ohio Railway Company, is and, at the time hereinafter stated, was a corporation and common carrier of freight and passengers for hire, and said defendant, by its locomotives, cars, and other appurtenances, now operates and, at the times hereinafter stated, operated lines of railway extending into the county of Boyd and state of Kentucky. She says that on the 22d day of September, \*1894, while crossing the track of the defendant at the crossing of the Ashland & Catlettsburg Turnpike road and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant, the Chesapeake & Ohio Railway Company, and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Catlettsburg to Ashland, Boyd county, Kentucky, whereby she had been damaged in the sum of \$30,000.

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were, and for a long time theretofore had been, servants of the corporate defendants, in charge and control of said train, and then and there were, and for a long time theretofore had continuously been, respectively, engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

On the 30th of January, 1895, the railway company filed its petition for the removal of the cause to the circuit court of the United

States for the district of Kentucky, and tendered therewith a bond, as required by law.

The petition read as follows:

"Your petitioner, Chesapeake & Ohio Railway Company, respectfully shows that it is one of the defendants in the above-entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and cost, exceeds the sum or value of \$2,000.

"Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized, and existing under and by virtue of the laws of the state of Virginia \*and a citizen of the said [132] state of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, your petitioner avers, was then and still is a citizen of the state of Kentucky; that the said controversy is of the following nature, viz.:

"Whether your petitioner is liable to the said plaintiff for damages on account of the death of said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto, and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that, because thereof, your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

"Your petitioner further states that the defendants R. H. Chalkey and William Sidles are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the circuit court of the United States for the district of Kentucky, and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States."

The Boyd circuit court adjudged the bond sufficient, but overruled the petition.

Separate answers by the company and by Chalkey and Sidles were thereupon filed, and issue joined thereon; trial was had, resulting in a verdict and judgment in favor of plaintiff; and the judgment was affirmed, on appeal, by the court of appeals of Kentucky. 20 Ky. L. Rep. 792, 47 S. W. 615.

In the opinion of that court it was said, among other things:

"The main ground for reversal is the refusal of the lower court to sustain the petition of the appellant the Chesapeake & Ohio Railroad Company for a transfer of this case to the United States court for the district of Kentucky.

"The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different states, the Chesapeake & Ohio



[134] Railroad Company being a corporation created under the laws of the state of Virginia, and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the state of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd circuit court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

"It is alleged by appellee in her petition, and, so far from the contrary being shown by appellant the Chesapeake & Ohio Railroad Company, is clearly proved by the evidence in this case, that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio Railroad Company, through its said employees, was also guilty of said negligence, and therefore they were jointly liable for the destruction of the life of said Dixon, caused thereby.

"It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio Railroad Company to the circuit court of the United States for the District of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined; and such is the doctrine as settled by the Supreme Court of the United States.

"As, therefore, the appellant Chesapeake & Ohio Railroad Company neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer."

To review the judgment of the court of appeals this writ of error was allowed.

Messrs. **A. M. J. Cochran** and **W. H. Wadsworth** argued the cause, and, with **Mr. C. B. Simrall**, filed a brief for plaintiff in error:

The principle upon which the master is held liable in cases of negligent acts of the servant in his absence does not grow out of any idea of concert of action.

*Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. Rep. 642.

The master cannot be joined in the same cause of action with the servant for the negligent act of the servant done in the master's absence and without his order.

*Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Hewett v. Swift*, 3 Allen, 420; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Seelen v. Ryan*, 2 Cin. Sup. Ct. Rep. 158; *Campbell v. Portland Sugar Co.* 62 Me. 553, 16 Am. Rep. 503; *Page v. Parker*, 40 N. H. 47; *Perkins v. Stein*, 94 Ky. 433, 20 L. R. A. 861, 22 S. W. 649; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. Rep. 642; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. Rep. 745; *Hartshorn v. Atchison, T.* 179 U. S.

& *S. F. R. Co.* 77 Fed. Rep. 9; *Deere, W. & Co. v. Chicago, M. & St. P. R. Co.* 85 Fed. Rep. 876; *Creagh v. Equitable Life Assur. Soc.* 88 Fed. Rep. 1.

**Mr. H. T. Wickham**, with Messrs. **W. H. Wadsworth** and **A. M. J. Cochran**, filed a further brief for plaintiff in error.

**Mr. James Andrew Scott** argued the cause, and, with Messrs. **John H. Hager** and **R. S. Dinkle**, filed a brief for defendants in error:

The question of the existence of a separable, removable controversy is to be determined upon the construction of the allegations of the petition. If the plaintiff in fact counts or declares upon one cause of action, and no more, the case cannot contain a separable controversy.

*Ferguson v. Chicago, M. & St. P. R. Co.* 63 Fed. Rep. 179; *Ayres v. Wiswall*, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90; *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; *Pirie v. Tvedt*, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *Sloane v. Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Connell v. Smiley*, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

\***Mr. Chief Justice Fuller** delivered the [135] opinion of the court:

The question to be determined is whether the court of appeals of Kentucky erred in affirming the action of the Boyd circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry.

By § 241 of the Constitution of Kentucky it is provided that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

Section 6 of the Kentucky statutes provides: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death



from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same; and when the act is wilful or the negligence is gross, punitive damages may be recovered; and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury; and in this case the court of appeals held that the company and its engineer and fireman were jointly liable for Dixon's death, if caused by the negligence of those employees, and that the cause of action as alleged against all the defendants was an entire cause of action. The court also held that such cause of action was sufficiently proven, but we are dealing with the pleading alone.

[136] Counsel for plaintiff in error contends, however, that plaintiff's \*complaint does not state a joint cause of action against the corporate and individual defendants, but states a separate cause of action against the railway company and a separate cause of action against the other defendants.

It is conceded that if an action be brought on a joint cause of action it makes no difference that separate causes of action may have existed on which separate actions might have been brought, and, furthermore, that it makes no difference that in an action on a joint cause of action a separate recovery may be had against either of the defendants; while it is insisted that if two or more separable controversies appear from the averments it is not material whether they have been properly or improperly joined.

If the liability was not joint then separable controversies existed, and the argument is that the averment that the negligence complained of "was the joint negligence of all the defendants" merely stated the conclusion of law that the company and its employees were jointly liable in the action for the injury inflicted through the negligence of the latter in the course of, and within the scope of, their employment, and this conclusion is denied on the ground that the liability of the company, as alleged, rested on a wholly different basis from that of the liability of its servants.

In *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. Rep. 637, Taft, J., held that there were separable controversies in such cases, because the liability of the master for the negligence of his servants in his absence, and without his concurrence or express direction, arises solely from the policy of the law which requires that he shall be held responsible for the acts of those he employs, done in and about his business, while the liability of the servant arises wholly from his personal act in doing the wrong.

This view of the ground of the master's liability is expressed by Mr. Pollock in his work on Torts (Am. ed. 89, 90) thus: "I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is

about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

\*So it was said by Lord Brougham in *Dun-*[137]  
*can v. Findlater*, 6 Clark & F. 894, 910:

"The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

By Lord Cranworth in *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 283: "He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

And by Chief Justice Shaw in *Farwell v. Boston & W. R. Co.* 4 Met. 49, 38 Am. Dec. 339: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant in the course of his employment and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiltiter*."

Whatever its sources or the principles on which it rests, the rule itself is firmly established; and many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion.† As remarked by Mr. Justice Gray, then chief justice of Massachusetts, in *Mulchey v. Methodist Religious Soc.* 125 Mass. 487, the question is "a somewhat nice one," the determination of which by the highest court of Kentucky we are not called upon to revise, as the disposition of this case turns on other considerations.

In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, it was said:

"It is well settled that an action of tort which might have \*been brought against many[138] persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause

†See cases collected in 15 Enc. Pl. & Pr. 560.  
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of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie v. Tvedt*, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Little v. Giles*, 118 U. S. 596, 600, 601, 30 L. ed. 269, 270, 271, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Torrence v. Shedd*, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; *Connell v. Smiley*, 156 U. S. 335, 340, 39 L. ed. 443, 445, 15 Sup. Ct. Rep. 353."

In *Louisville & N. R. Co. v. Wangelin* it was said to be equally well settled "that, in any case, the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court." In that case the declaration charged two corporations with having jointly trespassed on the plaintiff's land, and it was insisted that one of the corporations was not in existence at the time of the alleged trespass, but that was held to be a question on the merits.

And in *Provident Savings Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104, it was held that the question of a colorable assignment was matter of defense, and not ground for removal.

The contention of counsel is that this complaint charged neither direct, nor concurrent, [139] nor concerted action on the part \*of all the defendants, but counted merely on the negligence of the employees.

If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties.

The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And, on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its codefendants, being its employees, could not. At all events a judgment against all could not afterwards be attacked for the first time on this ground.

But does the complaint bear the construction the company puts upon it?

The pleader did not set forth—and, according to the decision of the court of appeals, this was not material—the specific acts of negligence complained of. It was stated that the "negligence of the corporate defendant was done by and through its said servants and other of its servants then and there 179 U. S.

in its employment, and said negligence was the joint negligence of all the defendants." Assuming this averment to be inconsistent with a charge of direct action by the company, it may nevertheless be held to amount to a charge of concurrent action when coupled with the previous averment that Dixon was killed, while crossing the track at a turnpike crossing, by the negligence of the company and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurrent negligence is charged the controversy is not separable.

\*In *Whitcomb v. Smithson*, 175 U. S. 635, [140] 44 L. ed. 303, 20 Sup. Ct. Rep. 248, the action was brought in the state court against one railway company and the receivers of another to recover for personal injuries inflicted by concurrent negligence. The cause was removed to the circuit court and remanded because there was no separable controversy. At the close of the evidence on the subsequent trial the company moved that the jury be instructed to return a verdict in its favor, which was resisted by plaintiff, but granted by the court, and a verdict returned accordingly. The other defendants, the receivers, then applied for a removal, which was denied. We held the ruling in favor of the company was a ruling on the merits, and not a ruling on the question of jurisdiction, and sustained the action of the state courts.

*Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854, is another case in which an action for concurrent negligence was held not to present a separable controversy.

In *Powers v. Chesapeake & O. R. Co.*, where the company and its employees had been jointly sued as in the case at bar, the case had been remanded on removal for want of separable controversy. Plaintiff subsequently discontinued the action as to all the defendants, except the company, and the company again made application to remove. This was denied by the state court, but granted by the circuit court, and the judgment of the latter was affirmed by this court, the question of separable controversy being necessarily not passed on here. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

*Plymouth Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034, and *Connell v. Utica, U. & E. R. Co.* 13 Fed. Rep. 241, are more in point on the precise question sought to be raised, and in the latter case Mr. Justice Blatchford expressed the opinion that it was proper for the Federal courts to follow the decisions of the state courts that a cause of action was entire.

Our conclusion is that it cannot properly be held that it appeared on the face of this pleading, as matter of law, that the cause

of action was not entire, or that a separable controversy was presented.

*Judgment affirmed.*

[141] \*Mr. Justice Harlan and Mr. Justice White dissented. Mr. Justice McKenna, not having heard the argument, took no part in the disposition of the case.

GILMORE G. SCRANTON, *Plff. in Err.*,  
v.

EBEN S. WHEELER.

(See S. C. Reporter's ed. 141-190.)

*Ejectment—as remedy of riparian owner—state practice—action against United States officer—as suit against United States—cutting off riparian owner from access to navigable waters—pier for improvement of navigation—right to compensation.*

1. The remedy of ejectment in favor of a riparian owner to prevent interference with his rights in his submerged water front, when recognized by the state court, will be sustained as a proper one by the Supreme Court of the United States on writ of error to the state court.

NOTE.—*Right, in improving navigation, to destroy the access of riparian owner to navigable water without compensation.*

As a general rule a riparian owner has a right of access which cannot be impaired by the state by granting rights to individuals which will interfere with it; and in those states in which the rule has not been adopted the effect of the decisions has been in part neutralized by statutes giving privileges to riparian owners.

See cases collected in *note* on the right of owner of upland to access to navigable water, appended to *State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593.

In England and countries following its law, the riparian right cannot be taken by the public for improving navigation without compensation. *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165; *Atty. Gen. v. Wemyss*, L. R. 13 App. Cas. 192, 57 L. J. P. C. N. S. 62, 58 L. T. N. S. 358; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612; *Queen v. Rynd*, 16 Ir. C. L. Rep. 29.

In Wisconsin and New York the right of the public to improve the navigation of the stream is superior to the riparian owner's right of access.

Thus, in *Black River Improv. Co. v. La Crosse Boom. & Transp. Co.* 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443, it was held that a riparian owner could not recover damages for the diversion of the waters of the stream by a corporation, under authority of the legislature, for the purpose of improving the public navigation.

In that case it was said that the doctrine of *Deiaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386, that a riparian owner upon a navigable lake has, as such, the exclusive right of access to and from the lake front to his land, cannot be extended to a case where the state places obstructions in the navigable waters of the state for the purpose of improving the navigability of the stream.

In *Cohn v. Wausau Boom Co.* 47 Wis. 325, 2 N. W. 546, where a boom company had run a

2. A suit by a riparian owner to prevent interference with his rights in a submerged water front by an officer of the United States in possession of a pier built by the government is not to be deemed a suit against the United States of which a state court cannot take jurisdiction without the consent of the United States, although in determining the question the court may have to consider whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him.

3. A pier erected by the United States on land submerged under navigable water, the title to which is owned by the riparian proprietor, when this is done merely for the improvement of navigation, though it permanently destroys his access to the navigable waters, does not entitle him to any compensation under U. S. Const. 5th Amend., prohibiting property to be taken for public use without just compensation, since the title to the land, whether owned by the riparian owner or by the state, was acquired subject to the rights which the public have in the navigation of such waters.

[No. 9.]

*Argued October 16, 1899. Decided November 12, 1900.*

boom along the river in front of plaintiff's land, he claimed the right to have it removed as a nuisance. But the court, without directly considering the question of the right of access, held that plaintiff held his right as a riparian owner only by implied public license, as tenant by sufferance of the state, a right of which the exercise might always be prohibited by public law in aid of public use. The private right is a quasi intrusion upon the public right, tolerated only in private aid of navigation, and gives way *ex necessitate rei* to public measures in aid of navigation.

And that case was recognized in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 82, 38 N. W. 529.

A riparian owner is entitled, as against all but the Crown as trustee for the public at large, to the right of access; but his right of ingress and egress to his water front does not include a right to compensation for an interference therewith caused by a public improvement on the water front for the benefit of navigation. *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096.

The court said that while the general rule prevents disturbance of riparian rights by public authority without making compensation when the interest of the whole people requires the improvement of a water front for the benefit of navigation it seems to be the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tide-water front without compensating the riparian owner other than by giving him a paramount right of purchasing in case of sale. The right of the government rests upon the principle of implied reservation, and in every grant of land bounded by navigable water where the tide ebbs and flows, made by the Crown or the state as trustee for the public, there is reserved by implication a right so to improve the water front as to aid navigation for the benefit of the general public without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject



**I**N ERROR to the Supreme Court of the State of Michigan to review a decision against the claim of a riparian owner to compensation for the destruction of his right of access to navigable waters by a pier built by the government. *Affirmed.*

See same case below, 113 Mich. 565, 71 N. W. 1091.

Statement by Mr. Justice Harlan:

[141] \*This writ of error brings up for review a final judgment of the supreme court of Michigan holding that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation.

of the grant, and its relation to the navigable tide water.

In *Avery v. Fox*, 1 Abb. (U. S.) 246, Fed. Cas. No. 674, where, for the purpose of improving navigation, the channel of a river which flowed past plaintiff's land was moved so that the water would be diverted from the old course, it was held that the riparian owner had the right to have the water flow past his land, of which he could not be deprived without compensation.

But when the right of the Federal government to make improvement in aid of commerce conflicted with the right of the individual, the right of the individual was held not to exist.

In *Hawkins Point Light House Case*, 39 Fed. Rep. 77, where the United States had placed a lighthouse in the water in front of property the owner of which had by the state statutes the title to the soil and the right to wharf out, the court says that it is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine that, in order to develop the greatest public utility of a water way, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. If necessary to the free navigation of the stream the owner will be prevented from extending any structure into it.

In *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, the United States government had built a dike in the Ohio river, and confined the water to the main channel, the effect of which was to prevent the free ingress and egress of boats to the landing of plaintiff, a riparian owner, so that, at the time of year when the landing was most needed, it could not be reached by boat. The court held that the riparian owner's rights were subject to the consequences of the improvement by the government of its navigable waters, and that the constitutional provision requiring compensation for private property taken for public use did not apply because the private property was not taken, but only damaged. The effect of that decision is that the right of access is not property, although the opinion does not directly say so. But the lower court, whose opinion was affirmed (*Gibson v. United States*, 29 Ct. Cl. 18), directly held that the owner of a wharf on the bank of a river has no right of property below low-water mark, and no property in the flow of water or in the approach to land. The court says that if the riparian owner had any such right it must be based on pre-179 U. S.

Omitting any reference to immaterial matters, the case as made by the pleadings and evidence is as follows:

\*By an act of Congress approved September [142] 26th, 1850, chap. 71, providing for the examination and settlement of claims for land at the Sault Ste. Marie in Michigan, the local register and receiver of the land office were authorized to report upon claims to lots at that place under instructions to be given by the Commissioner of the General Land Office. 9 Stat. at L. 469.

In conformity with proceedings under that act the heirs of Franklin Newcomb and Samuel Peck were confirmed in their claim jointly to premises known as Private Land Claim No. 3, and a patent was issued to them by the United States on the 6th day of October, 1874. The premises were at the west or upper end of the St. Mary's Falls ship canal,

scription, which is at variance with the doctrine of *Lyon v. Fishmongers' Co.*, which holds the right to be a natural one. It was further said that the riparian owner's right was a mere license which might be revoked at any time, relying on *Lansing v. Smith*, 8 Cow. 146, *Homochitto River Comrs. v. Withers*, 29 Miss. 21, 64 Am. Dec. 126, and *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269.

A change in the channel of a river so as to prevent the flow of the water to the land of a riparian owner will not render the United States liable to make compensation as for property taken. *Friend v. United States*, 30 Ct. Cl. 94. In that case, stones and dirt were dumped in the channel of the river, by which the access to the plaintiff's land was cut off.

The right to regulate commerce involves the right to regulate navigation, and this involves the use of submerged lands. The title of the riparian owner, although extending to the current of the stream, is subject to the right of Congress to occupy the submerged land for the erection of structures in aid of commerce between the states; and it is immaterial that such structures are placed in the water in such a way as to interfere with the riparian owner's access to deep water. The right of access to deep water is a right subordinate to the right of the state and the Federal government to control the stream in so far as necessary for purposes of commerce. *Scranton v. Wheeler*, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. Rep. 803. This case was reversed in 41 L. ed. U. S. 318, 16 Sup. Ct. Rep. 1206, evidently for lack of jurisdiction.

Some of the state courts have followed the above decisions.

Although the riparian owner takes the title to the soil under water, his right is subordinate to that of the United States government to make improvements in aid of navigation, so that he is entitled to no compensation although the government erects a pier in such a manner as to cut him off from access to the navigable water. *Scranton v. Wheeler*, 113 Mich. 565, 71 N. W. 1091.

The right of access of a riparian owner is subordinate to the power of Congress over the subjects of interstate commerce. *Winifrede Coal Co. v. Central R. & Bridge Co.* 24 Ohio L. J. 173.

The right of the United States to improve navigation without making compensation to the riparian owner flows from the full power conferred upon Congress to regulate commerce among the states. *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12, affd. 169 N. Y. 60.



and one of the boundaries, as shown by the field notes, was "along the right bank of the Ste. Marie river." By mesne conveyances from the heirs of Franklin Newcomb the plaintiff, Scranton, became the owner of an undivided half of the land in question.

By an act approved August 26th, 1852, chap. 92, Congress granted to the state of Michigan the right to locate a canal through the public lands in that state known as the military reservation, at the falls of St. Mary's river, and 400 feet of land in width extending along the line of the canal was granted for the construction and convenience of the canal and the appurtenances thereto, the use being vested in the state for such purposes and no other. The act provided that the canal should be located on the line of the survey, made for that purpose, or on such other route between the waters above and below the falls as might be selected with the approval of the Secretary of War. In aid of the construction and completion of the canal Congress also granted to the state 750,000 acres of public lands, and it was provided that the canal should be, and remain, a public highway for the use of the United States, free from toll or other charge upon the vessels of the government engaged in the public service, or upon vessels employed in the transportation of property or troops of the United States. 10 Stat. at L. 35.

(144) The construction of the canal was begun by Michigan in 1853 and completed in 1855. It was owned and operated by the state until the year 1881, when it was transferred to the United States in conformity with the river and harbor act of June 14th, 1880, chap. 211, by which \$250,000 was appropriated for improving and operating the river and the canal, and by which also the Secretary of War was authorized to accept on behalf of the United States from the state of Michigan the St. Mary's canal and the public works thereon,—the transfer to be so made as to leave the United States free from all debts, claims, or liability of any character whatsoever, and the canal after the transfer to be free for public use. By the same act the Secretary of War was authorized, such transfer being made, to draw from time to time his warrant on the Treasury to pay the actual expenses of operating and keeping the canal in repair. 21 Stat. at L. 180, 189.

Prior to the transfer Congress had made large appropriations for the repair, preservation, improvement, and completion of the canal. 16 Stat. at L. 224, chap. 240; 16 Stat. at L. 402, chap. 34; 18 Stat. at L. 238, chap. 457; 18 Stat. at L. 456, chap. 134; 19 Stat. at L. 136, chap. 267; 20 Stat. at L. 156, chap. 264; 20 Stat. at L. 369, chap. 181; 21 Stat. at L. 189, chap. 211.

As originally constructed, a pier extended from the west end of the canal into the water, curving to the north. This pier was opposite to a part of Private Land Claim No. 3, but left at that time a riparian frontage for those premises of from 300 to 400 feet.

In 1877 the United States commenced and in 1881 completed the construction in the water of what is known as the new south

pier, which extended across the entire front of Private Land Claim No. 3, and was within the riparian ownership of the plaintiff as projected from the land towards the middle thread of the stream. The effect of the construction of this new pier was to exclude the plaintiff altogether from access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable. On both sides of the space included within such projected lines of the plaintiff's riparian ownership, and between the new pier and the bank of the river, the water was only 5 feet in depth; so that by reason of the construction and maintenance of the pier the plaintiff was prevented from reaching navigable water of greater depth than 5 feet.

The plaintiff desired to land freight on the new south pier, \*and thus convey it to the lot [144] in question. But he was prevented from doing so by the defendant, Wheeler, superintendent of the property, who was in possession of and exercised exclusive control over the canal and the pier as an officer or agent of the United States, and not otherwise.

No part of the pier in question in front of Private Land Claim No. 3 rests upon the fast land within that claim, but entirely upon submerged lands in front of or opposite to the fast land. The water between the pier and dry land is very shoal.

St. Mary's river forms a part of the boundary line between the United States and Canada, and, where navigable, forms, with the Great Lakes, a highway for interstate and international commerce. Near the point in question the river was not originally navigable, owing to the falls, and the canal was built around the falls to connect its navigable parts above and below, and was used in connection therewith for the purposes of such commerce.

The present action was brought by Scranton against Wheeler in the circuit court of Chippewa county, Michigan, the declaration alleging that the plaintiff was the owner in fee, but was illegally deprived by the defendant of the possession of his interest in "Private Land Claim No. 3, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attaching thereto and being a part thereof;" which premises the plaintiff claimed in fee. The damages alleged were \$35,000.

Upon the petition of Wheeler the action was removed for trial into the circuit court of the United States on the ground that the government of the United States was the real party in interest, and that the defense depended upon the construction of the laws of the United States. In that court there was a judgment in his favor. The case was then carried to the circuit court of appeals, where the judgment was affirmed, an elaborate opinion being delivered by Judge Lurton. 16 U.



S. App. 152, 57 Fed. Rep. 803, 6 C. C. A. 585. [145] That court held that an officer of the \*United States could be sued in ejectment by one claiming the title and the right of possession; that the case was properly removed to the circuit court for trial; that the circuit court of appeals had jurisdiction under the act of March 3d, 1891, chap. 517 (26 Stat. at L. 826), to review the judgment of the circuit court; and that, as "an incident to the ownership of land on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged land under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his [the owner's] land to the center of the stream." After observing that, although the plaintiff under the law of Michigan was seised of the legal title to the soil under the water, yet, in the very nature of the property, such seizure was of the bare technical title, the court proceeded: "It must, from these constitutional principles, follow that the state of Michigan held the soil beneath her navigable rivers under a high public trust, to preserve them forever free as public highways, subject only to the power of Congress to regulate commerce among the states. The legal title, which under her law becomes vested in such proprietors, must be subject to the same public trust, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the state or is in the owner of the shore. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation and the control of Congress over that right. . . . The significance of that case [*Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412], as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of those owning land on the shores above, whose access to and use of the stream was thereby injured. Their property had not been taken. The injury to them was consequential, and they were held to be without remedy. Here

[146] the \*plaintiff has sustained an injury which is wholly a consequence of the erection of a structure by Congress in aid of the general and public right of navigation. If Congress may lawfully use the soil as a support for such structures without acquiring the naked title outstanding in the plaintiff, then, for such injuries as are merely consequential, it is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the state, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a

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stream wholly within its borders, and which is sought to be removed under the authority of subsequent congressional legislation, and such a case as the present. In the cases first mentioned, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. In that case it was held that, not only must the actual property of the owner in the structure be paid for, but his franchise also. The plaintiff in the case before us had made no improvements for either public or private uses. No property of his had been invaded, none had been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involved the necessary use of the submerged land, in so far as such use was essential to the maintenance of the public highway. . . . The conclusion we have reached is that there is no error in the judgment of the circuit court. The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution."

Upon writ of error to this court the judgment of the circuit court of appeals was reversed, upon the joint motion of the parties, with directions to remand the case to the state court for trial. The parties concurred in the opinion that the case was not removable from the state court,—*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654, and *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34, being cited by them in support of that view.

\*At the trial in the state court the plaintiff [147] asked the court to charge the jury:—

That under the law of Michigan applicable to the facts in this case, the plaintiff was the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of the upland to the center file of the stream, and running at right angles with the course of the stream in front of the upland, and therefore that the land and property described in the declaration belonged to and was owned by the plaintiff in fee simple, and so belonged to him when the action was brought;

That the pier or structure in question was constructed and was maintained by the defendant across plaintiff's land without his consent and against his rights in the premises;

That neither the defendant nor the United States had any lawful right to construct the pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff, and excluding him from enjoyment thereof, and from all access from his land and premises to the navigable water of the river in front thereof, and from the navigable water of the river to his land;



That neither the government of the United States nor the defendant had any lawful right to so construct the pier, or to maintain the same as was being done at the time suit was brought, and as they were now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or without obtaining the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor; and,

That under article 5 of the Amendments to the Constitution of the United States the property in question could not lawfully be taken for the public use to which it was appropriated, without just compensation having been made therefor to the owner, or without due process of law.

[148] The plaintiff also requested this instruction: "The construction of this pier was in violation, and the maintaining of the same was in violation, of said article 5 of the Amendments to the Constitution of the United States in this, that it appears \*from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof, and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article 5; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article 5 of Amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent."

These instructions were severally refused, and to that action of the court the plaintiff excepted.

In charging the jury the court stated that the United States district attorney had suggested in writing that the property in controversy, the title and possession of which were the subjects of this litigation, was, and for many years had been, in the possession of the United States through its officers and agents; that it was held for public uses in connection with the commerce and navigation of the Great Lakes; that the nominal defendant had no personal interest in the matter; that his physical possession of the premises was in his official capacity, and in law the possession of the United States; that the United States had always held title to the said land, and now holds possession under its claim of title; that this action was in effect an action against the United States government, which in its sovereign capacity could not be sued; and for these reasons the district attorney asked that all proceedings be stayed and the suit dismissed.

A verdict for the defendant was directed on the ground that, in legal effect, the action was against the United States, and that a judgment for the plaintiff would be one against the government and its property.

\*In the supreme court of the state the failure of the trial court to charge the jury as requested by the plaintiff, and the direction to the jury to return a verdict for the defendant, were assigned for error. That court, all the justices concurring, held that the action was not against the United States, but affirmed the judgment upon other grounds. It said: "When one in the actual possession of property defends his right of possession upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770. In that case the authorities upon this point are reviewed at length, including the case of *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754, upon which defendant mainly relies. The United States government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to submerged lands is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the government possesses no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended, on the other hand, that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as it shall determine to be necessary in aid of navigation. The court of appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion \*of the law and the authorities. The *Hawkins Point Lighthouse Case*, 39 Fed. Rep. 77, appears to be exactly in point, and to rule the present case. We think the conclusion reached by the court below was a correct one, although it gave a wrong reason." 113 Mich. 565, 71 N. W. 1091.

The *Hawkins Point Lighthouse Case*, referred to in the opinion of the state court, was ejectment brought in a circuit court of the United States against a government



keeper of a lighthouse to recover possession of such house, erected in the Patapsco river, a public navigable water of the United States, by the lighthouse board in pursuance of acts of Congress. There was no condemnation for public use of the lands upon which the lighthouse rested, nor was any compensation made to anyone for the site. The plaintiff was the owner of the upland, but had not, in the exercise of his riparian right, improved out into the water in front of his land. The court, speaking by Judge Morris, held that the plaintiff was not entitled to recover, saying: "While the submerged land remains a part of the bed of the river it is not private property in the sense of the 5th Amendment to the Federal Constitution. As was declared in *Gilman v. Philadelphia*, 3 Wall. 725, 18 L. ed. 99, the navigable waters 'are the public property of the nation, and subject to all the requisite legislation by Congress.' In the hands of the state or of the state's grantee the bed of a navigable river remains subject to an easement of navigation, which the general government can lawfully enforce, improve, and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a waterway, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: *The Black Bird Creek Case*, 2 Pet. 245, 7 L. ed. 412; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782. If it were made apparent to Congress that any extension of the plaintiff's present shore line into the river tended to

[151] impair the navigability of the stream or its use as a highway of commerce, Congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended, and the plaintiff would have no claim for compensation. If the plaintiff could thus lawfully be prevented from appropriating to his private use any part of the submerged land lying in front of his shore line, and the whole of it be kept subservient to the easement of navigation, how can it be successfully claimed that he must be paid for the small portion covered by the lighthouse 200 feet from the shore, which has been taken for a use as strictly necessary to safe navigation as the improved channel itself? The court of appeals of Maryland, whenever called upon to declare the nature of the title of the state and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much a part of the *jus publicum* as the stream itself." 39 Fed. Rep. 77.

The plaintiff, Scranton, has assigned various grounds of error. These grounds are substantially those embodied in his requests 179 U. S.

for instructions in the trial court, and which were insisted upon in the supreme court of the state.

**Messrs. John C. Donnelly and H. P. Davock** argued the cause and filed a brief for plaintiff in error:

The right of access of a riparian owner to a navigable stream is a private right wholly distinct from his right to use the stream for purposes of navigation, in common with the rest of the public.

Gould, Waters, p. 304; *Rose v. Groves*, 5 Mann. & G. 613; *Atty. Gen. v. Thames Conservators*, 1 Hem. & M. 1; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, L. R. 10 Ch. 679; *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229; *Montreal v. Drummond*, L. R. 1 App. Cas. 384; *Bell v. Quebec*, L. R. 5 App. Cas. 84; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

The right of access from riparian property to the water, and *vice versa*, has been held to be valuable property which cannot be destroyed or impaired without compensation.

*Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Richardson v. Boston*, 24 How. 188, 16 L. ed. 625; *Van Dolsen v. New York*, 21 Blatchf. 454; Gould, Waters, p. 305, note 4; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 672, 27 L. ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15.

A person who loses his right of access not only suffers a loss in common with the rest of the public, but something in addition thereto.

*Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386.

The state cannot give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights.

*Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The power of the Federal government to control commerce and navigation was derived from the respective states. Consequently the states and the United States in the exercise of this power are subject to the same limitations.

*Pollard v. Hagan*, 3 How. 219, 11 L. ed. 569.

In those cases in which damages have been denied for injuries resulting from obstructions placed in streams under congressional authority, the loss resulted from an injury to the right of passage upon the highway after the riparian owner got upon it, not from exclusion of the owner from access to the water.

*Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Eldridge v.*



*Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345.

A riparian owner upon navigable water has the exclusive right of access to and from such water, growing out of his title to the land; and such right has a pecuniary value, and its obstruction or material abridgment is generally an injury entitling him to redress.

*Prieve v. Wisconsin State Land & Improv. Co.* 93 Wis. 534, 33 L. R. A. 650, 67 N. W. 918; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612.

The courts of New York have come finally to recognize that this right of access cannot be cut off without compensation, by a work done under the authority of the state legislature.

*Williams v. New York*, 105 N. Y. 419, 11 N. E. 829; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 30 N. E. 654, 136 N. Y. 543, 32 N. E. 979.

It has been definitely settled by the supreme court of Michigan that ejectment is the proper remedy for recovery in cases like the one at bar.

*Cole v. Wells*, 49 Mich. 450, 13 N. W. 813; *Beidelman v. Foulk*, 5 Watts, 308; *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. 561; *Nichols v. Howland*, 52 Hun, 287, 5 N. Y. Supp. 252; *Gould, Waters*, §§ 185, 194, 471.

*Mr. John C. Donnelly* filed a separate supplemental brief for plaintiff in error:

The owner can be deprived of his right of access only in accordance with established law, and, if necessary that it be taken for public use, upon due compensation.

*Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *Richardson v. Boston*, 24 How. 188, 16 L. ed. 625; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Harrison v. Sterett*, 4 Harr. & McH. 540; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Meyers v. St. Louis*, 8 Mo. App. 266; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654, 9 R. I. 455; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *Norfolk City v. Cooke*, 27 Gratt. 430.

Property rights cannot be destroyed without compensation; and the right of access is a valuable property right which cannot be destroyed or abridged except upon payment of compensation to the owner.

*Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165; *Little v. Dublin & D. R. Co.* 7 Ir. C. L. Rep. 82; *Queen v. North Midland R. Co.* 2 Eng. Ry. & Canal Cas. 1; *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. 82; *State v. Sargent & Co.* 45 Conn. 358; *Chicago v. Laflin*, 49 Ill. 172; *Musser v. Hershey*, 42 Iowa, 356; *Grant v. Davenport*, 18 Iowa, 179; *Renwick v. Davenport & N. W. R. Co.* 49 Iowa, 664; *Garrite v. Baltimore*, 132

53 Md. 422; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Drury v. Midland R. Co.* 127 Mass. 571; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. 626; *Myers v. St. Louis*, 82 Mo. 367; *Steers v. Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *Langdon v. New York*, 93 N. Y. 129; *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Boorman v. Sunnucks*, 42 Wis. 233.

Ejectment is the proper remedy for the enforcement of right of access and to prevent the interruption or destruction thereof.

*Edmondson Island Case*, 42 Fed. Rep. 15; *Adams v. Emerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Pick. 122; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159.

*Mr. Robert A. Howard* argued the cause, and, with *Solicitor General Richards*, filed a brief for defendant in error:

The proprietorship of the beds and shores of navigable waters in this country, and the control of those waters, belong to the states in trust for the use of the people,—especially the public use of navigation and commerce.

*Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

The states by virtue of their sovereignty can exercise certain powers over navigable waters in aid of navigation. This, of course, upon the hypothesis that Congress has not legislated upon these matters.

*Pollard v. Hagan*, 3 How. 220, 11 L. ed. 569; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816.

These cases express the principles of the common law upon this matter of control over navigable waters as applied to the states.

*Gann v. Free Fishers*, 11 H. L. Cas. 192.

After the adoption of the Constitution the power existing in the states for the improvement of rivers within their borders was recognized as a concurrent power used in the absence of legislation by Congress. When exercised by Congress the power is paramount and illimitable.

*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668; *Miller v.* 179 U. S.



*New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Hawkins Point Light-House Case*, 39 Fed. Rep. 77.

The bed of a river owned by the state may be used by the United States, without the consent of the state and without compensation, for the construction of a bridge over the river, and not in aid of the navigation of the river, but in aid of interstate commerce generally.

*Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411.

Congress could interfere and legalize a bridge, a decree having been rendered declaring it an obstruction and directing it to be removed by elevating the bridge, or, if not, by abatement.

*Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 429, 15 L. ed. 436.

Congress could legalize a bridge pending a suit to remove the structure as a nuisance.

*The Clinton Bridge*, 10 Wall. 454, *sub nom. Gray v. Chicago, I. & N. R. Co.* 19 L. ed. 969.

In the case of a public navigable river the rights of the riparian owner must be subject to the public right of navigation.

*Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662.

[151] \*Mr. Justice Harlan delivered the opinion of the court. After stating the facts as above reported, he proceeded:

1. The government insists that ejectment is not the proper remedy for a riparian owner to secure the removal of a structure that interferes with access by him from his fast land to navigable water. A sufficient answer to this objection is that the state court recognized the present action as a proper one under the laws of Michigan for the relief sought by the plaintiff. We have therefore to consider only the controlling ques-

[152] tions of a \*Federal nature presented by the record and decided by the state court.

2. The supreme court of the state correctly held that the trial court erred in directing a verdict for the defendant upon the ground that a judgment against him would in legal effect be a judgment against the United States. It is true the defendant, Wheeler, insisted that the action of which the plaintiff complained was taken by him under the authority of the United States. But this fact was not sufficient to defeat the suit. If the plaintiff was entitled to access from his land to navigable water, and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and, the

United States not being a party of record, a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff. This subject has been examined by the court in numerous cases, the most recent one being *Tindal v. Wesley*, 167 U. S. 204, 222, 223, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770. In that case—which was a suit to recover real property in South Carolina held by the defendants, as they insisted, in their capacities as officers of the state, and only for the state—it was said that “the 11th Amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff.” Again: “It is said that the judgment in this case may conclude the state. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to \*possession of [153] the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The state not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim.”

These principles are applicable to the present case, and show that it is not within the rule forbidding a suit against the United States except with its consent.

3. The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States, of the taking of private property for public use without just compensation, has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from, but in front of, his upland, and which pier was erected by the United States, not with any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river.

Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not over-

ride the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the

[154] \*general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question.

In *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 181, 20 L. ed. 557, 561, the court construed a provision of the Constitution of Wisconsin declaring that "the property of no person shall be taken for public use without just compensation therefor;" observing that it was a provision almost identical in language with the one relating to the same subject in the Federal Constitution. In that case it appeared that a public improvement in a navigable water was made under local statutory authority, whereby the plaintiff's land was permanently overflowed and its use for every purpose destroyed. Referring to some adjudged cases which went, as the court observed, beyond sound principle, it was said that "it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

That case was relied upon in *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 642, 25 L. ed. 336, 338, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this court said that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority." It was observed in the same case that the extremest qualification of the doctrine was that found in *Pumpelly's Case*, and that case was referred to as holding nothing more than that "the permanent flooding of private property may be regarded as a 'taking,' because there would be in such case "a physical invasion of the real estate of the private owner, and a practical ouster of his possession."

[155] \*In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 341, 343, 37 L. ed. 463, 473, 474, 13 Sup. Ct. Rep. 622, there was an actual taking of certain locks and dams which had been constructed and maintained, under competent authority, by a navigation company; and the question was whether the franchise to take tolls for the use of the

locks was to be deemed a part of the property taken for which compensation must be made. This court held that it was, remarking: "The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual." Again, in the same case: "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

But the case most analogous to the present one is that of *Gibson v. United States*, 166 U. S. 269, 271, 275, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578. That was an action in the court of claims to recover damages resulting from the construction of a dike by the United States in the Ohio river, near the plaintiff's farm on Neville island, a short distance below Pittsburg.

\*From the finding of facts in that case it [156] appears that at the time the dike was constructed Mrs. Gibson's farm was in a high state of cultivation, with a frontage of 1,000 feet on the main channel of the Ohio river, and had a landing that was used in shipping products from and in bringing supplies to it, and that there was no other landing on the farm which the owner could use in shipping products and in receiving supplies; that the dike was constructed under the authority of an act of Congress appropriating money for improving the Ohio river; that the owner was unable to use the landing for the shipment of products from and supplies to the farm for the greater part of the gardening season on account of the dike obstructing the passage of boats, and could only use the landing at a high stage of water; that after the dike was made she could not, during the ordinary stage of water, ship products from or receive supplies for her farm, without going over the farms of her neighbors to reach another landing;



and that in consequence of the construction and maintenance of the dike the plaintiff's farm had been reduced in value from \$600 to \$150 or \$200 per acre. It was further found that the plaintiff's access to the navigable part of the river was not entirely cut off; that at a 9-foot stage of water, which frequently occurred during November, December, March, April, and May, she could get into her dock in any manner, while from a 3-foot stage of water she could communicate with the navigable channel through a chute, and at any time haul out to the channel by wagon; that no water was thrown back on the land by the building of the dike; and that the dike itself did not come into physical contact with the land, and was constructed in the exercise of a claimed right to improve the navigation of the river.

This court held that the plaintiff had no cause of action against the United States. It said: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and, although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal government by the Constitution,"—citing *South Carolina v. Georgia*, \*93 U. S. 4, 23 L. ed. 782; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345. Again, in the same case: "The 5th Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power." "Moreover," the court said, "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

In the light of these adjudications can it be held that Scranton, the plaintiff, is entitled, by reason of the construction of the pier in question, to compensation for the destruction of his right, as riparian owner, of access from his land to the navigable part of the river immediately in front of it?

It is said that he is so entitled in virtue of the decision in *Yates v. Milwaukee*, 10 Wall. 497, 504, 505, 19 L. ed. 984, 986. The report of that case shows that Yates owned a wharf on a navigable river within the limits of the city of Milwaukee, and that the city by an ordinance declared the wharf to be a  
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nuisance, and ordered it to be abated. There was no proof whatever in the record that the wharf was in fact an obstruction to navigation, or a nuisance, except the declaration to that effect in the city ordinance; and Yates brought suit to enjoin interference with it by the city. This court held that the mere declaration by the city that Yates's wharf was a nuisance did not make it one, saying: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it 'is one, subject it [158] to removal by any person supposed to be aggrieved, or even by the city itself.'" This, as this court said in *Shively v. Bowlby*, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548, was quite sufficient to dispose of the case in Yates's favor, and indicated the point adjudged. A proper disposition of the case required nothing more to be said. But the opinion of the court went further, and after observing, upon the authority of *Dutton v. Strong*, 1 Black, 25, 17 L. ed. 29, and *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74, that a riparian owner is entitled to access to the navigable part of the river from the front of his lot, subject to such general rules and regulations as the legislature might prescribe for the protection of the rights of the public, said: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The decision in *Yates v. Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence, and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation,—a right never exercised by him in the construction of a wharf before the improvement in question was made by the government.

While the present case differs in its facts from any case heretofore decided by this court, it is embraced by principles of constitutional law that have become firmly established.

\*The Constitution invests Congress with [159]  
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the power to regulate commerce with foreign nations and among the several states. This power includes the power to prescribe "the rule by which commerce is to be governed;" "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and "comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'" *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197, 6 L. ed. 23, 70.

In *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96, 99, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

In *South Carolina v. Georgia*, 93 U. S. 4, 11, 12, 23 L. ed. 782, 784, the court said that Congress "may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage."

In *Mobile County v. Kimball*, 102 U. S. 691, 696, 26 L. ed. 238, 239, the court, observing that the power of Congress to regulate commerce was without limitation, said: "It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power."

In *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 20, 1 Inters. Com. Rep. 411, Mr. Justice Bradley, holding the circuit court, said: "Such being the character of the state's ownership of the land under water,—an ownership held, not for the purpose of emolument, \*but for public use, especially the public use of navigation and commerce,—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The 5th Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway is at all a diversion of the

property from its original public use. It is not so considered when sea walls, piers, wing-dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the states extends, not only to the control of the navigable \*waters of the country and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

As much was said in argument about the decisions in New York it may be well here to refer to some of the rulings of the highest court of that state. In *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 85, 89, 30 N. E. 654, the court of appeals of New York, referring to the prior case of *Gould v. Hudson River R. Co.* 6 N. Y. 522, said: "It was there held that the owner of lands on the Hudson river has no private right or property in the waters or the shore between high and low water mark, and therefore is not entitled to compensation from a railroad company which, in pursuance of a grant from the legislature, constructs a railroad along the shore, between high and low water mark, so as to cut off all communications between the land and the river otherwise than across the railroad. It is believed that this proposition is not supported by any other judicial decision in this state, and if we were dealing with the question now as an original one it would not be difficult to show that the judgment in that case was a departure from precedent and contrary to reason and justice." Again, in the same case: "It must now, we think, be regarded as the law in this state that an owner of land on a public river



is entitled to such damages as he may have sustained against a railroad company that constructs its road across his water front and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. This principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution."

[162] But in a later case in New York relating to this subject—*Sage v. New York*, 154 N. Y. 61, 69, 38 L. R. A. 606, 47 N. E. 1096—the court of appeals, after observing that the court in *Rumsey v. New York & N. E. R. Co.* had been careful to say that the principle announced by it was not to be extended so as to \*interfere with the right of the state to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution, said: "While we think it is a logical deduction from the decisions in this state that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the state, as in the *Langdon* [93 N. Y. 129] and *Williams* [105 N. Y. 419, 11 N. E. 829] Cases. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the Crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant, and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public."

All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected  
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by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly \*within its discretion; and the judiciary is [163] without power to control or defeat the will of Congress, so long as that branch of the government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not. The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new south pier rests is in the state or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." *Webber v. Pere Marquette Boom Co.* 62 Mich. 636, 30 N. W. 469, and authorities there cited. But it is equally well settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman v. Benson*, 8 Mich. 18, 32, 77 Am. Dec. 435; *Ryan v. Brown*, 18 Mich. 195, 207, 100 Am. Dec. 154. So that, whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman v. Benson*, above cited, the supreme court of Michigan, speaking by Justice Campbell, declared the right of navigation to be one \*to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the appropriation of the submerged lands in question, and that the United States under the power to regulate commerce has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so,—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention  
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is that compensation must be made for the loss of the plaintiff's access from his upland to navigability, incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates Case*, "in due subjection to the rights of the public,"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by \*compelling the government to make compensation for the injury to a riparian owner's right of access to navigability, that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability.

It follows from what has been said that the pier in question was the property of the United States, and that when the defendant refused to plaintiff the privilege of using it as a wharf or landing place he violated no right secured to the latter by the Constitution.

We are of opinion that the court below correctly held that the plaintiff had no such right of property in the submerged lands on which the pier in question rests as entitles

him, under the Constitution, to be compensated for any loss of access from his upland to navigability, resulting from the erection and maintenance of such pier by the United States in order to improve, and which manifestly did improve, the navigation of a public navigable water.

*The judgment of the Supreme Court of Michigan is therefore affirmed.*

Mr. Justice **Brewer** concurred in the result.

Mr. Justice **Shiras**, dissenting:

Gilmore G. Seranton, the plaintiff in error, derived his title to a tract of land, known as Private Land Claim No. 3, and fronting on the St. Mary's river, a stream naturally navigable, under a patent of the United States granted on October 6th, 1874.

It must be regarded as the settled law of this court that grants \*by Congress of portions of the public lands, bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States.

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, there was a controversy between parties claiming under a patent of the United States for a donation land claim bounded by the Columbia river, and parties claiming under deeds from the state of Oregon for lands between the lines of low and ordinary high tide of the Columbia river. It was held by the supreme court of Oregon (22 Or. 427, 30 Pac. 154) that the lands in question, lying between the uplands and the navigable channel of the Columbia river, belonged to the state of Oregon, and that its deed to such lands conveyed a valid title.

The case was brought to this court, where the judgment of the supreme court of Oregon was affirmed. The opinion of this court contains an elaborate review of the English authorities expounding the common law, of decisions of the several states, and of the previous decisions of this court. The conclusion reached was that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution. The theory on which Congress has acted in this matter was thus stated by the court:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation,



and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case [167] \*of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."

The reasoning and conclusions of this case were followed and applied in the subsequent cases of *Mann v. Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; and *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

It cannot be said that any title to the submerged land became vested in the plaintiff in error, as against the state or its grantees, by reason of the fact that it is the law in Michigan, in the case of lands abutting on navigable streams, titles to which are derived from the state, that such titles extend to and embrace submerged lands as far as the thread of the stream. It has never been held in Michigan that that doctrine applied to the case of titles derived from the United States.

*Shively v. Bowlby* and *Mann v. Tacoma Land Co.*, above cited, were both cases in which it was held that titles derived under grants by the United States to lands abutting on navigable waters did not avail as against the state and subsequent grantees.

It is not pretended that the state of Michigan ever made any grant of these submerged lands to the plaintiff in error; but, on the contrary, the state in 1881 transferred all its rights in the St. Mary's canal and the public works thereon, with all its appurtenances, to the United States. How. Stat. § 5502.

This would seem to dispose of the claim to the land occupied by the pier in the river in front of Private Land Claim No. 3. And, indeed, the counsel for the plaintiff in error, in their briefs filed of record in this court, conceded that, under the facts of this case, compensation could not be demanded for the [168] appropriation \*of the submerged lands, and restricted their argument to the question of the plaintiff's right of access to the navigable stream, bounding his property. But the opinion in this case, while correctly stating that the question before us is as to the right of the plaintiff in error to be indemnified for the total destruction of his access to the river, does not confine the discussion to that question. Not regarding the fact that the plaintiff in error has failed to show any title to the submerged land, and that no such

claim is urged on his behalf in this court, it is said in the opinion that—

The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new south pier rests is in the state or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." *Webber v. Pere Marquette Boom Co.* 62 Mich. 636, 30 N. W. 469, and authorities there cited. But it is equally well settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Ryan v. Brown*, 18 Mich. 195, 100 Am. Dec. 154.

So that whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, such title was taken subject to the rights which the public have in the navigation of the waters in question. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is strictly consistent with such use, and infringes no right of the riparian owner. Whatever the interest of a riparian owner in the submerged lands in front of his upland, his title is not as full and complete as his title acquired to fast land which has no direct connection with the navigation of the river or water on which it borders. It is not a title at his absolute disposal, but is to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as is consistent with or demanded by the public right of navigation. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the appropriation of the submerged lands in question, and that the United States, under the \*power to reg- [169] ulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so,—certainly in every case where the use of the submerged lands is necessary for the improvement of navigation.

It is, I think, impossible to read this language, particularly when read in connection with other passages in the opinion, without understanding it to assert that where the riparian owner has a title to lands under navigable waters adjacent to his upland, such land may be taken into the exclusive possession of the government by the erection of a public work without compensation; and that, even if the state court should hold that the riparian owner had a title to the submerged lands, and was entitled to be compensated for their appropriation for a public purpose connected with navigation, it would be the duty of this court to overrule such a decision.

As, for the reasons already mentioned, no such question is now before us, and therefore those portions of the opinion of the majority cannot justly be hereafter regarded as furnishing a rule of decision in such a case, yet I must be permitted to disavow such a



proposition. When the case does arise, I incline to think it can be shown, upon principle and authority, that private property in submerged lands cannot be taken and exclusively occupied for a public purpose without just compensation. At all events, I submit that it will be in time to decide so important a question when it necessarily arises, and when the rights of the owner of the property have been asserted and defended in argument.

The real question, then, in this case, is whether an owner of land abutting on a public navigable river, but whose title does not extend beyond the high-water line, is entitled to compensation "because of the permanent and total obstruction of his right of access to navigability resulting from the maintenance of a pier constructed by the United States in the river opposite such land for the purpose of improving navigation."

To answer such a question, the *nature* of the riparian right of access must be first determined. That he has such a right all must admit. But does his right constitute "private property" within the meaning of the [170] Constitution, or is it in the \*nature of a license or prescription, of which he can be deprived for the benefit of the public without being entitled to compensation?

The term "property," standing alone, includes everything that is the subject of ownership. It is a *nomen generalissimum*, extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments. *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 35; Shaw, Ch. J.

"The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed." *Soulard v. United States*, 4 Pet. 511, 7 L. ed. 938; Marshall, Ch. J.

Private property is that which is one's own; something that belongs or inheres exclusively in an individual person.

The right which a riparian owner has in a navigable stream when traveling upon it, or using it for the purpose of navigation, must be distinguished from his right to reach navigable water from his land, and to reach his land from the water. The former right is one which belongs to him as one of the public, and its protection is found in indictments at the suit of the public,—sometimes, in special circumstances, in proceedings in equity for the use of all concerned. Being a public right, compensation cannot be had by private parties for any injury affecting it. The latter right is a private one, incident to the ownership of the abutting property, in the enjoyment of which such owner is entitled to the protection of private remedies afforded by the law against wrongdoers, and for which, if it is taken from him for the benefit of the public, he is entitled to compensation.

This distinction has always been recognized by the English courts.

*Rose v. Groves*, 5 Mann. & G. 013, was a case where an innkeeper was held entitled to recover damages against a defendant for wrongfully preventing the access of guests to his home, situated on the river Thames, by placing timbers in the river opposite the inn, and wherein, meeting the contention that the plaintiff had no private right of action, but that his remedy was by proceedings \*for a public nuisance, Maule, J., said: [171] "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house" on the river.

In *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, Lord Cairns said:

"As I understand the judgment in *Rose v. Groves*, it went, not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right was not interfered with, when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In *Rose v. Groves*, Chief Justice Tindal put the case distinctly upon the footing of an infringement of a private right. He says: 'A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;' and then, after stating the facts, adds: 'It appears to me, therefore, that the plaintiff is not complaining of a public injury.'"

Elsewhere, in the same case, Lord Cairns said:

"Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land onto a highway is something quite different from the public right of using the highway."

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which *per se* he enjoys in a manner different from any other member of the public.

"But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very \*different [172] character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was de-



cided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an 'injurious affecting' of the land, that is to say, the occasioning to the land of an *injuria* or an infringement of right. The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages or altogether prevented." L. R. 1 App. Cas. 671.

This distinction between the right of immediate access from the abutter's property to and from a highway, whether a street or a navigable stream, and an injury arising after he reaches it and which is common to him and the rest of the public, is recognized by the courts of the states, and the former right is held to be a valuable one, which cannot be destroyed without compensation.

Thus, in *Haskell v. New Bedford*, 108 Mass. 208, it was held that where a sewer constructed by the city of New Bedford discharged filth into the dock of the plaintiff, obstructing his use of it, it created a private nuisance to the plaintiff upon his own land for which he could maintain an action for the special damages thereby occasioned to him, without regard to the question whether it was also a nuisance to the public, Mr. Justice Gray, now a justice of this court, saying: "The plaintiff's title extended, by virtue of the statute of 1806 [chap. 18] to the channel of the river; the filling up of the dock impaired his use and enjoyment of it for the purpose for which it had been constructed and actually used; and the injury thus done to him differed, not only in degree but in kind, from the injury to the public by interference with navigation. Neither this special injury to him, nor that occasioned to his premises by making them [173] offensive \*and unhealthy, was merged in the common nuisance,"—and citing, among other cases, *Rose v. Groves*, one of the English cases above mentioned.

And in *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470, it was held that while the owner of a wharf upon a tide-water creek cannot maintain an action for an illegal obstruction to the creek, that being a common damage to all who use it, yet for an obstruction adjoining the wharf, which prevents vessels from lying in it in the accustomed manner, this being a particular damage, he can maintain an action.

In *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386, the supreme court of Wisconsin held that—

"While the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; 179 U. S.

he has the right to build piers and wharves in front of his land out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. . . .

"It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. . . . These riparian rights are undoubted elements in the value of property thus situated. If destroyed, can anyone seriously claim that the plaintiffs have not suffered a special damage in respect to their property, different both in degree and kind from that sustained by the general public? It seems to us not."

In *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114, it \*was held by the supreme court [174] of Minnesota that the state could not give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights. The court, after citing cases in this court, said:

"According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, etc. . . . The rights which thus belonged to him as riparian owner of the abutting premises were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation."

In *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 545, 11 N. E. 469, the supreme court of Indiana said:

"Whatever may be the rule of decision elsewhere, nothing is better settled in this state than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legally adhering, to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted



from the uses to which it was originally dedicated, nor devoted to uses inconsistent with street purposes, without the abutting lotowner's consent, until due compensation be first made according to law for any injury and damage which may directly result from such interference."

This right of the owner of a lot abutting on a street to free access to and from the street, which right is analogous to the one we are here considering, has been frequently considered by the state courts, and some of the conclusions reached are thus stated in 2 Dillon's Municipal Corporations, 4th ed. § 656:

[175] "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period . . . that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had, in common with the rest of the public, a right of passage. But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it; and that these rights, whether the bare fee of the streets was in the lotowner or in the city, were rights of property, and as such ought to be, and were, as sacred from legislative invasion as his right to the lot itself. In cities the abutting owner's property is essentially dependent upon sewer, gas, and water connections; for these such owner has to pay or contribute out of his own purse. He has also to pay or contribute towards the cost of sidewalks and pavements. These expenditures, as well as the relations of his lot to the street, give him a special interest in the street in front of him, distinct from that of the public at large. He may make, as of right, all proper uses of the street, subject to the paramount right of the public for all street uses proper, and subject also to reasonable and proper municipal and police regulation. Such rights, being property rights, are, like other property rights, under the protection of the Constitution."

The courts of New York, which formerly took another view, now hold that right of access is a valuable property right and entitled to constitutional protection as such. *Steers v. Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *Langdon v. New York*, 93 N. Y. 129.

It is true that, in the later case of *Sage v. New York*, 154 N. Y. 62, 38 L. R. A. 606, 47 N. E. 1096, it was held that the riparian rights of the owner of lots abutting on the [176] Harlem river, a tide-water stream, are "subordinate to the right of the city of New York, under its ancient charters supplemented by

constitutional legislation and state grants, to fill in and make improvements, such as an exterior street, docks, and bulkheads, from the high-water mark in front of his upland to and below low-water mark, essential to navigation and commerce, without compensation. But the opinion shows that the decision was put wholly upon the law of the state of New York as declared in the authorities cited. Thus, the language of Gerard in his work on Titles to Real Estate is adopted:

"It has been established in this state [New York] by judicial decision that the legislature of the state has an inherent right to control and regulate the navigable waters within the state. . . . The individual right of the riparian owner was considered . . . as subject to the right of the state to abridge or destroy it at pleasure by a construction or filling in beyond his outer line, and that, too, without compensation made."

And again, the court says:

"In other states, some of the authorities are in accord, while others are opposed to the rule adopted in this state. . . . The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the state, and in others to the riparian proprietors. This also accounts for the want of harmony in the Federal courts, as they follow the courts of the state where the case arose, unless some question arises under an act of Congress."

This case, therefore, must be regarded as an adjudication that, in the state of New York, the nature and extent of riparian rights are to be determined by the law of the state, and that the Federal courts, in passing upon such rights, follow that law.

In *Backus v. Detroit*, 49 Mich. 110, 13 N. W. 380, it was held by the supreme court of Michigan, per Cooley, J., that the better and more sensible doctrine is that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain without making compensation to the riparian proprietor.

\*Leaving the decisions of the state courts, [177] let us turn to those of this court,—and I shall not consider it necessary to advert to the earlier decisions, because they are referred to and considered in the later ones.

*St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74, was a case involving the right of the complainant, Schurmeir, to enjoin the St. Paul & P. Railway Company from taking possession and building its railroad upon certain ground in the city of St. Paul, Minnesota, bordering on the Mississippi river, and lying between lots of the complainant and that river. The railroad company claimed to own the land in fee under a congressional land grant of May 22, 1857. The supreme court of Minnesota held that the complainant was entitled to a decree as prayed for; and this court, on appeal, affirmed the judgment of the supreme court of Minnesota, holding that, under the case of *Dutton v. Shirey*, 1 Black, 23, 17 L. ed. 29,



although riparian owners are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian properties bordering on navigable waters affected by the ebb and flow of the tide; and, speaking of the contention, on behalf of the railroad company, that the complainant had dedicated the premises to the public as a street, and had thus parted with his title to the same, this court said:

"Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, on appeal from the circuit court of the district of Wisconsin, it was held that the owner of land bounded by a navigable river has certain riparian rights, whether his title extend to the middle of the stream [178] \*or not; that among these are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier, for his own use, or for the use of the public; that those rights are valuable, and are property, and can be taken for the public good only when due compensation is made. In the opinion, per Miller, J., it was said:

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

Accordingly this court reversed the decree of the circuit court, and instructed it "to enter a decree enjoining [the city of Milwaukee] the defendants below from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the actual improvement of the navigability of the river, and upon due compensation made."

The opinion in *Yates v. Milwaukee*, like that of the majority in the present case, may be liable to the criticism made upon it in 179 U. S.

*Shively v. Bowlby*, 152 U. S. 1, 36, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, as having gone too far in saying that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, *independently of local law*, a right of property in the soil below high-water mark, and the right to build out wharves so far, at least, as to reach water really navigable. But, so corrected, it is a direct authority for the proposition we are now considering, namely, that riparian rights, when recognized as existing by \*the law of the state, are a valuable prop-[179] erty, and the subject of compensation when taken for public use.

In the case of *Weber v. State Harbor Comrs.* 18 Wall. 64, 21 L. ed. 801, it is said:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor whose land is bounded by a navigable stream has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates v. Milwaukee*. On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case."

In *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 682, 27 L. ed. 1073, 3 Sup. Ct. Rep. 445, 4 Sup. Rep. 15, Mr. Justice Matthews, delivering the opinion of this court, quoted with approval the definition of a riparian owner and of his right of access to a navigable river in front of his lot, given by Mr. Justice Miller in *Yates v. Milwaukee*.

In *Illinois C. R. Co. v. Illinois*, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110, this court said: "The riparian proprietor is entitled, among other rights, as held in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property and valuable; and, though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired."

In *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345, it was again held by this court, following *Hardin v. Jordan*, 140 U. S. 384, 35 L. ed. 434, 11 Sup. Ct. Rep. 808, 838, and *Shively v. Bowlby*, 152 U. S. 1, 58, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, that the nature and legal incidents of land abutting on navigable streams were declared by the law of the state wherein the land was situated. A bill was filed in the circuit court of the United States for the western district of Louisiana by Eldridge, a citizen of Mississippi, against the board of engineers of the state of Louisiana \*and one Trezevant, who [180] had been employed by that board to construct a public levee through a plantation belonging to the complainant and situated in Car-



roll township, state of Louisiana, in pursuance of an act of the general assembly of the state. The circuit court dismissed the bill, and an appeal was taken to this court. It appeared, and indeed was conceded by the appellant, that under the law and constitution of the state, and under French law existing before the transfer of the territory to the United States, land for the construction of a public levee on the Mississippi river could be taken, without compensation, by reason of a servitude on such lands for such a purpose. But it was contended on behalf of the appellant that, because he was a citizen of another state, and because he derived his title through a patent of the United States, that whatever may have been the condition of the ancient grants, no such condition attached to his ownership, and that the lands bordering on a navigable stream were as much within the protection of the constitutional principle awarding compensation as other property.

After reviewing the provisions of the Constitution and laws of the state and the decisions of the state court construing them, and citing the Federal decisions, this court said:

"These decisions not only dispose of the proposition that lands situated within a state, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the state, but also of the other proposition that the provisions of the 14th Amendment extend to and override public rights existing in the form of servitudes or easements, held by the courts of a state to be valid under the Constitution and laws of such state.

"The subject-matter of such rights and regulations falls within the control of the states, and the provisions of the 14th Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and its obligations, is impartially administered. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Missouri v. Lewis*, 101 U. S. 22, sub nom. *Bowman v. Lewis*, 25 L. ed. 989; [181] *HaWinger v. Davis*, 146 U. S. \*314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105. The plaintiff in error is, indeed, not a citizen of Louisiana, but he concedes that, as respects his property in that state, he has received the same measure of right as that awarded to its citizens, and we are unable to see, in the light of the Federal Constitution, that he has been deprived of his property without due process of law, or been denied the equal protection of the laws."

The case of *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, is cited and relied on in the majority opinion. In that case the owner of a farm fronting on the Ohio river filed a petition in the court of claims complaining of the construction by the United States of a dike in the bed of the river, and which the plaintiff alleged to interfere with her landing. The

principal finding of the court of claims was as follows:

"Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April, and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon."

The only injury suffered, therefore, by the plaintiff was the inconvenience of having to haul her produce by wagon over and across the dike in such portions of the year when the water was below a 3-foot stage, and when, at that part of the Ohio river, navigation was almost wholly suspended. At other times, and when the stage of the water permitted navigation, the plaintiff had the use of her dock. The court of claims dismissed the petition, and its decree was affirmed by this court. There was no pretense that the dike in question touched the plaintiff's land at any point.

The Chief Justice, in the opinion, put the judgment chiefly on the decisions of the state court. He said: "By the established law of Pennsylvania, as observed by Mr. Justice Gray in *Shively v. Bowlby*, 'the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation and to the authority of the legislature to make public improvements upon it, and to regulate his use of it.' " And after citing [182] several Pennsylvania cases, the Chief Justice concluded his opinion by saying: "In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of the appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject." It is obvious, therefore, that in this case the court applied the doctrine of *Eldridge v. Trezevant*, which was cited in the opinion, and that the servitude to which the plaintiff's lands were said to be subject was a servitude existing under the state law, and not a servitude created by Federal law.

In the states which originally formed this Union, or in those admitted since, it has never been held that the United States, through any of their departments, could impose servitudes upon the lands owned by the states or by their grantees. The cases are all the other way. *New Orleans v. United States*, 10 Pet. 736, 9 L. ed. 602; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Van Brocklin v. Tennessee*, 117 U. S. 151, 168, sub nom. *Van Brocklin v. Anderson*, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

In the recent case of *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649, the question of the nature and extent of riparian rights on the Potomac



river in front of the city of Washington was involved. The majority of the court held that, under the evidence, the titles of the owners of lots in the city plans were bounded by Water street, and that, therefore, such owners possessed no riparian rights entitled to compensation by the United States in carrying out a scheme of improvement of the waters of the river.

[183] The opinion of the court proceeded on the assumption, as matter of law, that owners of land abutting on the river would be possessed of riparian rights, and entitled, therefore, to compensation if such rights were impaired or destroyed by the improvements proposed by the government, but held, as a conclusion from the evidence, that, as matter of fact, the owners of lots under the city plans did not have titles extending to the river, but that their lots were bounded by Water street, the title to which was in the city, and therefore no compensation for \*exclusion from the river could be enforced. The case, therefore, may be properly regarded as an authority for the proposition that the owners of lots abutting on a navigable river are entitled to compensation if their riparian right of access is taken from them by improvements made by the government to promote the navigability of the Potomac river. The long investigation by court and counsel was, indeed, labor in vain if, at last, riparian rights possessed by the lotowners should be decided not to be private property within the protection of the Constitution.

If, then, by the law of the state in which the land is situated, the right of access to navigable streams is one of the incidents of abutting land, if such rights are held to be property and valuable as such, can the United States, under the incidental power arising out of their jurisdiction over interstate commerce, destroy such right of access without making compensation? I think that this question may well be answered in the words of Gould in his work on Waters, 2d ed. § 151: "When it is conceded that riparian rights are property, the question as to the right to take them without compensation would appear to be at an end."

The argument against the right of compensation in such a case seems to be based upon an assumption that because the government has the power to make improvements in navigable waters it follows that it can do so without making compensation to the owners of private property destroyed by the improvements. But this assumption is, as I think, entirely without foundation, and, if permitted by the courts to be made practically applicable, would amount to a disregard of the express mandate of the Constitution that private property shall not be taken for public uses without just compensation.

"The power to establish postoffices and to create courts within the states was conferred upon the Federal government; included in it was authority to obtain sites for such offices and for courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one  
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of those means well known when the Constitution was adopted, and employed to obtain land for public uses. Its existence, \*there- [184] fore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The 5th Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it may be taken?" *Kohl v. United States*, 91 U. S. 374, 23 L. ed. 452.

Accordingly in that case, a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a postoffice and other public uses was upheld, but those proceedings contemplated compensation, and Congress, in the act authorizing the proceedings, appropriated money for the purpose.

Now if, in order to render valid an appropriation of private property for the use of the government in the erection of postoffices and courthouses, compensation must be made, what is the difference in principle if the government is appropriating private property for the purpose of improving the navigation of a navigable stream? This question has been already put and answered by this court in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, where it was said:

"It cannot be doubted . . . that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela river as in its judgment the public interests demand. Its dominion is supreme.

"But, like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations \*imposed by this 5th Amend- [185] ment, and can take only on payment of just compensation."

"The power to regulate commerce is not given in any broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. . . . And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway."

As already remarked, the power of the government to control and regulate naviga-  
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ble streams, and to carry into effect schemes for their improvement, is not directly given by the Constitution, but is only recognized by the courts as an incident to the power expressly given to regulate commerce between the states and with foreign nations.

Now, if it be held that Congress has power to take or destroy private property lying under or adjacent to navigable streams, without compensating their owners, because it is done in the exercise of the power to regulate commerce, then it must follow that the same unlimited power can be exercised with respect to private property not in nor bounded by water. The power of Congress to regulate commerce is not restricted to commerce carried on in lakes and rivers, but equally extends to commerce carried on by land. If Congress, yielding to a loud and increasing popular demand that it should take possession and control of the railroads of the country, or should undertake the construction of new railroads as arteries of commerce, this novel notion, that the existence of the right to regulate commerce creates of itself, and independently of the law of the state, a Federal servitude on all property to be affected by the exercise of that right, would apply to all kinds of private property wherever situated.

But it may be asked why, if the question as to riparian rights is one of state law, the decision of the supreme court of Michigan in the present case, denying the claim of the abutting owner for compensation for the loss of his access to the river, is not conclusive.

[186] \*The answer to this question will be found in the opinion of that court. Instead of ascertaining and applying, or professing to apply, the law of the state in respect to riparian rights, the supreme court of Michigan treated the question as one under Federal law, and, following what it understood to be the doctrine laid down by several Federal circuit court decisions as obligatory, held that it was competent for the government of the United States, in the exercise of its power to regulate commerce between the states, to deprive abutting owners of their right of access to navigable streams without compensating them for their loss. The cases so relied on were *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411; *Hawkins Point Lighthouse Case*, 39 Fed. Rep. 77; and *Seranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803, 6 C. C. A. 585.

The first of these cases arose on a bill filed in the circuit court of the United States for the district of New Jersey by the attorney general of New Jersey, seeking to restrain the Baltimore & New York Railroad Company, acting under congressional authority, from occupying without compensation land belonging to the state of New Jersey, lying under tide waters, by the pier of a bridge. Mr. Justice Bradley, refusing the injunction, said:

"The character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of nav-

igation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation within the meaning of the Constitution. The 5th Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway is at all a diversion of the property from its original public use."

Mr. Justice Bradley was himself a New Jersey lawyer, and \*availed himself, in that case, of the law of that state, which has always been to the effect that the land underlying the tide waters belonged to the state, and was held for a public use. His view was that as, under the law of New Jersey, the land beneath tide waters was held by the state for public uses, such land was not *private property* within the meaning of the Constitution, or that, at all events, its occupation, to a limited extent, by the pier of a bridge intended to promote commerce, was not a diversion of the property from its original use. [187]

It needs no argument to show that such a decision is not applicable to the present case. Indeed, it is plain that if the case had been one involving the right of an abutter to access to the tide water, the same being, under the laws of the state, private property, the decision of that learned justice would have been very different. He was the organ of this court in pronouncing the opinion in *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, where the question was whether the title of riparian proprietors on the banks of the Mississippi extended to ordinary high-water mark or to the shore between high and low water mark, and said:

"In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; and *Goodtitle v. Kibbe*, 9 How. 471, 13 L. ed. 220. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 How. 443, 13 L. ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases



[188] must depend, on the local laws of the states in which the lands are situated. In Iowa, as \*before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

Whether the distinction suggested by Mr. Justice Bradley, between property held by the state for public purposes and private property, be or be not sound, the doctrine has no application to the present case, and, as the circuit court case was not brought for review to this court, the suggestion remains unadjudged.

The so-called *Hawkins Point Lighthouse Case* was an ejectment brought in the Circuit court of the United States for the district of Maryland to recover possession of the land covered by a lighthouse erected on land lying under the waters of a tide-water navigable river, by the lighthouse board, in pursuance of acts of Congress. The plaintiff claimed to be the owner of the submerged land, and the action did not involve the question of access to the river. Judge Morris held that the plaintiff was not entitled to recover; and, although stating that "the court of appeals of Maryland, whenever called upon to declare the nature of the title of the state and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much a part of the *jus publicum* as the stream itself," extended Mr. Justice Bradley's suggestion in the New Jersey case, and declared that the plaintiff, as grantee of the state, had no private property in the submerged land entitled to constitutional protection. As the structure was a lighthouse the case might have been governed by peculiar considerations, but the learned judge of the circuit court seems to have gone further, and to have held that, as a matter of Federal law, "in the hands of the state or of the state's grantees the bed of a navigable river remains subject to an easement of navigation, which the general government can lawfully enforce, improve, and protect, and that it is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation." If by this is meant that riparian owners may be deprived, without compensation, of access to navigable streams abutting on their land, by reason of a supposed servitude or easement imposed by the

[189] power granted \*to Congress by the Constitution to regulate commerce, then, for the reasons heretofore given and under the authorities cited, such a view cannot be sustained. The case under the name of *Hill v. United States* was brought to this court, but the writ of error was dismissed on an independent ground, which rendered it unnecessary for this court to pass upon the questions ruled in the court below. There the question of the right of the plaintiff to be compensated for deprivation of his riparian rights was not considered, and, indeed, could not be, as it was held that neither the circuit court nor this court had jurisdiction. *Hill*

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*v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011.

Yet this was the case which the supreme court of Michigan said in their opinion "appeared to be exactly in point and to rule the present case."

The only other case relied on by the supreme court of Michigan was *Scranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803, 6 C. C. A. 585, being this identical case, which had been removed from the state to the Federal court. It was subsequently brought to this court, but was dismissed because the record did not show that a Federal question had been raised or presented in the plaintiff's statement of his case in the state court. Accordingly the cause was remanded to the state court, and subsequently reached this court by a writ of error to the supreme court of Michigan. While the case was in the circuit court of appeals an opinion was filed by Circuit Judge Linton, in which, without adverting to the law of the state of Michigan, or citing any decisions of the supreme court of that state, in respect to riparian rights, he held that the right of the plaintiff, of access to the navigable water, was subordinate to the power of the Federal government to control the stream for the purposes of commerce, and that the plaintiff was therefore not entitled to compensation for the extinction of his right.

The proposition, frequently made, that the power of Congress to regulate interstate commerce, and therefore navigation, is *paramount*, can properly be understood to mean only that, as between the authority of the states in such matters and that of the general government, the latter is superior. It has no just reference to questions concerning private property lying \*within the states. [190] Much less can it be rightly used to signify that such power can be exercised by Congress without regard to the right of just compensation when private property is taken for public use.

The suggestion that "the riparian owner acquired the right of access to navigability, subject to the possibility that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property, for the purpose of improving navigation," would seem to be irrelevant, because the liability that his private property may at all times be taken for public uses is known to everyone. But hitherto it has not been supposed that the knowledge of such liability deprives the owner of the right of compensation when his property is actually so taken.

Nor can the statement that, in the opinion of this court, "it was not intended by the framers of the Constitution that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement," be admitted. The *intention* of the framers

is seen in the provisions of the Constitution, and in them the right to take private property for public uses is indissolubly connected with the duty to make just compensation. It cannot be supposed that a recognition of such a duty would cripple the government in the just exercise of the power it incidentally possesses to regulate interstate navigation.

As, then, the supreme court of Michigan considered the question solely as a Federal one, in which it supposed it was controlled by the Federal cases cited, this court has jurisdiction to review its judgment; and as by that judgment the plaintiff in error has been refused the protection of the Constitution of the United States claimed by him, I think the judgment should be reversed and the cause remanded to be proceeded in according to law.

Mr. Justice **Gray** and Mr. Justice **Peckham** concur in this dissent.

[191] \*FRITZ CONTZEN, *Appt.*,  
v.

UNITED STATES and the Apache Indians.

(See S. C. Reporter's ed. 191-196.)

*Indian depredations—citizens—alien minor in Texas at time of its admission.*

1. Citizenship of the claimant at the time of filing a petition to recover for Indian depredations is not sufficient to give jurisdiction to the court of claims, if he was not a citizen at the time of the depredations.
2. An alien minor who had resided in Texas less than six months before the admission of that state into the Union, and was not a resident at the time of its Declaration of Independence, and had never taken the oath of allegiance to Texas, was not a citizen of Texas at the time of its admission, *o.*, irrespective of the citizenship of his parents, "one of the people of Texas," who became citizens of the United States without naturalization.

[No. 84.]

Submitted November 7, 1900. Decided December 3, 1900.

**A**PPPEAL from a decision of the Court of Claims dismissing a petition on a claim to recover for Indian depredations. *Affirmed.*

See same case below, 33 Ct. Cl. 475.

Statement by Mr. Chief Justice **Fuller**:

Appellant filed his petition in the Court of Claims, alleging that on October 20, 1861, a band of Apache Indians raided the settlement at San Xavier, near Tucson, Arizona territory, and stole from his ranch certain cows, horses, and mules of the value of \$10,330; that these Indians were in amity and

under treaty relations with the United States at that date; and "that petitioner is a naturalized citizen of the United States, and has at all times borne true allegiance to the government of the United States," etc.

The United States pleaded that the claimant was not a citizen of the United States at the date of the alleged depredation, and that the court was therefore without jurisdiction to hear and determine the cause.

The court adopted as its findings of fact the following agreed statement of facts:

"The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the state into the Union, December 29, 1845.

"Since the admission of Texas the claimant has resided continuously \*in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona, in 1855, with Major Emory, on the boundary commission.

"In the year 1854 he went into court at San Antonio, Texas, and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization, from 1847 on, of anyone of the claimant's name, when such record should appear in the courts of San Antonio.

"That in October, 1861, the defendant Indians were in amity with the United States."

Judgment was thereupon given sustaining defendants' plea to the jurisdiction, and dismissing the petition. 33 Ct. Cl. 475.

**Messrs. A. B. Browne, Alexander Britton, J. W. Douglas, and Alexander Porter Morse** submitted the cause for appellant:

The leaning, in questions of citizenship, should always be in favor of the claimant of it.

*Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

The word "people" is synonymous with the word "inhabitants."

*Desbois's Case*, 2 Mart. (La.) 185; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; Webster, *Dict. People*; *Quinby v. Duncau*, 4 Harr. (Del.) 383.

Every freeman has the right of election of citizenship (nationality).

*Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; U. S. Rev. Stat. § 1999, p. 351; *Kosztka's Case*, 2 Wharton, *International Law*, §§ 175, 198.

Upon the acquisition, cession, or incorporation of a heretofore independent state into the American Union, the inhabitants,—the

NOTE.—As to citizenship and alienage under state and Federal laws—see note to *Minneapolis v. Reum*, 6 C. C. A. 37.



people of such state,—unless specially excluded or excepted by the terms of the treaty of cession or joint resolution of annexation, become *ipso facto* citizens (nationals) of the nation incorporating such state.

*Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *Debois's Case*, 2 Mart. (La.) 185; *United States v. Lavery*, 3 Mart. (La.) 735; 2 Story, Const. p. 654, 4th ed. note by Cooley.

Citizens (nationals), *latu sensu*, are naturally and usually divided into two general classes: (1) All the inhabitants (people) resident in the country, who are secured, by the public, natural, or fundamental law, the enjoyment of civil, personal, and property rights; (2) a limited and privileged number who, from reasons or motives of state policy or expediency, are clothed with political power and exercise the elective franchise.

*Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

The protective rights are secured to the first class as fully as to the second.

10 Ops. Att.-Gen. pp. 393, 394.

The perpetual inhabitants (of a state) are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united and subject to the society without participating in all its advantages.

*The Venus*, 8 Cranch, 290, 3 L. ed. 566.

The emigration of appellant from Germany to the Republic of Texas, where he established a permanent residence (domicil), conclusively establishes the fact of his abandonment of his native land for the land of his adoption.

*The Venus*, 8 Cranch, 278, 3 L. ed. 561; Story, Conf. L. § 44; 2 Wharton, International Law, § 198; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472; *Mitchell v. United States*, 21 Wall. 350, 22 L. ed. 584.

The act of March 3, 1891 (26 Stat. at L. 851, chap. 538), under provisions of which this action is brought, is remedial, and as such should not receive a narrow or strained interpretation.

*United States v. Northwestern Express Stage & Transp. Co.* 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 206.

Assistant Attorney General John G. Thompson submitted the cause for appellees; Mr. Lincoln B. Smith was with him on the brief:

The allegiance of an individual is not to be transferred from one sovereign to another except by his own consent and by his own acts; and, conversely, the sovereignty of any power is not to be extended to cover any individual without the consent and authority of the sovereign. These principles are applicable both to the inhabitants of ceded or conquered territory and to immigrants.

Wharton, Conf. L. § 75; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41.

In the absence of treaty stipulation, inhabitants of the ceded territory are received  
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into the new sovereignty with the same status which they enjoyed under their former sovereign, so far as this is possible under the respective forms of government.

Vattel, Law of Nations, Book 3, § 199.

The act of March 3, 1891, provides for the enjoyment of an extraordinary remedy granted by Congress in derogation of rights of sovereignty, and in derogation of the ordinary principles of international law as applied to the Indian tribes, and expressly limited in its application to "citizens of the United States." It cannot be doubted that the word "citizen" is there used with its full significance.

*Johnson v. United States*, 160 U. S. 546, 40 L. ed. 529, 16 Sup. Ct. Rep. 377.

The question of naturalization and allegiance is distinct from that of domicil.

*Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441; *United States v. Wong Kim Ark*, 169 U. S. 556, 42 L. ed. 893, 18 Sup. Ct. Rep. 456.

This is a question of jurisdiction in a suit against the United States; and, the statute being in derogation of sovereignty, must be strictly construed.

*Leighton v. United States*, 161 U. S. 291, 40 L. ed. 703, 16 Sup. Ct. Rep. 495.

If the question in this case turned on the change of domicil, and doubt existed, the presumption would be in favor of the preservation of the original nationality.

Morse, Citizenship, p. 13.

The Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit.

*Marks v. United States*, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476.

\*Mr. Chief Justice Fuller delivered the [192] opinion of the court:

The petition alleged that appellant was a naturalized citizen of the United States at the time it was filed, but it contained no averment that he was such citizen at the date of the alleged depredation. If he was not, the court of claims did not have jurisdiction to adjudicate upon his claims and its judgment must be affirmed. *Johnson v. United States*, 160 U. S. 546, 40 L. ed. 529, 16 Sup. Ct. Rep. 377.

It appeared that Contzen was born in Germany, February 27, 1831, and came to Texas in July, 1845, and that he was not naturalized under the statutes of the United States in that behalf prior to October 20, 1861. His title to citizenship at that time is asserted on the ground that he was embraced by a collective naturalization effected by the admission of Texas into the Union.

\*It is not disputed that citizenship may [193] spring from collective naturalization by treaty or statute, nor that by the annexation of Texas and its admission into the Union all the citizens of the former Republic became, without any express declaration, citizens of the United States.

And the first question is whether Contzen was a citizen of the Republic when it became a state.

The Declaration of Independence of Texas  
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was adopted March 1, and proclaimed March 2, 1836, and the Constitution of that Republic was ordained March 17 of that year.

Section 6 of the "General Provisions" of that instrument reads: "All free white persons who shall emigrate to this Republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this Constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship."

By § 10 it was provided that "all persons (Africans, or descendants of Africans, and Indians excepted) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic and entitled to all the privileges of such." 2 Charters and Constitutions, 1760.

The fundamental law of the Republic thus identified as citizens only such persons as were residing in Texas on the day of the Declaration of Independence, or should be naturalized according to its provisions.

Section 10 also provided that "no alien shall hold land in Texas except by titles emanating directly from the government of this Republic;" and by an act of 1837 appointments of aliens to military office were forbidden. 2 Laws Rep. Texas, p. 61.

Aliens as well as Africans and Indians were recognized constituents of the population.

March 1, 1845, a joint resolution for the annexation of Texas was approved, which provided that the territory of that Republic might be erected into a new state, "with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the

[194] same may be admitted \*as one of the states of this Union." The government of Texas thereupon consented to annexation, and a convention was called to sit at Austin on July 4, 1845, for the adoption of a Constitution for the proposed state. That convention assented to and accepted the resolution of Congress, and framed a Constitution, which was submitted to and ratified by the people October 13, 1845.

The joint resolution for the admission of Texas into the Union was approved December 29, 1845. This recited the previous proceedings, and that the Constitution, "with the proper evidence of its adoption by the people of the Republic of Texas," had been transmitted to the President of the United States and laid before Congress. An act of Congress was passed on the same day, December 29, 1845, by which the laws of the United States were "declared to extend to and over, and to have full force and effect within, the state of Texas, admitted at the present session of Congress into the Confederacy and Union of the United States." 2 Charters and Constitutions, 1764, 1765, 1768, 1783; 5 Stat. at L. 797; 9 Stat. at L. 1, chap. 1; 9 Stat. at L. 108.

Contzen was a minor in 1845, and his nationality of origin attached. He did not re-

side in Texas on the day of the Declaration of Independence; he had not resided there six months at the date of the admission of Texas into the Union; he had not taken the oath of allegiance to the Republic; he was simply, as Davis, J., delivering the opinion of the court of claims, said, "a German subject lately arrived in Texas." Clearly he was not a citizen of Texas when the state was admitted.

But it is contended that by his stay in Texas of less than six months Contzen became one of the people of Texas; that the people were admitted into the Union; and that all who were competent thereupon became citizens of the United States. In other words, that the effect of the proceedings through which annexation and admission were accomplished was not simply to collectively make citizens of the United States of all the then citizens of Texas, but to collectively naturalize all who might have been naturalized in Texas, but had not been, and had in no way signified their election to become citizens of the United States. And that this included alien minors independently of their parents.

\*We cannot concur in this view, and do [195] not think such was the intention of Congress or of the people applying for admission.

Texas occupied towards the United States the position of an independent sovereignty. Its citizens were determined by its laws, and they prescribed the manner in which aliens might become citizens.

The United States admitted Texas as one of the states of the Union with its population as it stood. Those who were citizens of the state became citizens of the United States, while aliens were relegated for naturalization to the laws of the United States on that subject.

It is true that § 2 of article 3 of the state Constitution, transmitted to Congress in the process of admission, provided that "all free male persons over the age of twenty-one years (Indians not taxed, Africans, and descendants of Africans excepted) who shall have resided six months in Texas, immediately preceding the acceptance of this Constitution by the Congress of the United States, shall be deemed qualified electors."

But we need not consider the effect of that clause, as Contzen did not come within it.

The subject of collective naturalization is discussed at length in *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375, and many cases cited and illustrations given. The case before us, however, is not one of a treaty of cession, or relating to a territory of the United States, and involving the construction of acts of Congress for its government, or of enabling acts for its admission.

Contzen, as we have said, was a minor at the time Texas was admitted. If he elected, when he attained his majority, to become a citizen of the United States, the way was open to him.

By the act of May 26, 1824, carried forward into § 2167 of the Revised Statutes, special provision was made for the natural-



[196] ization of alien minor residents on attaining majority, by dispensing with the previous declaration of intention, and allowing three years of minority on the five years' residence required; but he was obliged, at the time of his admission, to take the oath to support the Constitution, and of renunciation of all allegiance and fidelity to any foreign sovereign, in court, \*and also to declare on oath and prove to the satisfaction of the court that for two years next preceding it had been his bona fide intention to become a citizen of the United States, and in all other respects to comply with the laws in regard to naturalization.

The usual proof of naturalization is a copy of the record of the court admitting the applicant, though, in some instances, there may be facts from which, in the absence of the record, a jury may be allowed to infer that a person, having the requisite qualifications to become a citizen, had been duly naturalized. But the finding of facts in this case excludes any presumption that Contzen had complied with the statute prior to October, 1861.

*Judgment affirmed.*

MARK K. LOWRY, Delucius L. De Witt,  
and James G. Smith, *Plffs. in Err.*,

*v.*

SILVER CITY GOLD AND SILVER MINING COMPANY.

(See S. C. Reporter's ed. 196-198.)

*Error to state court—decision based on estoppel.*

A writ of error to a state court to review a decision in favor of the lessor of a mining claim against lessees who have attempted to make a new location will be dismissed by the Supreme Court of the United States, when one ground of the decision, sufficient to dispose of the case, is that the lessees are estopped to contest the rights of the lessor.

[No. 104.]

*Argued and Submitted November 14, 1900.  
Decided December 3, 1900.*

IN ERROR to the Supreme Court of the State of Utah to review a decree sustaining the title of the lessor of a mining claim against the claims of lessees. *Dismissed.*

See same case below, 19 Utah, 334, 57 Pac. 11.

Statement by Mr. Justice Brewer:

[196] \*On January 1, 1889, the Wheeler Lode mining claim, a claim 1,500 feet in length by 600 feet in width, was duly located on

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois ex rel. Akin, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to Re Buchanan, 39 L. ed. U. S. 884.

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mineral lands situated in the Tintic mining district, Juab county, Utah. The title to the claim passed to the defendant in error, and its right thereto was kept alive by regular performance of the prescribed annual work. On February 8, 1897, it leased this claim to two of the plaintiffs in error, Lowry and De Witt, for eighteen months, and those lessees went into possession and continued work on the mine. On June 4, 1897, the owners of a mining claim called the Evening Star applied for \*a patent, and included in their application a portion of the Wheeler claim. They published due notice of their application, and the sixty days given by statute for commencing an adverse suit passed without any such suit by the defendant in error, the owner of the Wheeler mining claim. Thereupon the two lessees, together with the other plaintiff in error, Smith, attempted to locate a new claim, called the Little Clarissa, upon the ground covered by the Wheeler claim. This attempted location was made two or three days after the expiration of the sixty days' publication by the owners of the Evening Star, and while the lessees were in possession under the lease from the owner of the Wheeler claim. It appears by the surveys that the premises claimed by the Evening Star included the original discovery shaft of the Wheeler location, the same being within 2¼ feet of the boundary line. It also appears that the original discovery shaft of the Wheeler claim was sunk only about 9½ feet in depth, and was then practically abandoned; that the vein was traceable and was traced on the surface for something like 500 feet within the boundaries of the Wheeler location, and that thereafter and many years before the lease referred to a new shaft had been sunk on that vein some 200 or 300 feet in depth at a point far outside of the Evening Star location and entirely within the limits of the Wheeler location, and that this was the condition at the time the lease was executed. The contract of the lessees was that they should sink this shaft a depth of at least 6 feet each month during the life of the lease and should not allow or permit any miner's or other liens to be filed against the claim, or suffer any act or thing whatever to be done whereby the title of the defendant in error to the claim should be encumbered. After the location by the plaintiffs in error of the Little Clarissa claim, and a repudiation by them of the obligations of the lease, the defendant in error filed its bill in the district court of Utah in and for the county of Juab, to quiet its title, restrain the defendants from occupying the premises, and for restitution thereof. This suit was commenced after the publication by the locators, the lessees, and Smith, of an application for a patent for the Little Clarissa mine, and within the sixty \*days required for commencing an adverse suit. The district court entered a decree quieting the title of the plaintiff, ordering restitution, and enjoining the defendants from entering upon the premises, or in any way interfering with plaintiff's possession and enjoyment of the premises. This decree was affirmed by the su-

preme court of the state (19 Utah, 334, 57 Pac. 11), and thereupon this writ of error was brought.

**Mr. O. W. Powers** argued the cause, and, with **Messrs. Arthur Brown** and **H. P. Henderson**, filed a brief for plaintiffs in error.

**Messrs. C. S. Varian** and **F. S. Richards** submitted the cause for defendant in error.

[198] \***Mr. Justice Brewer** delivered the opinion of the court:

This was plainly an attempt on the part of the plaintiffs in error—two of whom were lessees of the defendant in error—under the forms of law to appropriate to themselves property which for years had been in the unchallenged possession of the defendant in error, and upon which it had expended many hundreds of dollars. That such attempt was unsuccessful in the courts is no more than was to be expected.

The supreme court of the state placed its decisions upon two grounds: First, that, although the *Evening Star* claim included the original discovery shaft of the *Wheeler* claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the *Evening Star* the owners of the *Wheeler* had located a new shaft and developed the mine in that shaft. *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, was held not applicable. The other ground was estoppel by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131. See also *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715, and cases cited in the opinion. *The writ of error is dismissed.*

[199] \***A. J. KIZER**, *Plff. in Err.*,  
v.

TEXARKANA & FORT SMITH RAILWAY  
COMPANY.

(See S. C. Reporter's ed. 199-201.)

*Error to state court—claim under Federal statute sustained by state court.*

A decision by a state court sustaining a defense in an action for breach of contract, to the effect that the contract was in violation of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104), does not entitle the plaintiff to a writ of error from the Supreme Court of the United States under U. S. Rev. Stat. § 709, unless he set up some claim under the

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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Federal statute which was denied by the state court.

[No. 100.]

*Argued and Submitted November 13, 1900.*  
*Decided December 3, 1900.*

IN ERROR to the Supreme Court of the State of Arkansas to review a decision sustaining a defense that a contract sued on was in violation of the Interstate Commerce Act. *Dismissed.*

See same case below, 66 Ark. 348, 50 S. W. 871.

The facts are stated in the opinion.

**Mr. Oscar D. Scott** submitted the cause for plaintiff in error.

**Mr. James F. Read** argued the cause, and, with **Messrs. Gardiner Lathrop**, **Thomas R. Morrow**, **John M. Fox**, **Samuel W. Moore**, and **James B. McDonough**, filed a brief for defendant in error.

\***Mr. Justice Peckham** delivered the opinion of the court: [199]

The plaintiff in error commenced an action against the defendant in error in a circuit court of the state of Arkansas to recover damages for the breach of an alleged contract between the parties, by which the railroad company agreed to furnish cars and to transport over its road and into points in the state of Texas certain lumber for the plaintiff in error from his saw mill in Rankin, in Little River county, in the state of Arkansas, at a certain rate of compensation, and it was alleged in the plaintiff's complaint that the defendant had violated that contract by charging a greater sum for the transportation of such lumber than had been agreed upon, and the plaintiff sought to recover from the defendant in error the excess paid by the plaintiff over the contract price.

Several defenses were put in by the defendant, and among others it set up that the contract was illegal, because the transportation \*of the lumber from Rankin, in the state of [200] Arkansas, to places in the state of Texas over defendant's road, was interstate commerce, and the contract therefore violated §§ 1, 2, and 3 of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104) in that it made a discrimination in favor of the plaintiff.

The trial court held that the contract did violate that act, and was therefore void, and could not be enforced or damages recovered for its breach.

Plaintiff in error then appealed to the supreme court of Arkansas, where the judgment was affirmed, the court saying, in its opinion, that "the facts in this case, as found by the court, as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibition of §§ 1, 2, and 3 of the Interstate Commerce Law, enacted by Congress. . . . We think the contract relied on in this case is prohibited by the Act of Congress to Regulate Commerce, and is void."

Upon the affirmance of the judgment by the supreme court of Arkansas, the plaintiff brought the case here by writ of error.

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He now says that, although he set up no claim of any title, right, privilege, or immunity under the act of Congress, yet the claim which defendant specially set up under it was acknowledged and enforced by the state court, and the statute was thus construed unfavorably as to him, and that he has, therefore, a right to have the judgment of the state court, which was based on such construction, reviewed here under § 709 of the Revised Statutes of the United States. But that section provides, so far as here applicable, that when any title, right, privilege, or immunity is claimed under a statute of the United States, and the decision of the state court is against the title, right, etc., specially set up or claimed under such statute, then and in such case the judgment of the state court may be reviewed by this court.

[201] Here, the claim under the Federal statute has been allowed by the state court, and the contract sued on by the plaintiff in error has been denied validity because of its violation of that statute. It is not every case where a Federal statute has been \*construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege, or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of, the claim made under the Federal statute. The question whether that statute, properly construed, prohibited the making of such an agreement as that set up in the complaint in the state court, having been decided in favor of the claim set up by defendant under the statute, this court has no jurisdiction to review the judgment. *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715, and cases there cited; *Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385.

*The writ of error is therefore dismissed.*

LAS ANIMAS LAND GRANT COMPANY,  
Appt.,  
v.  
UNITED STATES.

(See S. C. Reporter's ed. 201-206.)

*Private land claims—claim partly allowed by Congress.*

A claim for the remainder of the land included  
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in an alleged Mexican land grant, and which has been allowed in part only by act of Congress, is not within the jurisdiction of the court of private land claims under the act of March 31, 1891 (26 Stat. at L. 854, chap. 539), §13, subd. 4, excluding claims for lands the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority.

[No. 65.]

*Argued November 13, 1900. Decided December 3, 1900.*

APPEAL from a decision of the Court of Private Land Claims dismissing a claim for lack of jurisdiction. *Affirmed.*

The facts are stated in the opinion.

Mr. William B. Vates argued the cause and filed a brief for appellant.

Mr. Matthew G. Reynolds argued the cause, and, with Solicitor General Richards, filed a brief for appellee.

\*Mr. Justice Peckham delivered the opinion [202] of the court:

The company has appealed from the judgment of the court of private land claims dismissing for lack of jurisdiction of the subject-matter its claim, and also the several claims in that court which had been consolidated with it in the case now before us.

On March 2, 1893, the appellant filed its petition in the court below in regard to the land grant in question. It therein claimed to be the owner, through mesne conveyances, of a land grant made by the governor of New Mexico, in 1843, to two residents of the then department of New Mexico (which was a department of the Republic of Mexico), named respectively Cornelio Vigil and Ceran St. Vrain. It was alleged that the grant had been, subsequently to the cession of the territory to the United States by the government of Mexico, surveyed by the United States surveyor general for the state of Colorado, and that it contained 3,640,465.21 acres. It was also alleged that pursuant to the 8th section of the act of Congress, approved July 22, 1854 (10 Stat. at L. 308, chap. 103), the then owners of the grant presented the same to the surveyor general of the territory of New Mexico, who, pursuant to the provisions of the said act, took testimony as to the nature, character, and extent and bona fides of the grant, and on September 17, 1857, rendered his decision in favor of the validity of the grant in its entirety, and transmitted his report to the Congress of the United States for its action in the premises. Subsequently Congress passed the act approved June 21, 1860 (12 Stat. at L. 71, chap. 167), the 1st section of which, in relation to claim No. 17 (the claim in question), enacted that it should not be confirmed for more than 11 square leagues to each of the claimants, Cornelio Vigil and Ceran \*St. Vrain. (This would amount to [203] something in the neighborhood of 100,000 acres of land.)

The 2d section of the act provided for a survey of the claims of Vigil and St. Vrain, and directed that it should be made with ref-



erence to actual settlers holding possession under titles or promises to settle, which had heretofore been given by said Vigil and St. Vrain in the tracts claimed by them, and these settlers' tracts were to be deducted from the area embraced in the 22 square leagues, and the remainder was to be located in two equal tracts, each in square form, in any part of the tract claimed by said Vigil and St. Vrain, selected by them, and it was made the duty of the surveyor general of New Mexico to immediately proceed to make the surveys and locations in accordance with the terms of the section.

It also appeared by the petition that Congress passed a further act in relation to this claim, approved February 25, 1869. 15 Stat. at L. 275, chap. 47. That act gave directions for the survey of the claims of Vigil and St. Vrain, and then directed that before the act of June 21, 1860 (*supra*), confirming the grant *pro tanto*, should become legally effective the claimants or their legal representatives were to pay the cost of so much of the surveys as inured to their benefit respectively. The act further provided that upon the adjustment of the claims, according to its provisions, it was the duty of the surveyor general to furnish approved plats to said claimants or their legal representatives, and after the lines were run the surveyor general was to notify Vigil and St. Vrain, or their agents, of the fact of such survey being made, and those claimants were directed, within three months after notice of such survey, to select and locate their claims in accordance with the act, and also with the act of 1860, which was amended by the act of 1869, and in case they failed to make such selection and location they were to be deemed and held to have abandoned their claim.

Various other allegations were made in the petition, not now material.

The prayer was that the validity of the title to the grant to Vigil and St. Vrain and the right of the petitioner, as their grantee, by mesne conveyances, should be inquired into by the \*court, and that the grant, with the exception of tracts heretofore confirmed and awarded under the provisions of the acts of Congress of June 21, 1860, and February 25, 1869, might be confirmed to the petitioner, or to the heirs and legal representatives of the said Vigil and St. Vrain, and if any of the lands had been sold that their value might be inquired into, and the petitioner recover the same in place of such lands as may have been disposed of by the government.

An answer was filed on the part of the government, which put in issue all the allegations of the petition as to the validity of the grant, and the answer alleged that the grant was wholly unauthorized and void.

Among other things the answer of the government also referred to and set out the report of the Senate committee to the Senate in 1860, which explained the reason for the act of 1860. Reference was made in the report to the original petition for the grant, and to the language contained therein, which asked only for a grant of a tract of land

within the boundaries of the land described in the petition, and not for a grant of the whole land so described, and it was stated in the report that such language formed no justification for the grant of the whole land described in the petition; that such grant was the act alone of the justice of the peace, who was without jurisdiction, and the committee found no proof of the approval of his action by an officer superior to him, and as his power could not go beyond the execution of the governor's orders, the committee could not and did not concur in the recommendation of the surveyor general that the grant should be confirmed for the full extent claimed. The committee thought, however, that the parties were entitled to have their title confirmed to some extent, and to what extent involved the inquiry as to the true meaning of the words "a tract of land" as contained in the original petition, and the committee reported that as "under the Mexican colonization law of 1824 and the regulations of 1828, the extreme quantity allowed to be granted by the governor to any colonist was 11 square leagues; that in the absence of any other guide a restriction of the confirmation to the extent of 11 square leagues for each claimant would be the utmost they could fairly expect, and \*would be, not only [205] a fair, but a liberal, compliance with the obligation imposed on the good faith of the United States under the terms of the treaty of Guadalupe Hidalgo." After this report to the Senate, the act of 1860, giving to each of the claimants a confirmation for 11 square leagues, was passed. The act of 1869 was also set up in the answer.

The case was thus at issue, when, after notice to the claimants, it was called for trial in the court below, the record shows that "no appearance was made by the plaintiffs and the court took the matter under advisement." On October 5, 1898, the record shows that "it appearing from the allegations of the several petitions herein that this court does not have jurisdiction of the subject-matter of the several actions, for the reason that the right to the land claimed in said suits has hitherto been lawfully acted upon and decided by Congress, it is ordered and decreed by the court that said causes be, and the same are hereby, dismissed." The land company has appealed from this judgment of dismissal to this court. The court decided the case upon a perusal of the petition, which showed the source of the grant and the action of Congress in relation to it, and held that it appeared therefrom the court had no jurisdiction.

The court of private land claims was specially organized by the act of Congress approved March 3, 1891 (26 Stat. at L. 854, chap. 539), for the purpose of hearing and determining claims of a particular character specially pointed out and described in the body of that act. It has no other jurisdiction than that granted by Congress, being confined entirely to claims of the character mentioned in the act.

The 6th section of the act describes gen-



erally the character of the claims submitted to the court for adjudication.

Section 13 of the act provides "that all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely: . . .

Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority."

[206] The history of the action of Congress in relation to this claim, as contained in the petition and in the answer, shows that, so far as the rights of the claimant under the land grants are concerned, those rights had been lawfully acted upon and decided by Congress prior to the passage of the act of 1891. The action of Congress in the act of 1860, and as thereafter amended in 1869, was a final adjudication which granted 11 square leagues to each of the two claimants, and rejected and refused to confirm the grant for any larger amount.

The claim in this case is thus brought directly within the 4th subdivision of § 13, above set forth, and it is perfectly clear that Congress did not give the court of private land claims jurisdiction to determine the rights of the parties in cases of this description.

Whatever the rights of the claimant may be, if any, to have its claim decided by a judicial tribunal, it certainly has no right to ask that the court of private land claims shall pass upon its claim when, by the very act which creates that court, it is prohibited from exercising jurisdiction in a case like the one before us.

The judgment of the court below was therefore right, and must be affirmed.

EDWARD C. BAGGS, Receiver, *Plff. in Err.*,  
v.

ALBERT G. MARTIN and Others.

(See S. C. Reporter's ed. 203-209.)

*Removal of causes—estoppel to deny jurisdiction.*

The removal into a Federal court, by a receiver appointed by it, of an action pending against him in a state court, constitutes a waiver of any right he may have had to have the matter decided by the state tribunal, but not an attempt to confer jurisdiction by consent, since the Federal court has jurisdiction, either exclusive or concurrent, of an action against a receiver it has appointed; and therefore such removal estops him from thereafter contesting the right of the Federal court to determine the case.

[No. 205.]

Submitted October 29, 1900. Decided December 3, 1900.

NOTE.—As to estoppel of party who has invoked jurisdiction to deny it after obtaining the benefit of the court's taking jurisdiction—see note to *Robertson v. Smith* (Ind.) 15 L. R. A. 273.

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ON CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit inquiring as to the jurisdiction of a Federal court on removal of an action by a receiver. *Jurisdiction sustained.*

Statement by Mr. Justice Shiras:

This was a cause brought to this court on a certificate from the judges of the circuit court of appeals of the eighth circuit. A statement of the facts and the questions put will be found in the opinion of the court.

Mr. A. M. Stevenson submitted the cause for plaintiff in error.

Mr. E. H. Wilson submitted the cause for defendants in error; Messrs. E. Keeler and H. N. Sales were with him on the brief.

\*Mr. Justice Shiras delivered the opinion of the court: [207]

Edward C. Baggs was, on July 1, 1898, duly appointed receiver of the Denver City Railroad Company, a corporation of the state of Colorado, by the circuit court of the United States for the district of Colorado, in an action brought in said court by the Central Trust Company, a corporation of the state of New York. While Baggs, as such receiver, was managing and operating said road one Mary E. Martin, while a passenger on the railroad, received injuries on account of which she died on August 7, 1898. Albert G. Martin, Harry D. Martin, and Herman H. Martin brought an action in the district court for the county of Arapahoe, state of Colorado, against Edward C. Baggs, as receiver of the Denver City Railroad Company, alleging that their mother, Mary E. Martin, had received fatal injuries by the fault and negligence of certain persons in the employ of said receiver engaged in operating said road, and claiming damages, in accordance with the laws of the state of Colorado, against Edward C. Baggs in his capacity as receiver. Thereafter, on September 19, 1898, and within due time, the receiver presented his petition and bond to the district court for the county of Arapahoe, praying for the removal of said cause from said court to the circuit court of the United States for the District of Colorado, on the alleged ground that the said action was one arising under the laws of the United States, and was ancillary to said action and proceeding in said circuit court of the United States for the district of Colorado, where in said Central Trust Company of New York was complainant and said Denver City Railroad Company was defendant. This application to remove was granted, and thereafter a trial of said cause was had in the circuit court of the United States, and a verdict and judgment were recovered against the said Edward C. Baggs, as receiver of the Denver City Railroad Company, in the sum of \$3,000. Thereafter, and in due season, [208] the record in said cause was duly removed, by writ of error, to the United States circuit court of appeals for the eighth circuit, where it still remains, the cause being as

yet undecided. Whereupon the following questions have been certified to us by the judges of the said circuit court of appeals:

"First. In view of the provisions contained in § 3 of the judiciary act approved March 3, 1887 (25 Stat. at L. 436, chap. 866), permitting receivers appointed by any court of the United States to be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver is appointed, was it competent for said Edward C. Baggs, as receiver of the Denver City Railroad Company, to remove said cause from the district court of Arapahoe county, wherein he was sued, to the circuit court of United States for the district of Colorado?

"Second. Did said circuit court for the district of Colorado, by virtue of the aforesaid removal, acquire lawful jurisdiction of said cause, and power to render the aforesaid judgment therein?"

It may be, as contended on behalf of the plaintiff in error, that the mere order of the circuit court of the United States appointing a receiver for a corporation created by the law of a state, at the suit of a citizen of another state, and where the jurisdiction of the circuit court depended on the diverse citizenship of the parties, did not create a Federal question under § 709 of the Revised Statutes, and that, accordingly, the removal of this cause from the state to the Federal court, for the sole reason that the defendant, seeking the removal, had been so appointed, was not well founded. *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316.

But, without entering into that subject, or the question of the scope and effect, as respects jurisdiction, of the act of March 3, 1887, permitting receivers appointed by any court of the United States to be sued without the previous leave of the court in which he had been appointed, we think that, in the present case, the receiver, having voluntarily brought the cause into the \*circuit court by whose appointment he held his office, cannot, after that court has passed upon the matter in controversy, be heard to object to the power of that court to render judgment therein.

We do not mean to be understood to say that mere consent, or even voluntary action by the parties, can confer jurisdiction upon a court which would not have possessed it without such consent or action. But here the circuit court had, independently of the citizenship of the parties in the damage suit, jurisdiction over the railroad and its property in the hands of its receiver. It may be that its jurisdiction was not, by reason of the act of March 3, 1887, exclusive of that of other courts in controversies like the present one. But when the receiver, waiving any right he might have had to have the cause tried in a state court, brought it before the court whose officer he was, he cannot successfully dispute its jurisdiction. The claim was against him as receiver, and, if successfully asserted, would affect the

property of the Denver City Railroad Company, which was in course of administration by the circuit court of the United States for the benefit of its creditors, among whom were the defendants in error. As, then, the cause of action arose out of the alleged misconduct of the receiver, or of his agents, for whom he was responsible, and as the property to be affected was in the exclusive control of the circuit court, that court plainly had jurisdiction to entertain and determine the controversy, whether that jurisdiction was invoked by the parties seeking redress, or, as in this case, by the receiver. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 2 Wall. 609, *sub nom. Milwaukee & M. R. Co. v. Soutter*, 17 L. ed. 886.

We therefore answer the second question put to us by the judges of the Circuit Court of Appeals in the affirmative; and it is therefore unnecessary to answer the first question, as the defendants in error are not raising it.

It is so ordered.

\*H. ABRAHAM & SON, Composed of Henry Abraham and Jacob Abraham *et al.*,  
Plffs. in Err.,

v.

MARIE L. CASEY, Administratrix of the Succession of Laurent Lacassagne, Deceased.

(See S. C. Reporter's ed. 210-220.)

*Local law in Federal court—judgment—dismissal without prejudice.*

1. The conclusion of the highest court of a state as to sale and record of title of real estate, and the nature of the rights of a mortgage creditor, are part of the local law to be accepted by the Supreme Court of the United States.
2. A decision cannot be held *res judicata* on a question of title by reason of certain language used by way of reasoning in the opinion, when the substantial effect of the decision is that the title will not be adjudicated in equity, and that the bill must be dismissed, but without prejudice to an action at law.

[No. 62.]

Submitted November 2, 1900. Decided December 3, 1900.

NOTE.—As to effect of decisions of state courts in Federal courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.



**I**N ERROR to the Supreme Court of the State of Louisiana to review a decree upholding a purchase on foreclosure sale, and ordering an injunction against interference with the property. *Affirmed.*

See same case below, 51 La. Ann. 840, 25 So. 441.

Statement by Mr. Justice **White**:

[210] \*A statement somewhat in detail of the admitted facts concerning this protracted and involved litigation is essential in order to simplify and make clear the issues which arise for decision on this record.

Jean Baptiste Cavailhez, a native of France, took up his residence about 1849 in what is now known as the parish of Vermilion, Louisiana. He married Earnestine Diaz, and they there lived together as man and wife, where a daughter, Marcelline, was born. In 1862 Cavailhez purchased a plantation and his title was recorded, and on the 19th of August, 1869, Cavailhez sold to Clarke H. Remick the plantation which Cavailhez had acquired, as aforesated. The consideration was \$15,000, \$7,000 of which was evidenced by a note of the purchaser, Remick, for that amount, payable on demand to bearer, and bearing 8 per cent interest from a stated date. The remainder of the price, \$8,000, was evidenced by four notes for \$2,000 each, maturing at one, two, three, and four years from date, bearing 8 per cent interest from their date until paid. The payment of the five notes was secured by mortgage upon the property.

[211] On the day the foregoing act of sale was passed (the 19th of August, 1869, in view of a marriage contemplated to take place between Clarke H. Remick and Marcelline Cavailhez, a marriage\*contract was entered into between them, determining, as allowed by the laws of Louisiana, the rules which should govern the property relations of the prospective spouses during the existence of the proposed marriage. Jean B. Cavailhez and his wife, Earnestine Diaz, became parties to the contract, and gave to their daughter Marcelline, as her separate property, the note for \$7,000 which had been furnished by Remick, who became responsible for the amount thereof to his intended wife as her paraphernal property. Both the act of sale to Remick from Cavailhez and the marriage contract were duly recorded. Earnestine Diaz, the reputed wife of Cavailhez, died some time before 1882. Cavailhez died in 1882, and Remick, the son-in-law, died shortly afterwards in the same year. Remick left surviving his widow, Marcelline, and four minor children. His succession was duly opened in the probate court having jurisdiction, in May, 1882. His widow, Marcelline, qualified as tutrix of the children, and after due proceedings the plantation which Remick had bought of Cavailhez was, at auction, sold by decree of the probate court, and was bought by the widow. The proceeds arising from the probate sale were accounted for in the probate court. The title by which Mrs. Remick thus acquired the plantation was also duly recorded.

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On the 22d day of August, 1883, Mrs. Remick, having become indebted to A. G. Maxwell, mortgaged the plantation which had been acquired by her as above stated to secure the Maxwell debt, which was evidenced by two notes, amounting in the aggregate to \$3,483.50, which notes were described in the act of mortgage which was recorded.

On the 5th of March, 1884, Jeanne Caroline Cavé, alleging herself to be a citizen of France, filed her bill of complaint in the circuit court of the United States for the western district of Louisiana, in which she in substance averred that she was the lawful wife of Jean B. Cavailhez, to whom she had been married in France in 1833; that Cavailhez had deserted her, had come to the state of Louisiana, and there unlawfully married and lived with Earnestine Diaz as his wife; that by the marriage relation which existed between complainant and Cavailhez it resulted that all the property acquired by him during his residence \*in Louisiana was com-[ 112] munity property, of which she was the one-half owner. It was further alleged that at the time Cavailhez deserted her in France he had in his possession separate funds which he had received from her, and that she was entitled to be secured for the repayment of such funds by a legal mortgage upon the undivided portion of the community property belonging to the husband. The death of Cavailhez and of Earnestine Diaz, his reputed wife, was stated. The sale of the plantation to Remick, the marriage contract, the death of Remick and the purchase of the plantation by Mrs. Remick at probate sale, were all alleged, and the averment was made that both Remick and his surviving wife were fully cognizant that the complainant was the lawful wife of Cavailhez, and that all the parties, Cavailhez, Earnestine Diaz, Remick, and the daughter Marcelline, had conspired for the purpose of concocting the sale to Remick and the marriage contract as an efficacious means of depriving complainant of her share in the community as the lawful wife of Cavailhez. The sole defendant to the bill was Marcelline Cavailhez, the widow of Remick, not only individually, but also as tutrix of her minor children, and as such administering the estate of her deceased husband. The prayer of the bill was "that said acts of sale and marriage contract . . . be decreed null and void; that your oratrix be recognized as the widow of said Baptiste Cavailhez and his lawful wife up to the date of his death; that the marriage between said Baptiste Cavailhez and Earnestine Diaz, both now deceased, be decreed absolutely null; that the aforesaid . . . plantation be decreed to be still the property of the estate of Baptiste Cavailhez; that your oratrix be recognized as the owner of one undivided half of said . . . plantation; that she be recognized as a mortgage creditor of said Baptiste Cavailhez in the sum of \$5,310, with interest from judicial demand, on the undivided half thereof belonging to said Baptiste Cavailhez."

Mrs. Marcelline Remick answered, both in her capacity as tutrix and individually.

[213] She averred the validity of the marriage of her father and mother; charged that even if the previous marriage between the complainant and Cavailhez had taken place as alleged in the bill, the good faith of her mother, Earnestine \*Diaz, rendered the marriage lawful as to her and her issue. The alleged fraud in the sale of the plantation and the marriage contract was denied. It was, moreover, averred that her husband Remiek, during his lifetime, had expended a considerable amount of money in improving the plantation, and that if the complainant was entitled to the relief which she sought she was in equity bound to pay the value of such improvements.

Whilst this suit was pending in the circuit court of the United States the notes held by Maxwell, and which were secured by mortgage as already stated, became due. Maxwell thereupon commenced on May 25, 1885, in the state court having jurisdiction, foreclosure proceedings according to the forms provided by the laws of Louisiana, Mrs. Mareelline Remick, individually and asatrix, being made the defendant. Under a decree of sale on the 8th of July, 1885, the plantation was sold, and was bought jointly by Laurent Lacassagne and Maxwell. The formal deed of the sheriff to them was regularly executed and recorded. On the 22d day of October, 1885, Maxwell conveyed to Lacassagne his undivided half of the property thus purchased. Thereafter, on the 11th of January, 1886, the equity cause which was pending at the time of the sale just mentioned in the circuit court of the United States was decided in favor of the complainant, the decree substantially awarding all the prayers of the bill. It declared complainant to be the lawful wife of Cavailhez, and that the sale made by him to Remiek was void; that the marriage contract between Remiek and Mareelline Cavailhez was likewise void, and therefore that one half of the property belonging to Cavailhez at the time of his death was owned by the complainant as his widow in community, and that the other half was liable to pay the amount which the complainant had asserted in her bill to be the sum of her separate property received by her husband. The decree, however, recognized in part the right of the defendant to recover for the value of the improvements which had been put by Remiek upon the plantation. A writ of possession was issued to enforce this decree, it being immaterial for the purposes of the case to ascertain what was done in execution of the writ. The complainant in the equity suit, Jeanne C. Cavé, after the decree in her favor, \*died in 1886, leaving a will, in which she instituted Francois Chapuis, a citizen of Switzerland, her universal residuary legatee, and appointed him her executor. Her estate was opened, and in the probate proceedings Chapuis was appointed as executor, and was recognized as universal legatee.

On April the 15th, 1886, Laurent Lacassagne, averring himself to be a citizen of France, filed his bill in the circuit court of the United States for the western district of

Louisiana against Francois Chapuis individually, and as universal legatee of Jeanne C. Cavé, and as her executor. The bill alleged the ownership of the complainant of the plantation which had been bought in the Maxwell foreclosure. It averred the decree in the equity cause in favor of Mrs. Jeanne C. Cavé, the fact of her death, and that Chapuis was her executor, and had succeeded to her rights as her universal legatee; it alleged a disturbance of the possession of the complainant by a writ of possession issued to enforce the decree. He, moreover, averred that the court was without jurisdiction to render the decree, because Mrs. Jeanne C. Cavé, the complainant, had falsely represented herself to be a citizen of France, when in fact she was a citizen of the state of Louisiana; it charged that the decree was inoperative as to Lacassagne, because his rights were not involved in the controversy. The prayer was that the decree be vacated; that Chapuis be perpetually enjoined from enforcing it. Chapuis demurred to the bill, first, for want of jurisdiction, because both himself and the complainant were aliens, and, second, because of a want of equity. A restraining order issued which, after hearing, was set aside, and a final decree was ultimately entered, maintaining the demurrers and dismissing the bill. From this decree Lacassagne appealed to this court.

Pending the appeal just referred to, Chapuis, having become indebted to the commercial firm of H. Abraham & Son, mortgaged the undivided half of the plantation, which had been acquired by him as above stated. He also, in the same act of \*mortgage, transferred to Abraham & Son, as security for the debt due that firm, the claim against the other undivided half of the plantation, which had been allowed Mrs. Jeanne C. Cavé, the complainant in the equity cause. He moreover thereafter caused probate proceedings to be had as to the estate of Jean Baptiste Cavailhez, provoked a sale under the order of the probate court to pay the debts of the estate, and at such sale bought the undivided half of the plantation, which it was assumed belonged to Cavailhez, in accordance with the decree in the equity cause.

In March, 1892, the appeal pending in this court in the case of *Lacassagne v. Chapuis* was here decided. The decree of the lower court which dismissed the bill absolutely was "so modified as to declare that it is without prejudice to an action at law, and, as so modified, it is affirmed with costs."

The debt due to Abraham & Son, which Chapuis had secured by the mortgage and transfer, as above stated, matured, and that firm commenced in February, 1893, proceedings in the state court having jurisdiction, to foreclose the mortgage. Thereupon Laurent Lacassagne, in May, 1893, filed his petition in the seventeenth judicial district court in and for Vermilion Parish, Louisiana, against Chapuis and Abraham & Son. He alleged his ownership of the property in virtue of the Maxwell foreclosure and his purchase from Maxwell; he charged that the decree in the original Cavé suit in the circuit



court of the United States was *res inter alios acta* as to him; that it was void because of a want of jurisdiction growing out of the fact that both parties to the cause were citizens and residents in the state of Louisiana; that the mortgage of Abraham & Son was nothing worth because of the want of title in Chapuis, and prayed that Abraham & Son be perpetually enjoined from enforcing their mortgage against the plantation, and that they with Chapuis or his successors in right be forever restrained from disputing the ownership of the petitioner. Both Abraham & Son and Chapuis excepted on the ground of *res judicata* arising from the decree of the circuit court of the United States rendered in the suit of Mrs. Cavé, and by a further exception of estoppel alleged also to have [216] arisen from the decrees in said \*cause, based on the ground that the foreclosure proceedings of Maxwell had been commenced whilst the original equity cause suit was pending. The trial court sustained both exceptions, refused the injunction, and dismissed the petition of Lacassagne. An appeal was taken by Lacassagne to the supreme court of the state of Louisiana. In that court the judgment below was reversed, and the case was remanded to the trial court with directions to hear the cause on its merits.

Lacassagne thereupon amended his pleadings, the parties defendant answered, various substitutions of persons took place, caused by the death of necessary parties; interventions were filed, and other proceedings were had, which were confusing and conflicting, and need not be referred to, except to say that the decree of this court in *Lacassagne v. Chapuis* was pleaded as an additional ground for the claim of *res judicata* and estoppel. Suffice it to say that, when the issues were finally made up, the cause was decided by the trial court against Lacassagne. He again prosecuted an appeal to the supreme court of the state of Louisiana, and the judgment of the trial court was reversed. The court finally disposed of the cause by decreeing the validity of the Maxwell foreclosure sale and the purchase thereunder, and ordered an injunction restraining Chapuis or his successors and representatives, including Abrahams & Co., from interfering with Lacassagne as the owner of the property. To such decree this writ of error is prosecuted.

**Messrs. William A. Maury, Albert Voorhies, and W. O. Hart** submitted the cause for plaintiffs in error.

**Mr. W. S. Benedict** submitted the cause for defendant in error.

[216] \*Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The Federal questions raised by the assignment of errors are that the court below refused to give due faith and credit to the decree of the circuit court of the United [217] States for the western \*district of Louisiana, and to the decree of this court in the case 179 U. S.

of *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

To determine whether these contentions are well founded, the exact ground upon which the court below predicated its conclusion must be ascertained. The court decided that the decree of the circuit court of the United States for the western district of Louisiana was not *res judicata* against Lacassagne, because he was not a party to that cause, and as to him, therefore, it was *res inter alios acta*. It further held that the *lis pendens* arising from that cause did not estop Lacassagne, since the title which he held originated prior to the inception of the suit, and was wholly independent of the issues which it involved.

These general propositions which the court announced were deduced from the following conclusions, *viz.*: 1. Under the Louisiana law Jean B. Cavailhez, as head and master of the community existing between husband and wife, had the undoubted right to dispose of the community property without the consent of his wife, and therefore the deed made by him to Remick was binding upon the community irrespective of whether Mrs. Cavé, the plaintiff in the equity cause, was or was not his lawful wife. 2. That as to the charge of fraud made conjointly against Cavailhez, his reputed wife Earnestine Diaz, his daughter Marcelline, and the purchaser Remick, such alleged fraud was wholly inefficacious, even if established as to them, to affect Maxwell, who had acquired his mortgage whilst the property stood on the public records in the name of Remick by a conveyance from Cavailhez, who had the power to make the title. 3. That the right acquired by Maxwell under his mortgage was, by the Louisiana law, a quasi alienation of the property in his favor, taking its origin, it is true, from the date of the mortgage given by Mrs. Remick, but relating back to the recorded title from Cavailhez, which was in every respect, as to Maxwell, unaffected by the issues in the equity suit. 4. That the right thus acquired by Maxwell was an independent one, springing from the undoubted power of Cavailhez to sell and from the state of the public records, on the faith of which Maxwell had the right to rely when he accepted his mortgage. 5. That the \*laws of Louis- [218] iana forbidding a transfer of property *pendente lite* did not operate to prevent Maxwell from foreclosing his mortgage pending the equity suit, because, although the foreclosure proceedings were filed after such cause was commenced, the right in virtue of which they were initiated arose long anterior to the beginning of the equity suit, and was paramount to and independent of all the controversies which were therein presented for decision.

These conclusions of the state court depended alone upon an interpretation of the local law of the state, governing the sale, the record of title to real estate, and the nature under the local law of the rights of a mortgagee creditor. 48 La. Ann. 1160, 20 So. 672; 51 La. Ann. 840, 25 So. 441. It is the duty of this court to follow the rule an-

nounced on such subjects by the highest court of a state. *Clarke v. Clarke*, 178 U. S. 186-190, 44 L. ed. 1028, 1030, 20 Sup. Ct. Rep. 873, and authorities there cited.

Accepting the rule of property under the Louisiana law to be as announced by the supreme court of that state, it is manifest that the proceedings in the equity cause were not *res judicata*, and that the *lis pendens* created by that suit did not prevent the exercise by Maxwell of his right to foreclose his mortgage, and therefore the title which he acquired in the foreclosure proceedings was not impaired by the pendency of the suit. But it is argued although this be undoubted, it is not applicable because of the decree of this court in the case of *Lacassagne v. Chapuis*. In that cause, however, the decree below which dismissed the bill was so modified as to cause it to be "without prejudice to an action at law." And the court below has expressly decided that the proceeding taken by Lacassagne in the state court, and which is now under review, was the proper method by which he could, according to the Louisiana law, test his legal rights asserted to arise from the Maxwell foreclosure proceedings, and the purchase made thereunder. It is, however, argued that in the opinion in *Lacassagne v. Chapuis* this court upheld a construction of the Louisiana law which is in conflict with that law as construed by the supreme court of Louisiana in its opinions in this case, and therefore, it is asserted, this court should apply its previous conclusions as to the law of Louisiana instead of now [219] conforming to the view of the Louisiana law subsequently laid down by the supreme court of the state. This court, it is said, by virtue of the appeal in the *Lacassagne* case, was first vested with jurisdiction to consider the Louisiana statute as to *lis pendens*, and therefore, at least, as to the parties to this record, should hold the Louisiana law to be in accord with its previous decision, although by doing so the interpretation of the state law by the supreme court of the state be wholly disregarded. But we need not pause to point out the unsoundness of this argument as applied to the question now here, since the premise which the proposition assumes is without foundation. The case of *Lacassagne v. Chapuis* came to this court on two demurrers, the one predicated on a want of jurisdiction because both parties were aliens, and the other on an asserted want of equity in the bill. The jurisdictional question as to alienage was disposed of on the ground that the bill was ancillary to the original suit. Whether the other matters alleged were within the cognizance of a court of equity was fully considered, and it was held that the claim of title in *Lacassagne* furnished no ground for equity jurisdiction. The court observed: "As the plaintiff was evicted and the plantation was put into the possession of the widow Cavé, a court of equity cannot give the plaintiff any relief until he has established his title by an action at law." True it is that subsequently, in considering whether the mortgage right of *Lacassagne* created a cause cognizable in

equity, the opinion intimated views of the Louisiana law not in accord with the law of that state, as announced by the supreme court of Louisiana as hitherto stated. But the passages referred to were merely reasoning conducive to the demonstration that the rights asserted in the bill were cognizable at law only, and therefore not the subject of equitable jurisdiction. That the court did not intend to, and did not, decide what were the legal rights of *Lacassagne* is at once demonstrated by the fact that the decree below, which dismissed the bill, was amended so as to cause it to be without prejudice to an action at law, and as thus modified was affirmed. To treat the passages in the opinion, which are relied on as having the conclusive import now in argument attributed to them, would of necessity give rise to the following deduction: The opinion \*on the one hand dismissed the question [220] of legal title from consideration because it was not within the province of a court of equity to decide who held the legal title, nevertheless the question of such title was finally disposed of in the cause.

But the premise contended for pushes to a more flagrant contradiction, since it cannot be accepted without admitting that, although the decree was "without prejudice to an action at law," the right to such action was in substance foreclosed.

*Affirmed.*

WILLIAM HENRY BALDWIN, JR., and  
Summerfield Baldwin, *Plffs. in Err.*,  
v.

STATE OF MARYLAND, to the Use of D.  
FRANK HULL, Collector of State and  
County Taxes for Washington County,  
Maryland.

(See S. C. Reporter's ed. 220-222.)

*Judgment—as to taxes of different years.*

1. A judgment establishing the liability of the estate of a ward for taxes, in a suit by the guardian to restrain their collection, is *res judicata* as to that question, in a subsequent action by the state against the sureties on the guardian's bond to collect the unpaid taxes.
2. A judgment establishing a liability to pay taxes for certain years is *res judicata* as to the liability for the taxes of a succeeding year, when the facts affecting the liability are identical in the two cases.

[No. 113.]

*Argued November 16, 1900. Decided December 3, 1900.*

NOTE.—As to conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 377; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 75; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 855.



**I**N ERROR to the Court of Appeals of the State of Maryland to review a decision sustaining a judgment against sureties of a guardian for unpaid taxes on the ward's estate. *Affirmed.*

See same case below, 89 Md. 587, 43 Atl. 857.

Statement by Mr. Justice **Brewer**:

[220] \*The facts are these: Prior to 1880 certain residents of Maryland died, leaving property to Columbus C. Baldwin, a minor. After the settlement of the estates of the decedents a guardian of the estate of said minor was appointed by the orphans' court of Washington county, Maryland. In consequence of the death of the guardian, succeeding guardians were appointed, and in August, 1891, William Woodward Baldwin was duly appointed a guardian of the estate of such minor, and gave bond to perform his duty according to law. The present plaintiffs in error were sureties on that bond. During the years of the guardianship the register of wills of Washington county made annual returns to the county commissioners of the property of estates unsettled, and among those that of the estate of this minor, and taxes were levied thereon in accordance with law, and were

[221] \*duly paid up to the year 1893. The taxes for 1893 and 1894 being unpaid, the guardian filed a bill in the circuit court for Washington county to restrain their collection. The basis of his contention was that both he and the ward were nonresidents of Maryland, and that the estate of the ward had been taken by him outside of the state. The circuit court decided against him, and denied the injunction. This judgment was affirmed by the court of appeals of the state. 85 Md. 145, 36 Atl. 764. An attempt was made to review that judgment in this court, but the writ of error was dismissed (168 U. S. 705, 42 L. ed. 1213, 18 Sup. Ct. Rep. 939) on the ground that no Federal question had been distinctly preserved, or, if preserved, that there was a non-Federal question which was decisive of the case. Thereafter, the taxes being still unpaid, and the estate still unsettled, and the same statement presented by the register of wills to the county commissioners in respect to the taxes of 1895, this action was commenced to recover from the bondsmen the amount of the taxes for the years 1893, 1894, and 1895. Judgment was rendered against them in the trial court, and affirmed by the court of appeals of the state (89 Md. 587, 43 Atl. 857), to reverse which judgment this writ of error has been sued out.

**Mr. Charles A. Boston** argued the cause and filed a brief for plaintiffs in error in opposition to the motion to dismiss:

There was a Federal question.

*Northern C. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; *State Tax on Foreign-held Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 623, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Tappan v. Merchants' Nat.* 179 U. S. U. S., Book 45.

*Bank*, 19 Wall. 490, 22 L. ed. 189; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 208, 29 L. ed. 163, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

The defendants pleaded the constitutional rights secured to them and also to their principal; this was entirely permissible.

*Hughart v. Spratt*, 78 Ky. 313; *Putnam v. Schuyler*, 4 Hun, 166; *Osborn v. Robbins*, 36 N. Y. 365; *Morse v. Hovey*, 9 Paige, 197; *Parshall v. Lamoreaux*, 37 Barb. 189; *Sawyer v. Chambers*, 43 Barb. 622.

**Messrs. Charles A. Boston** and **William Woodward Baldwin** filed a further brief for plaintiff in error.

**Mr. H. Kyd Douglas** argued the cause and filed a brief for defendant in error:

The main question in dispute, and in fact the whole one, was the construction of the statutes of Maryland as to the duties and responsibilities of guardians and the taxation of personal property in their hands. On these questions the decisions of state courts are not reviewable by the Federal courts except upon special authority.

*Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Adams v. Preston*, 22 How. 473, 16 L. ed. 273; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

No Federal question was involved; none necessary to the determination of the case; none decided in the state courts.

*Baldwin v. Washington County Comrs.* 85 Md. 145, 36 Atl. 764; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Eustis v. Bolles*, 150 U. S. 367, 37 L. ed. 1112, 14 Sup. Ct. Rep. 131; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Leeper v. Texas*, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350.

\***Mr. Justice Brewer** delivered the opinion-[221] ion of the court:

The controversy in the case reported in 85 Md. 145, 36 Atl. 764, was one between the estate of the ward and the state of Maryland. In that case the right of the state to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. The personality of the litigants, the form of the action, do not disturb the substantial fact that the controversy was between the estate of the ward and the state of Maryland, and that that controversy was determined in favor of the state. This court declining to disturb the final judgment \*of [222] the court of appeals of the state of Maryland, that controversy is settled and beyond further litigation. The matter has become *res judicata* between the estate and the state. There is no pretense that the taxes of 1895 stand in any other condition as to matter of

fact than the taxes of 1893 and 1894, which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895, comes within the force of that decision, and is determined by the conclusion in respect to the taxes of 1893 and 1894. *Johnson Steel Street-Rail Co. v. Wharton*, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The controversy, therefore, between the state of Maryland and the estate of the ward having been finally settled in favor of the state, and the only Federal question presented in this case being that already determined as to the right of the state to enforce a tax upon the property of the ward, it is unnecessary to consider the purely local question as to whether a judgment binding the estate binds also the sureties on the guardian's bond. *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Myrick v. Thompson*, 99 U. S. 291, 297, 25 L. ed. 325, 327; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939.

The judgment of the Court of Appeals of Maryland is affirmed.

Mr. Justice White and Mr. Justice Peckham dissent.

[223]\*FRED STEARNS, as County Auditor of Aitkin County, Minnesota, Plff. in Err.,  
v.

STATE OF MINNESOTA on the Relation of JAMES N. MARR.

(See S. C. Reporter's ed. 223-262.)

*Error to state court—Independent judgment as to Federal question—impairing obligation of contract—exempting from taxation—reserved power to alter, amend, or repeal—attempt to continue obligation while denying protection of contract—state as trustee of lands granted to railroads—taxation as affecting trust.*

1. The competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, are matters which the Supreme Court of the United States, on writ of error to a state court, must determine for itself by an independent judgment, as an exception to the

NOTE.—On effect of decisions of state courts in Federal courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

On the power of state legislature to exempt from taxation—see *Hogg v. Mackay* (Or.) 19 L. R. A. 77, and note.

That exemption from taxation, whether a contract or not, is not implied—see note to *Tucker v. Ferguson*, 22 L. ed. U. S. 805.

As to reserved power to alter, amend, or repeal—see note to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961.

general rule that it will accept the decision of the state supreme court on the construction of the state Constitution, though in determining the matter it may lean towards the interpretation placed thereon by the state court.

2. The power to alter, amend, or repeal by vote of the people a statute exempting a railroad company from all other taxes on payment of a percentage of its gross earnings, which is reserved by the Minnesota constitutional amendment of 1871 (Minn. Laws 1871, p. 41), cannot be exercised so as to continue in full the obligation as to payment of the percentage of gross earnings, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract.

3. Contracts between the state of Minnesota and railroad companies, made by acts of February 23, 1865 (Minn. Sp. Laws 1865, chap. 2, p. 19), and March 4, 1870 (Minn. Sp. Laws 1870, p. 338), whereby the state exempted the companies from all other taxes until a sale or lease of the lands, or sale of stumpage thereon, in consideration of a percentage on the gross earnings, were not in violation of the provisions of Minn. Const. art. 9, §§ 1, 3, requiring all property to be taxed at its true value in money, since these contracts were made by the state as a trustee of the public lands granted to it in aid of railroads, or which were granted to the corporations by Congress subject to the consent of the state, and, as the state had accepted the property as a trustee, it was not compelled to weaken the full accomplishment of that trust by subjecting the lands to taxation. If, in its judgment as trustee, the trust could be most effectually accomplished by transferring the lands subject to a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust. [Per Mr. Justice Brewer.]

[No. 20.]

Argued January 16, 17, 1900. Ordered for reargument, April 23, 1900. Reargued October 16, 17, 1900. Decided December 3, 1900.

IN ERROR to the Supreme Court of Minnesota to review a decision sustaining a statute against the contention that it impaired the obligation of a contract making an exemption from taxation. *Reversed.*

See same case below, 72 Minn. 200, 75 N. W. 210.

Statement by Mr. Justice Brewer:

\*This case comes on error to the supreme [223] court of the state of Minnesota, is brought here at the instance of certain railroad companies, and involves the question whether the real estate belonging to them, and not used in the operation of their roads, is subject to taxation according to its value, or is excepted from such ordinary rule of taxation by virtue of a contract alleged to have been made many years ago by legislation of the state, to the effect that railroad companies should pay a certain per cent on their gross earnings in lieu of taxes on all their property.

The facts are as follows, and first as to 179 U. S.



lands belonging to the St. Paul & Duluth Company:

[224] \*The Constitution of Minnesota, adopted in 1858, has always contained these provisions (article 9, §§ 1 and 3):

"Sec. 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."

"Sec. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

On May 23, 1857, by the territorial legislature of Minnesota the Nebraska & Lake Superior Railroad Company was organized. Minn. Laws 1857, chap. 93, p. 323. By an act of the state legislature, of date March 8, 1861, the name of this company was changed to the Lake Superior & Mississippi Railroad Company. Minn. Laws 1861, p. 201. By this act certain of the swamp lands granted to the state by the act of Congress of September 28, 1850 (9 Stat. at L. 519, chap. 84), were granted to that company to aid in the construction of its railroad. The St. Paul & Duluth company is the successor in interest of that company, and has succeeded to all its rights, privileges, immunities, and property. By act of Congress of date May 5, 1864 (13 Stat. at L. 64, chap. 79), as amended July 13, 1866 (14 Stat. at L. 93, chap. 178), lands were granted to the state of Minnesota to aid in building a railroad from the city of St. Paul to the head of Lake Superior. The first section declaring the grant reads: "That there be, and there is hereby, granted to the state of Minnesota for the purpose of aiding in the construction of a railroad in such state from the city of St. Paul to the head of Lake Superior, every alternate section of public land," etc. Section 5 reads:

[225] "That the said lands, hereby granted, when patented to said \*state, shall be subject to the disposal of said state for the purposes aforesaid, and for no other; and the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States."

On February 23, 1865, the legislature of Minnesota passed an act accepting the grant, and transferring the lands to the predecessor of the St. Paul & Duluth Railroad Company. Minn. Special Laws 1865, chap. 2, p. 19. The 179 U. S.

1st section, after accepting the lands granted, reads:

"And the same are hereby granted, vested in, and transferred to the Lake Superior & Mississippi Railroad Company, its successors and assigns, to be held, used, or sold and disposed of by said railroad company, to aid in the construction of a railroad, as contemplated and provided by said act of Congress, and for the equipment and operation of the same, and for no other purpose whatever, the same to be held, used, and disposed of upon and subject to the conditions in said act of Congress provided, and upon the conditions in this act contained. That in consideration of lands granted by this act, and of the lands, rights, privileges, and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the 1st day of March of each and every year after said railroad is completed and in operation, pay into the treasury of the state 3 per cent on the gross earnings of said railroad, which sum shall be in lieu of and in full of all taxation and assessments upon the said railroad, its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to said company shall be subject to like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company; but no mortgage or trust deed executed by said company upon said lands shall, for the purpose of taxation, be construed as such sale, conveyance, lease, or contract of sale."

\*Eight days thereafter, and on March 3, [226] 1865, an act amendatory of this act was passed. Special Laws 1865, chap. 8, p. 45. The 1st section of this act is as follows:

"1. That whenever any lands heretofore or hereafter granted to the Lake Superior & Mississippi Railroad Company to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed, or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance, or lease thereof shall have been made, but, in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon and all the interest of the purchaser or lessee therein may and shall, in case of default in the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act,



shall be and they are repealed. Provided, that said company shall, during the first three years after 30 miles of said railroad shall be completed and in operation, on or before the 1st day of March in each and every year, pay into the treasury of the state 1 per cent on the gross earnings of said railroad, the first payment to be made on the 1st day of March next after 30 miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the 1st day of March of each and every year, 2 per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the 1st day of March of each and every year, pay into the treasury of this state 3 per cent of the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

[227] \*The 2d section provided for acceptance of the provisions of the act by the railroad company; that when accepted "the same shall become obligatory upon the state and upon said company;" and they were accepted. Thereafter, as admitted, the railroad was constructed by the company "in reliance upon said act." Taxes were paid by the railroad company on its property in accordance with the terms of this alleged contract until 1895, and during those years the state made no attempt to levy any taxes upon these lands. In 1871 the following amendment to the state Constitution was by vote of the people duly adopted (Minn. Laws 1871, p. 41):

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state or operating its road therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property at and during the time and periods therein specified, pay into the treasury of this state a certain per centum therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

In November, 1896, this statute, passed in 1895 (Laws 1895, p. 378), was adopted by the people:

"Sec. 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used, or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and op-

eration of the railroads of said companies. Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing \*in this [228] act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last-mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void so far as it applies to the land of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

Under these provisions the state proceeded to levy taxes upon the lands of the St. Paul & Duluth company, and the validity of such taxation is the question involved.

Lands belonging to the Northern Pacific Railway Company are also involved in this litigation, and the facts in reference to those lands are these: On July 2, 1864, the Northern Pacific Railroad Company was chartered by an act of Congress to build a railroad from Lake Superior to the Pacific, and received a grant of public lands to aid in the construction thereof. The lands thus granted are those in respect to which the question of taxability arises. 13 Stat. at L. 365, chap. 217. By § 17 of that act the company was authorized to accept "any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred upon said company by the Congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid."

By § 18 it was required to obtain the consent of the legislature of any state through which, in the operation of its road, it might pass previous to commencing work. Such consent was obtained from Minnesota by an act of the legislature of that state, approved March 2, 1865. Laws 1865, p. 224. On March 4, 1870, the legislature of Minnesota passed an act \* (Minn. Special Laws 1870, p. [229] 338), the 1st and 2d sections of which are as follows:

"Sec. 1. That the lands, franchises, property, stock, and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property, and franchises of the Lake Superior & Miss-



Mississippi Railroad Company, as is provided in and by an act entitled 'An Act in Relation to the Taxation of Lands Granted to the Lake Superior & Mississippi Railroad Company,' approved March third, eighteen hundred and sixty-five. Provided, however, That the gross earnings of said railroad company on which a percentage is to be paid to the state shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state.

"Sec. 2. That said Northern Pacific Railroad Company shall have the right and authority to acquire and hold lands for right of way, depot grounds, and for all necessary purposes of said company in all respects as provided by the general laws of this state, as set forth in sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceedings, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company the right of way through and over any lands of this state to the same extent as is granted by act of Congress through and over the public lands to said company."

This act was duly accepted by the Northern Pacific Railroad Company. Thereafter its road was constructed, and up to the act of 1895, *supra*, taxes were levied and paid in the manner prescribed. The validity of taxes levied upon the lands of this company since the act of 1895, and under the authority of that act, is challenged, and becomes in this litigation one of the questions involved.

[230] Lands belonging to the Great Northern Railway Company were also involved in the litigation in the state courts, but that company is not here making any contention for a reversal of the judgment of the state supreme court.

After the act of 1895, approved by the vote of the people, proceedings were instituted to enforce the levy of taxes on the lands of these railroad companies, and the proceedings thus instituted are those which are now before us. The decision of the supreme court of the state was adverse to the railroad companies (72 Minn. 200, 75 N. W. 210), and the case is here on error to that judgment.

**Mr. C. W. Bunn** argued the cause and filed a brief for plaintiff in error:

Whether the laws of 1865 and 1870 were valid laws and constitute a contract is a question for this court, and the decision of the state court is not binding here.

*Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173.

A state may by contract based upon a valuable consideration make a binding contract  
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with an individual or corporation on the subject of taxation.

*New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Ct.* 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *Pearsall v. Great Northern R. Co.* 161 U. S. 662, 40 L. ed. 844, 16 Sup. Ct. Rep. 705; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

The acts constitute contracts in form.

*State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464.

That the acts were intended as, and understood to be, contracts, both by the legislature and the companies; that they were based on a full valuable consideration now executed; and that they ought in equity and justice to be sustained unless there is some insuperable legal objection,—is settled by a long line of decisions of the supreme court of Minnesota.

*First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224; *State v. Winona & St. P. R. Co.* 21 Minn. 472; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *St. Paul & C. R. Co. v. McDonald*, 34 Minn. 195, 25 N. W. 453; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942.

That these acts constitute a contract, provided the acts were valid laws, is not doubtful under the decisions of this court.

*Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558.

The Constitution of Minnesota adopted in 1858, art. 9, §§ 1, 3, has no application to the property in question.

*First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224; *State v. Winona & St. P. R. Co.* 21 Minn. 315; *State v. Southern Minnesota R. Co.* 21 Minn. 344; *Minnesota C. R. Co. v. Melvin*, 21 Minn. 339; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942; *Chicago, M. & St. P. R. Co. v. Pfander*, 23 Minn. 217; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *State v. Northern P. R. Co.* 32 Minn. 294, 20 N. W. 234; *St. Paul & C. R. Co. v. McDonald*, 34 Minn. 195, 25 N. W. 453; *Illinois C. R. Co. v. McLean County*, 17 Ill. 291; *Portland v. Portland Water Co.* 67 Me. 135; *State v. Crittenden County Ct.* 19 Ark. 360; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Ct.* 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *Nobles County v. Sioux City & St. P. R. Co.* 26 Minn. 294, 3 N. W. 701.

The law as settled when a contract is made must control as to the validity and effect of the contract; and this court will apply that law, ignoring a later decision of the  
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state court which would have the effect to violate the contract.

*Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090.

The alleged contract was acted on in good faith and executed. It has been treated as valid by all departments of the state government for thirty years, and was never attacked until the passage of the act of 1895. This long practical construction, and the long-continued payment of the gross-earnings percentage, with the investments which have been made in the state, forbid that this construction should now be changed to the detriment of vested rights.

*Carson v. Smith*, 5 Minn. 78, Gil. 61; *Green v. Knife Falls Boom Corp.* 35 Minn. 161, 27 N. W. 924; *Faribault v. Misener*, 20 Minn. 396, Gil. 347; *Ames v. Lake Superior & M. S. R. Co.* 21 Minn. 288; *State v. Moffett*, 64 Minn. 292, 67 N. W. 68; *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *The Laura*, 114 U. S. 411, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 25 L. ed. 198.

The laws in question are not exemption laws, and do tax the land. Therefore they comply with a requirement of the Minnesota Constitution that laws shall be passed taxing all property.

*St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *State v. Winona & St. P. R. Co.* 21 Minn. 472; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 36 N. W. 109; *Martin County v. Drake*, 40 Minn. 137, 41 N. W. 942; *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464.

The taxation is based on value.

*McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

The taxation in question is not contrary to the requirement of uniformity.

*McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atehison, T. & S. F. R. Co.* 19 Kan. 303; *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *People ex rel. St. Mary's Falls Ship Canal Co. v. Auditor General*, 17 Mich. 84; *State, Vanatta, Prosecutor, v. Runyon*, 41 N. J. L. 98; *Kittanning Coal Co. v. Com.* 79 Pa. 100.

All the legislature has done is to classify; the classification rests on reasonable

grounds, and, so far as appears, all members of the class are taxed alike.

*McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469.

The gross-earnings tax laws were confirmed by the constitutional amendment of 1871, according to whatever purport and effect the particular laws construed had.

*Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942; *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464.

Messrs. **Julien T. Davies** and **William B. Hornblower** also argued the cause, and, with Mr. Emerson Hadley, filed a brief for plaintiff in error:

This court is not bound by the construction placed by the supreme court of Minnesota upon the Constitution and statutes of that state.

*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 36, 31 L. ed. 614, 8 Sup. Ct. Rep. 741; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

The construction placed by the supreme court of Minnesota upon the Constitution of that state is incorrect.

*Rice County Comrs. v. Citizens' Nat. Bank*, 23 Minn. 280; *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *Ames v. Lake Superior & M. S. R. Co.* 21 Minn. 241; *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 36 N. W. 109; *St. Paul v. St. Paul, M. & M. R. Co.* 39 Minn. 112, 38 N. W. 925; *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594.

The determination of value of improved real estate by rental, and a taxation by percentage of the rental, cannot be held not to be a constitutional assessment according to value.

*People ex rel. Rome, W. & O. R. Co. v. Hicks*, 105 N. Y. 198, 11 N. E. 653; *People ex rel. Buffalo & State Line R. Co. v. Barker*, 48 N. Y. 70; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054.



Constitutional provisions requiring property to be uniformly assessed or taxed, or requiring property to be assessed at its actual value, similar to those under consideration, do not prohibit a legislature from commuting a tax or contracting for its release for a consideration.

Burroughs, Taxn. 66; Cooley, Const. Lim. p. 463; *Hunsaker v. Wright*, 30 Ill. 146; *Knorrville & O. R. Co. v. Hicks*, 9 Baxt. 445; *State use of Memphis v. Butler*, 11 Lea, 410, 86 Tenn. 614, 8 S. W. 586; *University of the South v. Skidmore*, 87 Tenn. 155, 9 S. W. 892; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Mississippi Mills v. Cook*, 56 Miss. 40; *Louisville & N. R. Co. v. State*, 8 Heisk. 664; *Louisville & N. A. R. Co. v. State ex rel. McCarty*, 25 Ind. 177, 87 Am. Dec. 358; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 303; *Illinois C. R. Co. v. McLean County*, 17 Ill. 291; *Kittanning Coal Co. v. Com.* 79 Pa. 100; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *New Orleans v. Davidson*, 30 La. Ann. 554; *New Orleans v. Fourchy*, 30 La. Ann. 910; *State v. North*, 27 Mo. 464.

The land-grant lands of the St. Paul & Duluth Railroad Company are not subject to the operation of §§ 1 and 3 of article 9 of the Constitution of the state of Minnesota.

*People ex rel. St. Mary's Falls Ship Canal Co. v. Auditor General*, 7 Mich. 84; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Portland v. Portland Water Co.* 67 Me. 135; *State v. Crittenden County Ct.* 19 Ark. 360; *First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224; *Illinois C. R. Co. v. McLean County*, 17 Ill. 296.

The statutes under which the St. Paul & Duluth Railroad Company claims the right to commuted taxation were not only valid and constitutional enactments of the legislature of Minnesota, but they constituted irrevocable contracts between the state and those companies.

*First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224; *State v. Wirona & St. P. R. Co.* 21 Minn. 315; *Chicago, M. & St. P. R. Co. v. Pfaender*, 23 Minn. 217; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *State v. Northern P. R. Co.* 32 Minn. 294, 20 N. W. 234; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *St. Paul & C. R. Co. v. McDonald*, 34 Minn. 195, 25 N. W. 453; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 36 N. W. 109; *St. Paul v. St. Paul, M. & M. R. Co.* 39 Minn. 112, 38 N. W. 925; *Martin County v. Drake*, 40 Minn. 137, 41 N. W. 942; Cooley, Const. Lim. p. 127; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Ct.* 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. 179 U. S.

ed. 173; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *Pearsall v. Great Northern R. Co.* 161 U. S. 662, 40 L. ed. 844, 16 Sup. Ct. Rep. 705; *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352.

The constitutional amendment of November 8, 1871, being section 32a of article 4 of the state Constitution, was an interpretation and ratification of the contract in chapter 8 of the Special Laws of 1865; and said amendment does not confer upon the legislature the right to amend or repeal the acts of 1865 without the consent of the railroad company.

*Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 472, 31 N. W. 942; *Strasser v. Conklin*, 54 Wis. 102, 11 N. W. 254.

Messrs. H. W. Childs, W. B. Douglas and A. Y. Merrill argued the cause and filed a brief for defendant in error:

The doctrine that a state can contract away so essential an attribute of sovereignty as the power of taxation should be rejected from.

*Bailey v. Magwire*, 22 Wall. 217, 22 L. ed. 850; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888; *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498; *Ford v. Delta & Pine Land Co.* 164 U. S. 666, 41 L. ed. 592, 17 Sup. Ct. Rep. 230; *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664; *Merchants' & T. Branch of State Bank v. Debolt*, 1 Ohio St. 591; *Bank of Toledo v. Toledo*, 1 Ohio St. 622; *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603; *Brewster v. Hough*, 10 N. H. 138; *Brainard v. Colchester*, 31 Conn. 407; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155; *West Wisconsin R. Co. v. Trempealeau County Supers.* 35 Wis. 257.

While this court may revise the judgment of the supreme court of a state, involving a statute of that state claimed to impair the obligation of a contract, the decision of the state court will be followed when the question is doubtful or the decision is not clearly wrong.

*Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

The taxing power of the state is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction.

*North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. ed. 287; *West Wisconsin R. Co. v. Trempealeau County Supers.* 93 U. S. 595, 23 L. ed. 814; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888.

The contention that contracts exist is opposed by the weight of judicial authority, both Federal and state.

*Welch v. Cook*, 97 U. S. 541, 24 L. ed.

1112; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Huntington v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

The constitutional amendment of 1871 served merely to temporarily validate void laws, and to authorize gross-earnings legislation in the future.

*State v. Duluth & Iron Range R. Co.* 77 Minn. 433, 80 N. W. 626; *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210.

The Constitution of Minnesota becomes operative *eo instanti* upon all property, real and personal, when it passes into private ownership.

*Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Dickerson v. Yetzer*, 53 Iowa, 681, 6 N. W. 41; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 13 Kan. 302; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805.

No such trusts inhered in the grants by the acts of Congress as to suspend or render inapplicable the operation of art. 9, §§ 1, 3, of the Constitution of Minnesota.

*United States v. Louisiana*, 127 U. S. 182, 32 L. ed. 66, 8 Sup. Ct. Rep. 1047; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Eric R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595.

The grant to the Minneapolis & St. Cloud Railroad Company does not contemplate that its granted lands shall be taxed by the gross-earnings method.

*Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 36 N. W. 109; *Re Swigert*, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; *State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield Comrs.* 23 N. J. L. 510, 57 Am. Dec. 409; *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271.

The second clause of § 9, specifying the classes of property which may be exempted, is exclusive of any further right of exemption.

*State v. United States & C. Exp. Co.* 60 N. H. 241; *Opinion of the Justices*, 4 N. H. 565; *Oliver v. Washington Mills*, 11 Allen, 268; *McBean v. Chandler*, 9 Heisk. 366, 24 Am. Rep. 308; *Zanesville v. Richards*, 5 Ohio St. 593; *Fletcher v. Oliver*, 25 Ark. 289; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408; *Hogg v. Mackay*, 23 Or. 339, 19 L. R. A. 77, 31 Pac. 780; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387.

Authority to prescribe a form of taxation appropriate to a given business, like a per centum tax upon the gross earnings of a railroad company, does not imply authority to contract away the right of taxation, wholly or in part.

*Tucker v. Ferguson*, 22 Wall. 528, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County Supers.* 93 U. S. 595, 23 L. ed. 168

814; *Pennsylvania College Cases*, 13 Wall. 190; *sub nom. Jefferson v. Washington & J. College*, 20 L. ed. 550; *Bailey v. Magwire*, 22 Wall. 217, 22 L. ed. 850; *Union Pass. F. Co. v. Philadelphia*, 101 U. S. 529, 25 L. ed. 312; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 375, 20 L. ed. 613; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406.

Assuming that a gross-earnings tax is a legitimate exercise of the taxing power, and that no contract right was acquired by virtue of the special laws in question, it follows that the question is not at all embarrassed by the fact that under the said laws the gross-earnings taxes were in lieu of other taxation upon both the granted lands and other property of the railroad companies.

*Nathan v. Louisiana*, 8 How. 82, 12 L. ed. 996; *McCulloch v. Maryland*, 4 Wheat. 419, 4 L. ed. 604; *Providence Bank v. Billings*, 4 Pet. 563, 7 L. ed. 956; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

Even under laws where the property of a railroad company was deemed exempt, the courts, with marked unanimity of opinion, have held that the exemption did not extend to all property of the company, regardless of the purposes for which it was held or the uses to which it was devoted.

*State, New Jersey R. & Transp. Co., Prosecutors, v. East, Fifth & Ninth Ward Collectors*, 26 N. J. L. 519; *Cooley, Taxn.* 151; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *St. Louis County v. St. Paul & D. R. Co.* 45 Minn. 510, 48 N. W. 334; 25 Am. & Eng. Enc. Law, p. 162, note 2.

The same strictness of rule obtains against relieving any owner of a given class of property of his just proportion of the tax, even where it is held that the legislature may exempt the class.

*Bright v. McCullough*, 27 Ind. 223; *Daily v. Swopc*, 47 Miss. 387; *Palmer v. Stumph*, 29 Ind. 329; *People v. Whyler*, 41 Cal. 351; *Portland Bank v. Apthorp*, 12 Mass. 252; *State v. United States & C. Exp. Co.* 60 N. H. 242; *Zanesville v. Richards*, 5 Ohio St. 593; *Loftin v. Citizens Nat. Bank*, 85 Ind. 341.

Such provisions are intended to prohibit discrimination in favor of or against persons and classes, either of persons or of property.

*Lehigh Iron Co. v. Lower Macungie Twp.* 81 Pa. 482; *Fletcher v. Oliver*, 25 Ark. 289; *Primm v. Belleville*, 59 Ill. 42; *Youngblood v. Saxton*, 32 Mich. 406, 20 Am. Rep. 654; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469.

Corporations fall within the purview of such provisions, as well as private individuals and all other subjects of taxation.

*Olark v. Port of Mobile*, 67 Ala. 217; *Ottawa Gas-light & Coke Co. v. Downey*, 127 179 U. S.



Ill. 201, 20 N. E. 20; *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633.

Conformity to their requirements is an indispensable prerequisite to the validity of a tax imposed in a state, when such provisions are in force.

*Sleight v. People use of Weller Twp.* 74 Ill. 47; *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144; *Northampton v. Hampshire County Comrs.* 145 Mass. 108, 13 N. E. 388; *State v. Cumberland & P. R. Co.* 40 Md. 22; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833.

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or when they are imposed uniformly upon all property or things of the same description.

*Smith v. Aberdeen*, 25 Miss. 458; *Palmer v. Stumph*, 29 Ind. 329; *Norris v. Waco*, 57 Tex. 635; *Dyar v. Farmington*, 70 Me. 515.

[230] \*Mr. Justice Brewer delivered the opinion of the court:

The supreme court of Minnesota held that the contract alleged to have been made with the railroad companies for a per cent of the gross receipts in lieu of all taxation upon their property was, in view of the provisions of §§ 1 and 3 of article 9 of the state Constitution, one beyond the power of the legislature to make. We quote from its opinion:

"The language of the Constitution is clear, exact, and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property.

[231] "It may be true, as claimed, that a gross-earnings tax (if subject to amendment) is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the \*property of railway companies and similar corporations is of great practical and material advantage to the state; but the fact remains that the taxation of all property upon the basis of its cash value was the sole rule ordained by the Constitution to secure equality and uniformity of taxation.

"We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. *State ex rel. Marr v. Luther*, 56 Minn. 156, 57 N. W. 464.

"But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors.

"Our conclusion is that Laws 1895, chapter 168, does not impair the obligation of any contract between the state and railway companies, and that the lands here in question

are taxable in the ordinary way, as other lands are taxable."

The Federal question thus suggested is the single one for consideration. Was there a valid contract created by the legislation providing for the taxation of all railroad property (lands included) on the basis of a per cent of the gross earnings, which was impaired by the legislation of 1895, withdrawing the lands from this arrangement, and directing their taxation according to their actual cash value? And, first, as to the St. Paul & Duluth company: That a contract was attempted to be made is obvious. The state, as trustee, held certain swamp and railroad lands. It proposed to give them to the company, subject to taxation in a certain way, if the company would construct the railroad. The company accepted the proposition and constructed the road. Thus, if the parties were competent to enter into such an arrangement, a contract was made. While some of the lands, the swamp lands, were granted to the state for a purpose other than railroad construction, they were granted in trust, and it has long since been settled that Congress alone \*can inquire into the [232] manner in which the state executed that trust and disposed of the lands. *American Emigrant Co. v. Adams County*, 100 U. S. 61, 69, 25 L. ed. 563, 566.

With respect to the Northern Pacific Railroad Company, the facts are slightly different, but the state legislation in respect to it was of a character to place its land grant in the same condition, so far as the question of contract is concerned. For the land grant to the company became operative within the limits of a state only when such state consented to the construction of the road. The power to consent carried with it the power to determine the conditions upon which such consent should be granted, and when the state of Minnesota said that the Northern Pacific Railroad Company might construct its road through the state, and might accept the provisions of the congressional grant, and prescribed the conditions upon which such road should be constructed and such grant should be taken, the effect of such legislation is the same as though the state received the grant and transferred it to the company on those conditions. It said, in substance, that, though the land was not given to the state to be transferred to a railroad company (and in that case the state might have prescribed the conditions of the transfer), it was given to the company subject to the assent of the state, and the state's assent to the gift was upon the conditions it named. The offer thus made by the state was accepted, and in reliance thereon the road was constructed.

Of course, withdrawing any portion of the property protected by the 3 per cent commutation, and subjecting that to ordinary taxation, leaving the 3 per cent still due from the railroad companies, changes materially the terms of the alleged contract, so that there can be no question that if there were a valid contract created by the earlier legislation, the act of 1895 impairs its obligation. The



general rule of this court is to accept the construction of a state Constitution placed by the state supreme court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract,

[233] were matters which \*in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.

In *Douglas v. Kentucky*, 168 U. S. 483, 42 L. ed. 553, 18 Sup. Ct. Rep. 199, this question was considered at length, and, by Mr. Justice Harlan, after a review of some prior cases, the conclusion was thus stated (p. 502, L. ed. p. 557, Sup. Ct. Rep. p. 204):

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 452, 14 L. ed. 997, 1011; *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. ed. 921, 923; *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 697, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 667, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 36, 31 L. ed. 607, 614, 8 Sup. Ct. Rep. 741; *Bryan v. Kentucky Conference, M. E. Church, South, Bd. of Edu.* 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 493, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968; *Bacon v. Texas*, 163 U. S. 207, 219, 41 L. ed. 132, 137, 16 Sup. Ct. Rep. 1023."

See also *McCullough v. Virginia*, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134; *Walsh v. Columbus, H. V. & A. R. Co.* 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393.

As a preliminary matter, it is worthy of note that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. Whether the revenues of the state were benefited or injured by this method of taxation we are not advised, but it does appear that neither party challenged it. Both the railroads and the state accepted and acted under it for nearly a third of a century. It may be well to notice the decisions of the supreme court of Minnesota prior to the one challenged in this proceeding. In *First Div. St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224, it appeared that a railroad charter had been granted by the territorial legislature, containing, among other things, a provision similar to the one in question, commuting all taxes on the basis of 3 per cent on the gross

earnings. \*The company having defaulted in its contract, foreclosure proceedings were had, and its property, franchises, etc., were brought in by the state. All this was done in pursuance of express statutory provisions. Thereafter an act was passed transferring to a new corporation all the property, franchises, etc., acquired by this foreclosure, and the question presented was whether this new company was entitled to the 3 per cent commutation; and it was held that it was. The opinion of the court was that, by the foreclosure proceedings the state acquired, without any merger, all the franchises and privileges held by the territorial corporation, and that it could transfer them to a new corporation of its own creation. We do not stop to question the argument of the supreme court to the effect that there was no merger. All that we deem necessary to notice is that the estate by the foreclosure proceedings acquired title to property,—railroad property, including lands granted to aid in construction,—and, having that property, could dispose of it free from any limitations imposed by the constitutional provisions which are now referred to as invalidating the present alleged contract. In other words, the state could take and dispose of lands upon precisely the same terms which it took and disposed of the lands to the present plaintiffs in error.

This decision was recognized and reaffirmed in *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469, 475, in which it was said:

"Upon the renewal of the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of 30 instead of 50 miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances, and other property, from all taxation, and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the Constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the state government, but, by an express constitutional \*amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

See also *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 470, 31 N. W. 942, in which is this declaration:

"That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota & Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul & Pacific Railroad Company and to the First Division of the St. Paul & Pacific Railroad Company, may be now accepted without question. It was so decided eighteen years ago in the case of the last-named company v. *Parcher*, 14



Minn. 297, Gil. 224, which decision has been ever since followed. *State v. Winona & St. P. R. Co.* 21 Minn. 315; *Minnesota C. R. Co. v. Melvin*, 21 Minn. 339; *Chicago, M. & St. P. R. Co. v. Pfaender*, 23 Minn. 217; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 475; *Nobles County v. Sioux City & St. P. R. Co.* 26 Minn. 294, 3 N. W. 701; *State v. Northern P. R. Co.* 32 Minn. 294, 20 N. W. 234."

And also *State ex rel. Marr v. Luther*, 56 Minn. 156, 162, 163, 164, 57 N. W. 464, decided 1894, in which the court said:

"The system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on 'railroad property' and on the lands granted to aid in its construction, while owned by the company, was inaugurated by the territorial legislatures, and was universally in vogue at the date of the adoption of the Constitution.

"And after that date the state legislatures invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the state, or were held by it in trust for that purpose under an act of Congress. This was the practice, not only as to old grants made before the adoption of the Constitution, but also as to new grants, both state and congressional, made after that date."

And then, after referring to a number of grants by Congress and the state, added:

[236] "In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the state by Congress for the same purpose (and which, while thus held by the state, either as proprietor or in trust, were, of course, not subject to taxation), it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the state a single grant of lands to aid in the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871 (Const. art. 4, § 32a), where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the Constitution, which of itself would be entitled to great weight."

It would seem from these decisions to have been the settled law of the state that it could, after the adoption of the Constitution of 1858, acquire title to lands and dispose of them subject to the same conditions under which the lands in controversy were granted to the plaintiffs in error.

In *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, legislation of the territory of Dakota, providing for the taxation of the lands of the Northern Pacific Railroad Company on the basis of a

percentage of the gross earnings of the railroad company, was held not in conflict with the mandate in the organic act that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." While the language of this organic act is not the same as that of the Minnesota Constitution, in that the Minnesota Constitution by implication requires the taxation of all property except that by its terms specifically exempted, and this act makes no provision in respect to the matter of exemption; yet in respect to property subject to taxation it, like the Minnesota Constitution, requires taxation "in proportion to [237] the value of the property taxed. It is doubtless true that it has been held that forbidding an exemption from taxation and requiring taxation according to the "true value in money" forbids taxation otherwise than in accordance with established general rules in respect to valuation, and prevents a commutation on a different basis; yet there have been rulings of the supreme court of Minnesota to the effect that commutation is not the same as exemption, or forbidden by a constitutional provision which forbids exemption, and that it may sometimes be the surest way of reaching taxation according to the "true value in money," and is, therefore, not necessarily an infringement of a constitutional provision requiring such taxation. Thus, in *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 535, 24 N. W. 196, the court said:

"This is not an immunity from taxation, but a commutation of taxes,—another and substituted way prescribed by law, in which the respondent, as the owner of this land among other property, is to contribute its share to the public revenue."

And in *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 542, 24 N. W. 313:

"It was not in reality a plan for *exempting* property from taxation, but a substituted *method* of taxation. It must be supposed that it was contemplated that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them."

So, also, in *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 165, 36 N. W. 109:

"It has been considered that the purpose of such statutes has been, not to exempt property from taxation, but to provide a substituted method of securing to the state its proper revenue from the taxable property of these corporations. *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 535, 24 N. W. 196; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313."

And, further, in *St. Paul v. St. Paul, M. & M. R. Co.* 39 Minn. 112, 113, 38 N. W. 925:

"As was said in *Ramsey County v. Chi-* [238] *cago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313."



W. 313, these charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the state will be equivalent in its results to taxation of the property."

And again, in *State ex rel. Marr v. Luther*, 56 Minn. 156, 160, 57 N. W. 464:

"It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although derived wholly from the former, is a commutation tax alike on both."

The contract made in 1865 with the predecessor of the St. Paul & Duluth Railroad Company, void at that time but made valid by the constitutional amendment of 1871 (as by the supreme court of the state now affirmed), commuted the taxes on all railroad properties, including its lands not used for railroad purposes, by the payment of 3 per cent on its gross earnings. Confessedly after that amendment there existed a binding contract between the state and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of 3 per cent of the gross earnings. If nothing had since occurred that contract, under the decision of the supreme court, would continue exempting lands not used, as well as lands used for railroad purposes, from any other taxation than that which was expressed by 3 per cent on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with the restrictive features of §§ 1 and 3 of article 9 in the state Constitution, and permitted and indorsed a peculiar method of taxation of railroad companies. The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may [239] be accepted, to wit, that by a vote of \*the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment? The law of 1895 adopted by the people does not release railroad companies from the burden of paying 3 per cent upon their gross earnings into the state treasury, but simply operates to put certain properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? It may seem a not unreasonable modification to exempt from the contract such property as is not used for railroad purposes, but would not the legislation assume a different aspect if it had subjected to ordinary taxation all the railroad property, except locomotives, and upon them

continued the burden of the payment of 3 per cent of the gross earnings? Of course, if there be no limitations in respect to the scope of amendment it would be within the power of the state to subject the bulk of the railroad property, whether used or not used for railroad purposes, to the burden of ordinary state taxation; and taking a single item like locomotives, without which the road could not be operated, continue upon the companies the duty of paying 3 per cent of the gross earnings. While it may be that no such inconsiderate action is to be expected, the possibility of such action suggests a query whether the power of repeal or amendment, preserved by the constitutional amendment of 1871, has not some limitations.

Giving to that power full scope, it may be said that if the prior legislation was unauthorized by the Constitution, a repeal of the amendment would wipe out the whole provision in reference to railroad taxation, and subject all railroad property within the limits of the state to the ordinary rule in respect to taxation. So it may be that the reserved power of amendment carries with it the right to increase or diminish the rate per cent of taxation. But a different question is presented when it is insisted that the power of amendment carries with it the right of continuing the rate per cent as to part only, but not all, of the property covered by the original contract. For, as stated, if the state can withdraw the lands not used for railroad purposes from the scope of this contract commutation, can it \*not to-morrow [240] likewise withdraw the lands which are used for railroad purposes, including therein the right of way, the tracks thereon, all the grounds occupied by station houses, etc., and then, on the day thereafter, withdraw from it all the personal property of the companies, except their locomotives, and still hold the corporations to the burden of the contract? May it not be fairly contended that the privilege of amendment reserved was as to the rate, and not as to the property to be included within the commutation? That the power of amendment has its limitations, or rather that an amendment may not be wholly as to the right of the state, and absolutely ignoring the right of the other party to the contract, has been adjudged by this court in *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346. In that case it was held that while under a statute the water company had been exempted from taxation on condition that it supplied water free to the city of Louisville, an act withdrawing that exemption from taxation, although silent as to the corresponding obligation of the water company, must be construed as releasing it from an obligation based upon such exemption. So it may well be said in the case before us that a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in full, and at the same time deny to the company, either



in whole or in part, the exemption conferred by the contract.

But there is another matter of significance. The lands in controversy were granted by Congress to the state as trustee. The act of 1865, by which the state offered the lands to the predecessor of the St. Paul & Duluth company, is entitled "An Act to Execute the Trust Created by the Act of Congress." The right of a state to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country. These lands were not donated by Congress to the state, to be used by it for its own benefit and in its own way, but were conveyed to the state in trust with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the purposes of the trust. Of course, this implied that, except as restrained by its own powers, the [241] state should make the grant as valuable as possible for the accomplishment of the purpose of the trust. Under those circumstances the peculiar nature of the trust created enabled the state to determine the limits and mode of taxation to which that property thus placed in its hands should be subjected. It might have provided that the title be retained by the state, that no conveyance be made to the railroad company, and that the first and only conveyance should be when the railroad company had made a contract with some individual for its purchase, and that contract had been completed by full payment to the company. Is it to be doubted that the state, retaining the title, although authorizing the railroad company to sell, could, while that title was so retained, hold it free from any kind of taxation? Would it not be a legitimate and appropriate discharge of the trust conferred if the state adjudged that such property should be held in its own name free from all taxation until such time as its full value in cash could be obtained from some individual? If the state could retain the title free from taxation until such time as its disposition to a private purchaser enabled the railroad company to realize the full value of the land, was it not also within its power to say that a temporary transfer to the corporation charged with the duty of constructing the railroad should also be accompanied by a like exemption from taxation? And if it could exempt from all taxation, it might with equal propriety say that it should be subjected to taxation in only a limited way.

Of course, it may be said, and in a general way rightfully so, that the powers of the legislature of a state are limited by its constitutional provisions. It follows therefrom that in dealing with property generally the legislature must, in respect to taxation, as in all other matters, keep within the express constitutional limits as interpreted by the highest court of the state. We would not weaken, even if we had authority so to do, the full scope of this constitutional obligation. Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the courts, state and na-

tional, as obligatory. And if the property in controversy was "that which passed directly into the mass of the general property of the state it might properly be said that the construction placed on constitutional limitations by the supreme court of the state determined absolutely for all courts, state and national, the full scope of the legislative power."

And in this respect we may notice the suggestion of the supreme court of the state, that other lands than these might be withdrawn from the general rule of taxation provided by the state Constitution, and the statement made by counsel in argument that many corporations had received in the early days of the state commutations based on a like principle. We quote the language of the supreme court:

"It is further claimed on behalf of the appellant that the mandates and inhibitions of the Constitution as to the taxation of all private property have no application to public lands which passed into private ownership with the privilege of commuted taxation created with respect to them while they were yet public lands. If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the state after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxes.

"The mandate of the Constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition. It would be a palpable evasion of the Constitution to permit the legislature to absolutely transfer public lands to private owners vested with the privileges and immunities as to taxation which are prohibited by the Constitution."

We think the apprehension of the supreme court is one more of imagination than of fact. It is true that Congress might act so as in effect to keep withdrawn a large area of the state from taxation. Under the reservation in the act of admission and the acceptance thereof by the state of Minnesota the right of Congress to determine the disposition of public lands within that state was reserved, and, according to the decision in *Van Brocklin v. Tennessee*, 117 U. S. 151, [243] *sub nom. Van Brocklin v. Anderson*, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, lands belonging to the United States are exempt from taxation by the state. So that if Congress should determine that the great body of public lands within the state of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation; and yet it cannot be imputed to Congress that it would discriminate against the state of Minnesota, or pass any legislation detrimental to its interests. It had the power to withdraw all the public lands in Minnesota from private entry or public grant, and, exercising that power, it might prevent the state of Minnesota from taxing a large area of its lands, but no such

possibility of wrong conduct on the part of Congress can enter into the consideration of this question. It is to be expected that it will deal with Minnesota as with other states, and in such a way as to subserve the best interests of the people of that state. That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power. So the fact that Congress might, if it saw fit, withdraw the public lands in Minnesota from sale, and thus prevent their taxation, furnishes no reason for denying the efficacy of the power to grant such lands, subject to conditions binding upon the state, or the right of the state, as its trustee, to prescribe limitations upon taxation. And this must be said bearing in mind that to the full extent there is no question of the duty of the legislature of Minnesota to subject any but trust property to the absolute scope of its constitutional provisions in respect to the matter of taxation. And in respect to the lands in controversy it must be remembered that they were granted to and accepted by the state in trust, and it cannot be doubted that the state has the power to compel its grantee to use the lands in furtherance of the trust, and prevent it from creating a large and permanent ownership of lands.

When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other states, there were within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857 (11 Stat. at L. 166, chap. 60), authorizing the inhabitants of Minnesota to form a constitution and a state government, tendered certain propositions \*to the people of the territory, coupled in § 5 with this proviso (11 Stat. at L. 167, chap. 60) :

"The foregoing propositions herein offered are on the condition that the said convention which shall form the Constitution of said state shall provide, by a clause in said Constitution, or an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall nonresident proprietors be taxed higher than residents."

And in article 2, § 3, of the Constitution, passed by virtue of this enabling act, reads as follows (Gen. Stat. Minn. 1894, p. lxxiv.) :

"The propositions contained in the act of Congress entitled 'An Act to Authorize the People of the Territory of Minnesota to Form a Constitution and State Government Preparatory to Their Admission into the Union on an Equal Footing with the Original States,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same, by the United States,

or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall nonresident proprietors be taxed higher than residents."

That these provisions of the enabling act and the Constitution, in form at least, made a compact between the United States and the state, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question \*as to [245] the validity of these two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation.

That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history. Section 10 of article 1 of the Constitution provides that "no state shall, without the consent of Congress, . . . enter into any agreement or compact with another state." It was early ruled that these negative words carried with them no denial of the power of two states to enter into a compact or agreement with one another, but only placed a condition upon the exercise of such power. Thus in *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547, a compact between Virginia and Kentucky was sustained, and it was held no valid objection to it that within certain restrictions it limited the legislative power of the state of Kentucky. In *Poole v. Flcger*, 11 Pet. 185, 9 L. ed. 680, 955, an agreement between Kentucky and Tennessee as to boundary was upheld, Mr. Justice Story, speaking for the court, saying (p. 209, L. ed. p. 690) :

"It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the



[246] law and practice of nations. It is a right equally belonging to the states of this \*Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that 'no state shall, without the consent of Congress, enter into any agreement or compact with another state,' thus plainly admitting that, with such consent, it might be done, and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states."

The same doctrine was announced in *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 531, 13 Sup. Ct. Rep. 728, and in the opinion in that case it was intimated that there were many matters in respect to which the different states might agree without the formal consent of Congress. In this case the difference between the agreements which states might enter into between one another and those from which they were debarred without the consent of Congress was noticed, and it was said (p. 518, L. ed. p. 542, Sup. Ct. Rep. p. 734):

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district and thus removing the cause of \*disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? . . .

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"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, § 1403, referring to a previous part of the same section of the Constitution, in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter \*into any [248] compact or agreement might be attended with permanent inconvenience or public mischief.'"

If as "a part of the general right of sovereignty" to which Mr. Justice Story refers in the quotation above made, the right of agreement between one another belongs to the several states, except as limited by the constitutional provisions requiring the consent of Congress, equally true is it that a state may make a compact with all the states, constituting as one body the nation, possessed of general right of sovereignty and represented by Congress. That Congress has consented is shown by the fact that it proposed the terms of the agreement and declared the state admitted on its assent to those terms.

The Constitution, article 1, § 8, provides that—

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

By an act of February 22, 1875, the legislature of Kansas ceded to the United States

jurisdiction over the territory of the Fort Leavenworth Military Reservation, reserving, not only the right to serve civil and criminal process, but also the right to tax railroad, bridge, and other corporations, their franchises and property, within the limits of the reservation. And in *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995, that cession was held valid, Mr. Justice Field, delivering the opinion of court, saying in reference to this question (p. 541, L. ed. p. 270, Sup. Ct. Rep. p. 1004):

"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution."

[249] \*The act admitting Kansas into the Union contained in its 1st section this provision (12 Stat. at L. 127, chap. 20):

"That nothing contained in the said Constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, . . . or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed."

Under the provisions of the treaty of 1854, between the Shawnee Indians residing within the territory of Kansas and the United States, certain of their lands were allotted to individual members and patented to them, with the express restriction that "the said lands shall never be sold by the grantee, or his heirs, without the consent of the Secretary of the Interior." In the case of *The Kansas Indians*, 5 Wall. 737, 757, *sub nom. Blue Jacket v. Johnson County Comrs.* 18 L. ed. 667, this court, holding a law of the state of Kansas subjecting these lands to taxation invalid, said:

"There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired, and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. . . . While the general government has a superintending care over their interests, and continues to treat with them as a nation, the state of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union." See also *Beecher*

*v. Wetherby*, 95 U. S. 517, 523, 24 L. ed. 440.

But we need not go outside of the present case. The state of Minnesota accepted the trust created by the act of Congress. Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts, as we have seen, have been frequent in the history of the nation, and their \*validity has not only never [250] been questioned, but has been directly affirmed. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805.

There is nothing in the case of *Van Brocklin v. Tennessee*, 117 U. S. 151, *sub nom. Van Brocklin v. Anderson*, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, in conflict with these views. In that case it was held that property of the United States, situated within the limits of a state, was exempt by the Constitution of the United States from taxation by that state; and while, referring to the many exemption clauses in different acts of admission of states, it was said that they were but declaratory of the law, and conferred no new right or power on the United States, it was not held that if, in the absence of such exemption clauses, the lands of the United States would have been subject to taxation, the compact thereby created would not have been operative to relieve them. And it must be remembered that the question here is not as to exemption, but as to full control over the matter of sale and disposal.

Returning, then, to the facts of the case before us, by the provisions quoted the state expressly agreed that no tax should be imposed on lands belonging to the United States, that it should never interfere with the primary disposal of the soil within the state by the United States, or with any regulations Congress might find necessary for securing the soil to bona fide purchasers thereof. These provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the state to the terms proposed by Congress: and among these terms were that the full control of the disposition of the lands of the United States should be free from state action. Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from state interference by the terms of the enabling act and the Constitution. With this full reservation of power in Congress it is not open to doubt that that body might have made such disposition of the public lands of the United States within the state as would withhold them from the burdens of state taxation, not only until such time as all interest of the United States in the lands had ceased, but also until they had been used to fully accomplish the purposes for which Congress was selling or donating them.

\*It is true, as has been held in the ordinary [251] administration of the affairs of the land department, that whenever full payment has been made to the United States, and the full equitable title has passed to an individual



purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary state taxation. *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Northern P. R. Co. v. Patterson*, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977.

But it has also been held that until the very last moment that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation. *Kansas P. R. Co. v. Prescott*, 16 Wall. 603, 21 L. ed. 373; *Union P. R. Co. v. McShane*, 22 Wall. 444, 22 L. ed. 747; *Central Colorado Improv. Co. v. Pueblo County Comrs.* 95 U. S. 259, 24 L. ed. 495; *Northern P. R. Co. v. Traill County*, 115 U. S. 600, *sub nom.* *Northern P. R. Co. v. Rockne*, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341.

But whatever may be the rule applicable in the ordinary administration of affairs in the land department, the provisions of the enabling act and the state Constitution, before referred to, secure to the United States full control of the disposition of the public lands within the limits of the state. Within the scope of this reserved power Congress might grant to a railroad corporation public lands to aid in the construction of its road, withholding, not only the legal title, but also exemption from state taxation until such time as someone should pay into the treasury of the company the full value of the land in money to be used in the construction of its road. It would be a part of the power reserved in Congress to determine the terms and conditions upon which title should effectually pass from the government. If Congress has a right to make a private corporation its agent to thus utilize to the fullest extent the value of the land it is willing to give to aid a public enterprise, it may deal with a state upon the same basis. The state, accepting the trust given by Congress, has all the powers of a trustee, and must have also all the freedom of a trustee, and may [252] determine in what way that \*trust may be most successfully carried out. The mere fact that the legal title has passed by act of Congress from the nation to the state is not the vital fact. Under § 3, article 9, of the state Constitution public property used exclusively for any public purpose is exempted from taxation. It is undoubtedly true as a general rule that a state does not tax its own property, but we do not rest on this express language of the state Constitution. We place our conclusion upon higher grounds. Accepting this property as a trustee, as it had a right to do, it was not compelled to weaken the full accomplishment of that trust by subjection of the lands to taxation.

We do not mean to hold that it was bound to exempt the land, either permanently or for any specified time, from taxation if in its judgment as trustee it believed that the 179 U. S. U. S., Book 45.

purpose of the trust could be otherwise fully and fairly accomplished; and to that extent, and no further, goes the opinion in *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805. In that case the state saw fit to tax the land after the lapse of a certain time, in respect to which Congress had prescribed an exemption, and it was said by Mr. Justice Swayne, on page 572, L. ed. p. 815.

"She was in nowise fettered, except as she had agreed to fulfil all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires*, and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further."

But if, in its judgment as trustee, the trust could be most effectually accomplished by transferring the lands to some corporation, subject to only a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust, it was not prevented from so doing by any obligation which it was under in respect to the general mass of property within the state. When the state accepted the position of \*trustee it had all the freedom of judgment [253] which belongs to a trustee in respect to the best means of carrying the trust into execution. The legislature was the body representing the state, whose judgment was invoked as to such means, and its action was taken, not so much in discharge of its constitutional obligations to the people, as of its contract obligations as trustee to the grantor of the trust. In other words, the state either could not accept the trust, or, accepting it, was entitled to all the freedom of judgment which attends the action of a trustee, and, as we have seen, it is too late in the history of railroad aid legislation in this country to hold that a state cannot accept the position of trustee of such a grant.

Congress, acting for the United States—the owner of the lands—could, by virtue of the compact with the state, have in creating the trust provided specifically for an exemption, or for taxation in a limited way. Having failed to so prescribe the manner in which the trust should be executed, the power became vested in the trustee, the state, and it exercised it in the way indicated by the legislation of 1865 and 1870. Having that power as trustee, it could make a valid contract in respect thereto with the corporations, and they, investing their money in the construction of the road on the faith of the contract tendered and accepted, are entitled to be protected against any subsequent legislative impairment in respect thereto.

For these reasons we are of opinion that there was a valid contract made with these 12 177



companies in respect to the taxation of these lands—a contract which it was beyond the power of the state to impair; that this subsequent legislation does impair that contract, and cannot, therefore, be sustained.

*The judgment of the Supreme Court of Minnesota is reversed*, except as to lands belonging to the Great Northern Railway Company, and the case is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Brown** concurred upon the ground that the legality of commuting the payment of taxes upon railway property by a payment of a percentage upon the gross earnings, having been recognized by the legislature and the supreme court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the state Constitution as against railways which were built upon the faith of its validity.

Mr. Justice **White**, with whom concurs Mr. Justice **Harlan**, Mr. Justice **Gray** and Mr. Justice **McKenna**, assenting to the judgment of reversal:

The act which was accepted by the corporation, and which is now decided to be an irrevocable contract protected from impairment by the Constitution of the United States, in substance provided that in lieu of all other taxes upon its property of every kind and nature, whether real or personal, the railroad company should annually pay a fixed gross receipt tax of 3 per cent. It, however, provided that the public lands which the state had received from the United States, and which it had given to the corporation to aid in the construction of its railroad, might be taxed by the state in addition to the 3 per cent gross receipt tax whenever the corporation had parted with its title to such property. When this gross receipt tax was enacted the Constitution of the state commanded that taxation should be equal and uniform, and that property should be assessed according to valuation. In addition express authority was given to exempt from taxation certain enumerated classes of property, such as universities, schools, churches, burying grounds, etc. From this it resulted that the legislature was deprived of the right to exempt persons or property in any case unless embraced in the classes as to which the power to exempt was specifically granted as above stated. This is not disputed. It follows, then, that if the gross-receipt tax was an exemption it was void, because repugnant to the Constitution of the state. If so void, it did not create a contract, within the contract clause of the Constitution of the United States, for rights protected from impairment could not flow from an act which had no legal existence. The conclusion, then, that the act which imposed the gross-receipt tax created a contract protected from impairment by the Constitution of the United States must rest on the premise that such act was not an exemption. To this proposition I cannot give my assent.

True it is that in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, a territorial legislative act, which taxed a railroad corporation by a levy on its gross receipts, was decided not to be a violation of the organic act of the territory which commanded that taxation should be uniform, and that all property should be assessed by a method of valuation. But in that case no question of contract was involved, and the issue presented and the one decided was that the territorial legislature, in selecting a gross-receipt tax as the method for reaching railroad property, did not necessarily violate the organic law of the territory as to uniformity and valuation. But this ruling is inapposite to the present case, where the question is not whether the legislature of Minnesota was empowered by the Constitution of that state to provide that railroad property should be taxed by a gross-receipt tax, but whether, conceding the legislature had the authority to enact such a tax as to railroads or any other class by it selected, it possessed the additional power to enter into an irrevocable contract, by which the method thus selected as to the persons and property designated should be forever thereafter continued.

It seems to me the moment it is admitted that the gross-receipt tax is an irrevocable contract, thereby it necessarily results that an exemption from taxation was provided for. The object of forbidding exemptions from taxation is not alone to secure revenue, but is to preserve untrammelled by contract the fulness of all the lawful power of taxation in the successive repositories of such power. In other words, forbidding exemptions in terms directs that no one legislature shall by contract limit the lawful rights of its successors, by taking particular property out of the legislative authority to tax, on the assumption that such persons or property are thereafter to be governed by a contract which exempts from all future exercise of the legislative power of taxation. This seems so obvious that I cannot find words to express the thought that a particular person or property is irrevocably taken, by contract, beyond the reach of the legislative right to tax by any lawful mode deemed from time to time to be best for the public interest, without at the same time saying \*that by [256] such an irrevocable contract an exemption from taxation is created.

Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form. Undoubtedly some of these decisions held that a gross-receipt tax was valid, just as it was so held in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242. But, as I have said, to decide that the general assembly of Minnesota could select a gross-



receipt tax without violating the rule of uniformity or the requirement of valuation, did not involve the question whether one legislature, in exercising its discretion as to such subjects, could, in addition, impose by an irrevocable contract its action on the succeeding legislatures of the state.

The first case which arose in Minnesota, in which the question whether the levy of a gross-receipt tax and the acceptance of the terms of the act by a corporation made an irrevocable contract, is the one now here, and there can be no question that the supreme court of Minnesota has declared unequivocally that the element of irrevocable contract, if upheld, would cause the act or acts to become exemptions, and therefore repugnant to the Constitution of the state. Even if, however, the Minnesota decisions, prior to the one now before us, had the import which is deduced from them, in my opinion they would not be decisive of this controversy. The decisions in question were not rendered prior to the enactment of the gross-receipt tax, which is here in controversy, and therefore it cannot be argued that they entered into and formed a part of such act. In adjudging whether a contract has been impaired by subsequent legislation, it is elementary that this court determines for itself whether there was a contract. Whilst it is true that in making such inquiry the persuasive power of state decisions will be taken into view, nevertheless the duty ever remains to determine independently whether the contract existed which it is asserted has [257] been \*impaired. Discharging such duty in this case, in view of the provisions of the Constitution of the state of Minnesota, my mind cannot be persuaded to the conclusion that an agreement is not an exemption by which a particular person or property is forever, as regards taxation, by irrevocable contract, exempted from the general rules of taxation.

Nor can I agree because the state of Minnesota received public land from the United States to be used to aid in the construction of a railroad, the general assembly of that state was thereby endowed with the attribute of dealing with such land in violation of the Constitution of the state. The Constitution of the state was the measure of the powers of the legislature of Minnesota, and in our system of government I do not conceive that Congress can confer upon a state legislature the right to violate the Constitution of the state. True it is that in taking the land a relation of trust was engendered, by which the obligation arose to devote the lands to the purpose for which they had been intrusted by Congress to the state. But this, it seems to me, can only signify that the state of Minnesota, through its legislature, was obliged to use the lands in furtherance of the trust, in accordance with the powers and under the restrictions imposed by the Constitution of the state. Whilst this reasoning is alone to my mind sufficient to refute the theory that the gift by Congress could endow the general assembly with power to disregard the Constitution of the state,

even if Congress had so expressly directed, the conclusion is cogently reinforced when it is considered that no provision was made by Congress in giving the lands to the state, that in using such lands for the purposes specified in the grant the state should exempt them by irrevocable contract from taxation. Even if it be conceded, *arguendo* only, that such a power could have been lawfully imposed, its exercise ought not to be implied in order thereby to prevent the legislature of the state from using its taxing authority free from the restraints of an irrevocable contract. But again, if it be conceded that Congress could lawfully have authorized the legislature of the state of Minnesota to violate the Constitution of that state, and even if it be granted that Congress did so, these concessions should not affect the decision \*of [258] this case. For if such power existed, it could only relate to lands given by the United States, and not to all the other real and personal property of the railroad, which came not from the grant by the United States to the state. But the irrevocable contract which is now decided to have been lawfully made by the general assembly of the state of Minnesota was not one dealing only with the lands given by the United States, but was one relating to all the property of the railroad. To enforce its obligations therefore, under the assumption of a trust as to lands given by the United States, is to restrain the power of the state by contract as to property within its borders, not received from Congress, not embraced by the trust, and over which the plenary taxing power of the state extends.

Because the provision as to the lands given by Congress to the state is indivisibly united with the other provisions contained in the gross-receipt tax law, it does not follow that that which is confessedly repugnant to the Constitution of the state should be held to be valid; but it should rather, I think, be decided that the vice which affects a part, and which cannot be separated, operates upon the contract as an entirety, and causes the whole to be void.

Although I dissent, for the foregoing reasons, from some of the grounds stated in the opinion of the court, I yet concur in the judgment of reversal upon one ground expressed therein. Conscious that nothing is needed to strengthen the conclusive reasoning by which the proposition is sustained in the opinion of the court, nevertheless, as the question presents itself to my mind in a somewhat different aspect from that considered by the court, the additional grounds which cause me to concur will now be stated.

In 1871 an amendment to the Constitution of Minnesota, which is set out in the opinion of the court, was adopted by a vote of the people. The opinion of the supreme court of Minnesota in the case at bar holds that the effect of that amendment was to ratify and confirm the gross-receipt tax laws, and to deprive the general assembly of all power to repeal or amend such laws, unless the legislative act so doing was submitted to and ratified by a vote of the people. Accepting

[259] this construction \*as conclusive, it follows that the gross-receipt tax laws, even if they contained a grant of exemption, were no longer in violation of the Constitution of the state, but did not evidence irrevocable contracts, since they were subject to repeal or amendment by a legislative act approved and ratified by a vote of the people. This suit rests upon an act of the general assembly of Minnesota, approved by the people in 1896, which it is claimed was the first act which repealed or amended the gross-receipt tax law relating to the rights of the corporation now here, to the extent that it provided that the public lands given to the railroad should be taxed before the corporation had parted with its title. Before examining the scope of the act relied upon, it is important to bear in mind the relations which are engendered when a contract is entered into by a state subject to the reserved power to repeal, alter, or amend. In such case no irrevocable contract, protected from impairment under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred subject to the power of repeal, alteration, or amendment are protected from an impairment which under the terms of the grant the state has reserved a right to make. *Louisville v. Bank of Louisville*, 174 U. S. 439, 444, 43 L. ed. 1039, 19 Sup. Ct. Rep. 753; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 644, 43 L. ed. 840, 843, 19 Sup. Ct. Rep. 571 *et seq.*

But whilst this is settled, it has also been equally determined that the reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guaranty against the taking of property without due process of law. *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419, and cases cited. And an apt illustration of the application of this doctrine is found in *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346.

Will, then, the enforcement of the amendatory act, which is here relied upon, providing for the taxation of the lands, before the corporation had parted with its title to them, in spite of the continued exaction of the gross-receipt tax, deprive the corporation of its property without due process of law, or deny to it the equal protection of the laws? The repealing act says:

[260] \*"Sec. 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used, or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies."

But these provisions, which in and of themselves are clearly an amendment of the

gross-receipt tax laws, are accompanied by the following proviso:

"Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings *in the same manner and in the same amount as is now provided by law*, and that nothing in this act contained *shall be construed to repeal said laws*, except in so far as the same relate to the tax upon said lands." [Italics are mine.]

Considering for a moment the ratified agreement which the gross-receipt tax law embodied, it is patent that the duties which it imposed and the obligations to which it gave rise were in the strictest sense reciprocal or commutative; that is, that the agreement to pay the gross-receipt tax, and necessarily the amount of those taxes, was predicated on the obligation on the part of the state to regard the payment of said tax as the discharge by the corporation of all taxes due upon all its real or personal property. The amendatory act, therefore, whilst increasing the sum of the obligation of the corporation to the state to the extent that the lands are no longer to be represented by the gross-receipt tax, yet at the same time retains in favor of the state the right to take the whole amount of the stipulated payment of the gross-receipt tax in the same manner as theretofore, that is, by the contract. That is to say, the amendatory act preserves the contract in favor of the state as an entirety, by retaining all the obligations due by the railroad to the state, and yet purports to repeal, alter, or amend the contract by relieving the state from its obligation to the corporation to include all the property of the latter for the purpose of taxation by a gross-receipt tax, which was the consideration upon which the obligation \*of the corporation to pay such tax rested. [261] This consequence is made certain by the provision that the gross-receipt tax, despite the amendment, shall remain payable *in the same amount and in the same manner as before the passage of the amendatory act*, and is additionally made evident by the provision of the amendatory act declaring that it "*shall not be construed to repeal*" the gross-receipt tax act. The situation created by the amendatory act may be thus illustrated: The state leases a building to it belonging for a term of years, conditioned on the payment of a stipulated amount of rent annually. The consideration of the obligation of the lessee to pay in such case would, of course, be the right of occupation granted by the state, and the continued right of the state to collect the rent would depend upon the enjoyment by the tenant of the right of occupation which the contract granted. Now, then, if in such a contract the power was reserved to repeal, alter, or amend, and it was exercised by declaring that the right of occupation should cease, but that the duty to pay the rent should continue in the same amount and in the same manner stated in the contract, and that nothing in the amendatory act should be construed as relieving the lessee from the duty to pay the whole of



the stipulated rent, a condition strictly analogous to that which arises from the amending act relied on in the case at bar would be presented.

[262] My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the state are concerned, and at the same time to destroy the reciprocal duty owed by the state to the other contracting party, is not to repeal, alter, or amend the contract at all, but, whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross-receipt tax was the duty on the part of the state to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. In reason, the argument comes to this, that the act purporting to amend, on its face, cannot be declared to have done so, without concluding at the same time both that it did alter, repeal, and amend, and that it did not. Under these circumstances, to enforce the amendatory act would necessarily be to deny to the corporation the equal protection of the laws, since it would leave the corporation subject to taxation, not by the general laws of the state, but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract. It would be a denial of due process of law to the corporation, since it would be but the recognition of the right of the state, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the state as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation.

# MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Petitioner,*

*v.*  
TINE COHEN.

(See S. C. Reporter's ed. 262-270.)

*Life insurance—notice as condition of forfeiture—New York statute affecting business in other states.*

1. The presumption is that the law of the place at which a contract is made shall gov-

NOTE.—On the question when a contract is governed by *lex loci contractus*—see notes to *Oswood v. Bauder* (Iowa) 1 L. R. A. 655; *Seyk v. Millers Nat. Ins. Co.* (Wis.) 3 L. R. A. 523, and *Slacum v. Pomery*, 3 L. ed. U. S. 205.  
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ern the rights of the parties, in the absence of anything to show the contrary.

2. Insurance business transacted in other states, by New York insurance companies, without any provision that the New York laws shall govern, is not subject to the provision of N. Y. Laws 1877, chap. 321, § 1, for notice as a condition of the forfeiture of a policy for nonpayment of premium by any life insurance company "doing business in the state."
3. The provision in an application for life insurance, made in another state to a New York company, that it is subject to the charter of the company and the laws of New York, is not sufficient to make the policy issued thereon, and which was delivered in such other state, subject to the requirement of N. Y. Laws 1877, chap. 321, § 1, for notice as a condition of forfeiture for nonpayment of premium.

[No. 157.]

*Argued March 14, 15, 1900. Decided December 3, 1900.*

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment for life insurance. *Reversed.*

See same case below, 38 C. C. A. 696, 97 Fed. Rep. 985.

Statement by Mr. Justice Brewer:

\*On June 10, 1885, the petitioner delivered [263] to Alexander Cohen, in the state of Montana, a life insurance policy for \$3,000, conditioned upon the annual payment of a premium of \$89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On September 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy.

The application commenced in these words: "Application for insurance in the Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty street, New York city, subject to the charter of such company and the laws of said state." It further contained this provision: "That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy. Among those conditions and stipulations was this: "Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

On November 9, 1898, this action was commenced in the circuit court of the United States for the district of Washington.

The single defense was the nonpayment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the nonpayment of the premium, or any refusal or failure on her part in respect to the policy. A demurrer to the answer was sustained, judgment rendered for the amount of the policy, less the unpaid premiums, which judgment

was affirmed by the United States circuit court of appeals for the ninth circuit (38 C. A. 696, 97 Fed. Rep. 985), and thereupon the case was brought here on certiorari.

**Messrs. Julien T. Davies and John B. Allen** argued the cause, and, with **Messrs. Edward Lyman Short and Frederic D. McKenney**, filed a brief for petitioner:

The act, so far as it relates to foreign corporations, must necessarily be limited in its operation to the business of collecting premiums in New York state.

*Re Prime*, 136 N. Y. 359, 18 L. R. A. 713, 32 N. E. 1091; *Re Merriam*, 141 N. Y. 484, 36 N. E. 505; *Re Balleis*, 144 N. Y. 134, 38 N. E. 1007; *Realty Co. v. Appolonio*, 5 Wash. 437, 32 Pac. 219.

The operation of the statute as to domestic companies is likewise limited to the collection of premiums and notice thereof in New York state.

*Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 35 N. E. 932; *Bank of Louisville v. Young*, 37 Mo. 407; *Bard v. Poole*, 12 N. Y. 503.

The statute of 1877 has never been construed, by the courts of New York, to require notices to be sent of premiums demanded or permitted to be paid outside New York state; and this court should not so construe it.

*State ex rel. Clapp v. Fidelity & C. Ins. Co.* 39 Minn. 544, 41 N. W. 108.

Whenever a statute refers in general language to all persons, things, or acts, two constructions of such language are always open: The words may apply to, first, all persons, things, or acts throughout the state; and, second, all persons, things, or acts throughout the world.

*State v. Lancashire F. Ins. Co.* 66 Ark. 466, 45 L. R. A. 348, 51 S. W. 633; *Rosseter v. Cahlmann*, 8 Exch. 361; *Merrill v. Boston & L. R. Co.* 63 N. H. 259; *Whitford v. Panama R. Co.* 23 N. Y. 465; *South Yuba Water Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Felton v. West*, 102 Cal. 266, 36 Pac. 676.

The statutes have been declared to be for the purpose of preventing forgetfulness on the part of the insured, and should not be construed harshly or oppressively against the insurer.

*Morrison v. Keystone Mut. Ben. Asso.* 138 N. Y. 116, 33 N. E. 738; *Trimble v. New York L. Ins. Co.* 20 Wash. 386, 55 Pac. 429; *McDougall v. Provident Sav. Life Assur. Soc.* 135 N. Y. 551, 32 N. E. 251; *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 21, 17 N. E. 396.

There is nothing in the New York decisions which binds this court, so far as the question here raised is concerned.

*Central R. & Bkg. Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80.

The enactment of an explicit provision on a given subject does not, of itself, prove that the law on that subject was different before, as such enactment may have been made in affirmance of the existing law and to remove doubts.

*Montville v. Houghton*, 7 Conn. 543; *Nun-*

*nally v. White*, 3 Met. (Ky.) 590; *Tilford v. Ramsey*, 43 Mo. 410.

Whenever insurance companies have attempted to import into their contracts, for their benefit and advantage, the laws of their own states, the courts have invariably refused to apply such laws, and have applied the laws of the state where the insurance was effected, the policy delivered, and the premiums paid.

*Equitable Life Assur. Co. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Knights Templars' & Masons' Life Indemnity Co. v. Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. Rep. 511; *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. Rep. 580, Affirmed, 22 L. R. A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. Rep. 723; *Hicks v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. Rep. 690; *Thwing v. Great Western Ins. Co.* 111 Mass. 93; *Heebner v. Eagle Ins. Co.* 10 Gray, 131, 69 Am. Dec. 308; *Re Breitung's Estate*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Robinson v. Hurst*, 78 Md. 59, *sub nom. Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, 26 Atl. 956; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. Rep. 541.

The policy in suit is a Washington contract, and is uncontrolled by the foreign statute, and must be effective according to the language used by the parties thereto.

*Northwestern Mut. L. Ins. Co. v. Elliott*, 5 Fed. Rep. 228; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 400; *Thwing v. Great Western Ins. Co.* 111 Mass. 109; *Wood, Fire Ins. 189*, note 2; *Hardie v. St. Louis Mut. L. Ins. Co.* 26 La. Ann. 242; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450.

The broad ground upon which courts other than those of New York state have held New York statutes applicable has been that the policies were New York contracts, or business done in New York, although it is also true that in the bulk of these cases the premiums were being collected in New York. This policy was neither.

*Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. Rep. 796; *Equitable Life Assur. Soc. v. Trimble*, 27 C. C. A. 404, 48 U. S. App. 565, 83 Fed. Rep. 85; *Provident Sav. Life Assur. Soc. v. Nixon*, 19 C. C. A. 414, 44 U. S. App. 319, 73 Fed. Rep. 144; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 N. W. 605; *Griffith v. New York L. Ins. Co.* 101 Cal. 640, 36 Pac. 113; *Warner v. National Life Asso.* 100 Mich. 157, 58 N. W. 667; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680.

The statute is not a limitation on the company's power to contract, nor as much a part of every contract made by the insurer as its charter.

*Des Moines Life Asso. v. Owen*, 10 Colo. App. 131, 50 Pac. 210; *United States Mortg. Co. v. Sperry*, 24 Fed. Rep. 838, Affirmed, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 179 U. S.



321; *White v. Howard*, 38 Conn. 342; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 24, 53 Am. Dec. 742; *American Bible Soc. v. Marshall*, 15 Ohio St. 543; *Bank of Louisville v. Young*, 37 Mo. 407; *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 35 N. E. 932; *Warren v. First Nat. Bank*, 149 Ill. 9, 27 L. R. A. 746, 38 N. E. 122; *Morawetz, Priv. Corp.* §§ 967, 968.

Messrs. *Edward Lyman Short, Julien T. Davies, John B. Allen, Frederic D. McKenney*, and *Robert C. Strudwick* filed a brief in support of petition for writ of certiorari.

Messrs. **Stanton Warburton** and **Harold Preston** argued the cause and filed a brief for respondent:

The contract took effect, was made, and was wholly to be performed in the state of New York.

*Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. Rep. 413; *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. Rep. 796; *Equitable Life Assur. Soc. v. Trimble*, 27 C. C. A. 404, 48 U. S. App. 565, 83 Fed. Rep. 85; *Phinney v. Mutual L. Ins. Co.* 67 Fed. Rep. 493; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1031, 1034; *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Hyde v. Goodnow*, 3 N. Y. 266; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *Massachusetts Ben. Life Asso. v. Hale*, 96 Ga. 802, 23 S. E. 849; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271, 26 S. E. 422; *Richardson v. Rowland*, 40 Conn. 565; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43.

The true basis of the decision in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Petrus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822, was that the insured, living in Missouri, must be subject to the public policy of that state, and that it would not allow the parties to withdraw themselves from the beneficial effects of the public policy and the statute of Missouri by making the place of contract outside of the state.

*Fletcher v. New York L. Ins. Co.* 13 Fed. Rep. 526; *Wall v. Equitable Life Assur. Soc.* 32 Fed. Rep. 273; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 439; *Equitable Life Assur. Asso. v.* 179 U. S.

*Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. Rep. 796.

The New York statute is a limitation upon the power of the plaintiff in error, a New York corporation, attending it wherever it travels.

*Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Relfe v. Rundle*, 103 U. S. 223, *sub nom. Life Asso. of America v. Rundle*, 26 L. ed. 338; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Rue v. Missouri P. R. Co.* 74 Tex. 474, 8 S. W. 533; *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43.

The legislature intended by the act of 1877 that its provisions should apply to policies issued upon the lives of nonresidents, as well as residents, of New York, whatever be the place of contract or wherever the premiums be demandable.

*Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 17 N. E. 396; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *Hebb v. Kittanning Ins. Co.* 138 Pa. 174, 20 Atl. 837; *New Era L. Ins. Co. v. Musser*, 120 Pa. 384, 14 Atl. 155; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271, 26 S. E. 422; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

That the legislature of Washington has imposed no like restriction upon the power of insurance companies does not enlarge the powers of corporations of other states.

*Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271, 26 S. E. 422; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Rue v. Missouri P. R. Co.* 74 Tex. 474, 8 S. W. 533; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Relfe v. Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America v. Rundle*, 26 L. ed. 337; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1031, 1034.

\*Mr. Justice **Brewer** delivered the opinion [264] of the court:

*Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906, was an action against the same insurance company, in the same district, on a policy like the one in controversy here, save that in that the insured was himself the beneficiary. It resulted in a judgment in the circuit court against the company. Thereupon the company sought to transfer it by writ of error to the court of appeals of that circuit, but that court dismissed the writ of error. Thereafter, on April 19, 1897, a certiorari was issued by this court. 166 U. S. 721, 17 Sup. Ct. Rep. 1004. On examination we held that the court of appeals erred in dis-



missing the writ of error, that it had jurisdiction, and that it ought to have reversed the judgment of the circuit court. The decision was based on the ground of error in the ruling of the circuit court in respect to rescission and abandonment. In the opinion we referred to the fact that there was a primary question of the applicability of a statute of the state of New York, but deemed it unnecessary to decide it. That decision was followed by the cases of the same company against Sears (178 U. S. 345, 44 L. ed. 1096, 20 Sup. Ct. Rep. 1032), against Hill (178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 1032), against Allen (178 U. S. 351, 44 L. ed. 1098, 20 Sup. Ct. Rep. 1032),—all of which cases were disposed of in like manner.

The primary question noticed, but not decided, in those cases is distinctly and solely presented in this.

The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the state of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822. In that state, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the state by which the insurance company was chartered and in which it had its principal office, by § 1 of chapter 321 of 1877 had enacted—

“Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided.”

The provision referred to, and which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330, 44 L. ed. 1089, 20 Sup. Ct. Rep. 906.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

The question therefore is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the state. Proceeding on the accepted principle that a state may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the

state. Undoubtedly a foreign insurance company making a contract within the state of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another state would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the state and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the state shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the state and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the state, how can we \*find in such language an intent to prescribe limitations upon the contracts of a home company outside the state? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other states to control insurance contracts made within their limits. Can it be that the state of New York, aware of the fact that other states and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those states and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the state of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws 1876, chap. 341, § 1; the statute now under consideration, Laws 1877; Laws 1892, chap. 690, § 92; Laws 1897, chap. 218, § 92. The varying provisions of these statutes, directed in terms, not to local companies, but to companies doing business in the state of New York, strengthen the conclusion that the state was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the state.

Again, the terms of the act itself tend in the same direction. It provides for a thirty-day notice. While such a notice might be reasonable as to all policies within the state, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a thirty-day notice in many cases would be of little value.

Further, by § 2 the statute provides that an affidavit by one authorized to mail the notice shall be “presumptive evidence” of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be en-



forced in every state and nation of the world?

[267] These considerations lead to the conclusion that the statute of \*New York, directed as it is to companies doing business within the state, was intended to be, and is, in fact, applicable only to business transacted within that state.

It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said state;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York.

Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the state of New York as are intended to and do change the charters of the companies, or are intended to have extraterritorial application, should be considered a part of the policy.

[268] The stipulation in this policy is different from that presented to the court of appeals of New York in *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 454, 7 L. R. A. 293, 23 N. E. 1048, which was that it was "a contract made and to be executed in the state of New York, and construed only according to the laws of that state." There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms.

While authorities on this particular question are not numerous, we may properly refer to an opinion of the supreme court of Washington, the state in which this action was brought (*Griesemer v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1031, 1034) in 179 U. S.

which, referring to this special question, and the contention that this very statute of the state of New York became a part of the contract of the company in the state of Washington, the court said, on pages 206, 207:

"It is claimed on the part of the plaintiff that upon its enactment it became attached to the defendant, it being a corporation organized under the laws of New York, and effected a change in its charter; so that every policy thereafter issued by it, whether in the state of New York or elsewhere, became subject to its provisions. On the other hand, it is claimed by the defendant that it only affected policies issued to, or held by, residents of the state of New York; that the evident object of its enactment was to protect such residents; that to give it a broader effect would be to convict the legislature of having discriminated against life insurance companies organized under the laws of the state.

"We are unable to construe the law in accordance with the contention of either party. The construction contended for by the defendant is too narrow. The language used is, that 'no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy. . . . ' This language, construed in its ordinary sense, seems to preclude such a narrow construction. Beside, if it were warranted by the language, it would not be reasonable to suppose that the legislature intended to so limit the effect of the statute. If it had so intended, it would have made use of language which in some manner confined the rights to be affected by the statute to residents of the state, instead of to companies doing business therein. While the construction contended for by the \*plaintiff seems to be equally untenable, for the reason that it would convict the legislature of having sought to accomplish something not in its power. So construed the act would apply to all policies of any company which should do business in the state of New York, wherever issued, regardless of the question as to whether or not it was organized under its laws. That the legislature of New York could not control companies not organized under its laws as to their business transacted in other states is too clear for argument. Hence the construction contended for by respondent would convict the legislature of having attempted that which it could not do, or of having deliberately discriminated against its own companies.

"In our opinion the reasonable and ordinary construction of the language used in the statute is such as to make it applicable to business done in the state of New York and that the question as to whether or not the companies doing such business were organized under its laws, or those of some other state, has no influence upon the question as to whether or not the statute is applicable. This construction is justified by the language used, and will give force to every word, while the other will not do so. And since the well-settled rule as to construction of statutes requires every word to be



given force if possible, it follows that the limitations of the act are impressed upon all policies issued in the state of New York by either domestic or foreign companies, and that it has no application to policies not issued therein, even although the companies issuing them were organized under its laws."

The New York cases cited by counsel throw no light on the question. *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048, contained in the contract, as heretofore stated, an express stipulation of the controlling law. In *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 17 N. E. 396, the question was as to the significance of the word "renewed" in the section referred to, and it does not appear where the policy was issued. In *Phelan v. Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 20 N. E. 827, the statute was held applicable to a foreign insurance company doing business in the state of New York, the notice given was held insufficient, and no question was considered as to the scope of the statute otherwise. [270] \**De Frece v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556, was likewise an action against a foreign insurance company, and involved no question like that before us. *Rae v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. Rep. 690, was also an action against a foreign insurance company, and the question was simply as to the sufficiency of the notice.

We conclude, therefore, that the statute of the state of New York does not, under the circumstances presented, control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited. *The judgment of the Circuit Court of Appeals will be reversed*, and the case remanded to the Circuit Court of the United States for the District of Washington, with instructions to set aside the judgment and overrule the demurrer.

Mr. Justice McKenna dissents.

Mr. Justice Peckham takes no part in the decision of this case.

R. A. WILLIAMS, *Plff. in Err.*,  
v.

EDGAR FEARS, Sheriff, and R. B. Aycock,  
Jailer.

(See S. C. Reporter's ed. 270-278.)

*License tax on emigrant agents—privileges of citizens—equal protection of laws.*

1. The imposition of a license tax upon emigrant agents by Ga. Laws 1898, p. 21, ¶ 10,

NOTE.—As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

On the general subject of the constitutionality of privileges, immunities, and protection,—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.  
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§ 4, which leaves laborers free to make their own contracts, and restricts the business of inducing them to enter into labor contracts and to change their location only by imposing a license tax upon it, is not in violation of U. S. Const. 14th Amend. or of U. S. Const. art. 4, § 2, as an abridgment of the privileges and immunities of citizens.

2. A discrimination against persons engaged in the business of emigrant agents hiring persons to labor outside the state, by a statute which imposes a license tax upon them, but not upon persons engaged in hiring laborers to work within the state, is not unconstitutional as a denial of the equal protection of the laws.

3. A burden on interstate commerce is not imposed by Ga. Laws 1898, p. 21, ¶ 10, § 4, imposing a license tax on emigrant agents engaged in the business of hiring persons to labor outside the state.

[No. 287.]

*Argued October 29, 1900. Decided December 10, 1900.*

IN ERROR to the Supreme Court of the State of Georgia to review a decision affirming a judgment sustaining a license tax on emigrant agents. *Affirmed.*

See same case below, 35 S. E. 699.

Statement by Mr. Chief Justice Fuller:

\*R. A. Williams was arrested on a warrant [271] issued by the county court of Morgan county, Georgia, and placed in the county jail on his failure to give bond pending his trial. Thereupon he made application to the judge of the superior court within and for that county for a writ of habeas corpus by petition alleging that the warrant under which he was arrested charged him with a violation of the 10th paragraph of § 2 of the general tax act of Georgia of 1898, and that his restraint was illegal because that part of the act was in conflict with clause 3 of § 8, and with clause 5 of § 9, of article 1, and with § 2 of article 4 of the Constitution of the United States; and also with the 14th Amendment. The writ of habeas corpus was duly issued, and the application heard on the return thereto, which resulted in the denial of the petition by the superior court, and the remanding of Williams to custody. The case was then carried to the supreme court of Georgia, where, on April 11, 1900, judgment was rendered affirming the judgment of the superior court. 35 S. E. 699.

The title of the general tax act of 1898 (Georgia Laws 1898, p. 21) read thus:

"An act to levy and collect a tax for the support of the state government and the public institutions; for educational purposes in instructing children in the elementary branches of an English education only; to pay the interest on the public debt, and to pay maimed Confederate soldiers and widows of Confederate soldiers such amounts as are allowed them by law for each of the fiscal years 1899 and 1900; to prescribe what persons, professions, and property are liable to taxation; to prescribe the methods of collecting and receiving taxes; to prescribe the method of ascertaining the property of



[272] the state subject to taxation; to \*prescribe additional questions to be propounded to taxpayers, and to provide penalties and forfeitures for nonpayment of taxes; to prescribe how the oath of taxpayers shall be administered, and provide penalties for violation thereof, and for other purposes."

Section 2 provided "that in addition to the ad valorem tax on real estate and personal property as required by the Constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years 1899 and 1900."

Then followed paragraphs imposing poll taxes, and taxes on lawyers, doctors, photographers, auctioneers, keepers of pool and billiard tables, traveling venders of patent or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise, local insurance agents, etc.

Paragraph 10 was as follows:

"Upon each emigrant agent, or employer or employee of such agents, doing business in this state, the sum of \$500 for each county in which such business is conducted."

Section 4 was as follows:

"Be it further enacted by the authority aforesaid, that the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of § 2 of this act shall be paid in full for the fiscal years for which they are levied to the tax collectors of the counties where such vocations are carried on at the time of commencing to do business specified in said paragraphs. Before any person taxed by paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of § 2 of this act shall be authorized to carry on said business they shall go before the ordinary of the county in which they propose to do business, and register their names, places of business, and at the same time pay their taxes to the tax collector; and it shall be the duty of said ordinary to immediately notify the comptroller general and the tax collector. Any person failing to register with the ordinary, or, having registered, failing to pay the tax as herein required, shall be liable to indictment for misdemeanor, and, on conviction, shall be \*fined not less than double the tax, or be imprisoned as prescribed by § 1039 of volume 3 of the Code of 1895, or both, in the discretion of the court. One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for use of officers of court."

Mr. James Davison argued the cause and filed a brief for plaintiff in error:

If the occupation of "hiring laborers in this state to be employed beyond the limits of the same" is an occupation connected with, or relating to, interstate commerce, it is exempt from state taxation.

*Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Robbins v. Shelby County* 179 U. S.

*Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Commerce comprehends emigration, as well as traffic, intercourse, navigation, and transportation; and a tax on an occupation connected with interstate traffic, intercourse, navigation, transportation, or emigration is a tax on commerce among the states.

*Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Walling v. Michigan*, 116 U. S. 456, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Head Money Cases*, 112 U. S. 580, sub nom. *Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; *Rorer, Interstate Law*, 1893, pp. 405, 406, and cases cited; *Black, Const. Law*, pp. 170, 171, 177, 178; *Commerce Clause, Fed. Const.* pp. 192, 218; *Bangor v. Smith*, 83 Me. 426, 13 L. R. A. 686, 22 Atl. 379; 9 Am. & Eng. Enc. Law, p. 936; *Lin Sing v. Washburn*, 20 Cal. 534; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347.

The object of the commerce clause is to secure uniformity of regulation against conflicting and discriminating state legislation.

*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 227, 44 L. ed. 142, 20 Sup. Ct. Rep. 96.

The test of constitutionality is involved in the inquiry whether enforcement would tend to trammel the trade between citizens of different states, or embarrass them in passing from one state to another.

*Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 280, 14 L. R. A. 596, 3 Inters. Com. Rep. 803, 14 S. E. 79.

This law is an indirect effort to restrict the right of a citizen to move from one state to another, and abridges his privileges and immunities.

*Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *People v. Raymond*, 34 Cal. 492; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 744, 745; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

It impairs the natural right of the laborer to labor; it is a tax on the laborer, and is class legislation aimed entirely at laborers; and it applies to a class of laborers only, to wit, those who seek to labor beyond the state.

*Re Tiburcio Parrott*, 6 Sawy. 349; *Low v.*

*Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 42 L. R. A. 442, 40 Atl. 977; *Fraser v. McConway & T. Co.* 82 Fed. Rep. 257; *Blake v. McCung*, 172 U. S. 248, 43 L. ed. 435, 19 Sup. Ct. Rep. 153; *Stockton Laundry Case*, 26 Fed. Rep. 613.

It imposes a tax of \$500, which is prohibitory in amount, on the person who hires laborers to work beyond the state, and exempts the person who hires laborers to work within the state.

*Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

The law denies to a nonresident the rights and privileges allowed the citizens of Georgia.

Cooley, Const. Lim. pp. 490, 597.

Mr. J. M. Terrell argued the cause and filed a brief for defendants in error:

Even if the term "interstate commerce" includes such a business as emigrant agent, ¶ 10 of the tax act of 1891 would still be constitutional.

*Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

Where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales, between resident and nonresident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce forbidden by the Constitution.

*Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

The act does not in the slightest degree impair the rights of the citizen; neither does it impose a tax upon his right to leave the state; neither does it deny to any person the equal protection of the laws.

*New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; *Slaughter House Cases*, 16 Wall. 63, 21 L. ed. 404; *License Cases*, 5 How. 504, 12 L. ed. 256; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *License Tax Cases*, 5 Wall. 471, 18 L. ed. 500; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745.

[273] \*Mr. Chief Justice Fuller delivered the opinion of the court:

Persons following the occupations named in some twenty-nine paragraphs of § 2 of the tax act of 1898, if they failed to register their names before the ordinary, or, having registered, failed to pay their taxes, as required by § 4, were liable to indictment for misdemeanor.

The supreme court of Georgia pointed out that it did not distinctly appear whether Williams was charged with having done business without registering, or without

paying the tax, but considered that to be immaterial, since he could not be punished for a failure to do either, if the provision imposing the tax were unconstitutional.

As preliminary to considering the validity of the provision, the court, as matter of original definition, and in view of prior legislation (Acts 1876, p. 17; Acts 1877, p. 120; Code, 1882, § 4598, *a, b, c*), held that the term "emigrant agent," as used in the general tax act of 1898, meant a person engaged in hiring laborers in Georgia to be employed beyond the limits of that state.

The court called attention to the fact that, while previous acts had required a license, this act provided for a specific tax on the occupation of emigrant agents in common with very many other occupations, the declared purpose of the levy being for the support of the government, and ruled that the question of whether the tax was so excessive as to amount to a prohibition on the transaction of that business did not arise, and, indeed, was not raised.

\*The inquiry is, then, whether a state law [274] taxing occupations is invalid so far as applicable to the pursuit of the business of hiring persons to labor outside the state limits, because in conflict with the Federal Constitution.

On behalf of plaintiff in error it is insisted that paragraph 10 is in conflict with the 14th Amendment because it restricts the right of the citizen to move from one state to another, and so abridges his privileges and immunities; impairs the natural right to labor; and is class legislation, discriminating arbitrarily and without reasonable basis.

Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.

And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned; . . . although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes." *Allgeyer v. Louisiana*, 165 U. S. 589, 591, 41 L. ed. 835, 836, 179 U. S.



17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 566, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

But this act is a taxing act, by the 2d section of which taxes are levied on occupations, including, by paragraph 10, the occupation of hiring persons to labor elsewhere. If it can be said to affect the freedom of egress from the state, or the freedom of contract, it is only incidentally and remotely.

[275] The "individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are.

The amount of the tax imposed on occupations varies with the character of the occupation. Dealers in futures are compelled to pay \$1,000 annually for each county in which the business is carried on; circus companies exhibiting in cities or towns of 20,000 inhabitants or more, \$1,000 each day of exhibition; peddlers of cooking stoves or ranges, \$200 in every county in which such peddler may do business; peddlers of cloaks, \$100; and so on.

The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject.

It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that, if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected.

Nor does it appear to us that the objection of unlawful discrimination is tenable.

The point is chiefly rested on the ground that, inasmuch as the business of hiring persons to labor within the state is not subjected to a like tax, the equal protection of the laws secured by the 14th Amendment is thereby denied.

In *Shepperd v. Sumter County Comrs.* 59 Ga. 535, 27 Am. Rep. 394, approved and followed in this case, the supreme court of Georgia decided that the act of 1876, which required a license as preliminary to carrying on this business, was not unconstitutional on this ground, for the reason that it did not appear that hiring for internal employment had become a business in Georgia, or [276] was "pursued as such by any person or persons. And for the further reason that the state could properly discriminate in its police and fiscal legislation between occupations of similar nature but of dissimilar tendency; between those which tended to induce the laboring population to leave, and those which tended to induce that population to remain.

We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature. *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, ante, p. 102, 21 Sup. Ct. Rep. 43, and cases cited.

tion of the state legislature. *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, ante, p. 102, 21 Sup. Ct. Rep. 43, and cases cited.

In fine, we hold that the act does not conflict with the 14th Amendment in the particulars named.

Counsel for plaintiff in error further contends that the imposition of the tax cannot be sustained because in contravention of clause 3 of § 8, and clause 5 of § 9, of article 1 of the Constitution.

Clause 5 of § 9 provides that "no tax or duty shall be laid on articles exported from any state." The facts of this case do not bring it within the purview of this prohibition upon the power of Congress, and it need not be considered as a substantive ground of objection.

The real question is, Does this law amount to a regulation of commerce among the states? To answer that question in the affirmative is to hold that the emigrant agent is engaged in such commerce, and that this tax is a restriction thereon.

In *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 241, Mr. Justice Field, delivering the opinion of the court, said: "Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." Broad as is the import of the word "commerce" as used in the Constitution, this definition is quite comprehensive enough for our purposes here.

These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged "in transportation, or that the tax on his occupation was levied on transportation. [277]

In *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, we held that the agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was an agency engaged in interstate commerce. But there the business was directly connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests.

So in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958, it was ruled that a tax imposed by a state on a corporation engaged in the business of interstate commerce, as described, for the privilege of keeping an office in the state, was a tax on commerce among the states.

On the other hand, it was held in *Nathan v. Louisiana*, 8 How. 73, 12 L. ed 992, that

a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrument of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce.

In *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. ed. 357, 361, it was decided that issuing a policy of insurance was not a transaction of commerce, and it was said: "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence in value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale."

Again, in *Hooper v. California*, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, it was held that a section of the Penal Code of California making it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which had not complied with its laws relative to insurance, was not a regulation of commerce. Mr. Justice White there adverts to the real distinction on which the general rule and its exceptions are based, "and which consists in the difference between interstate commerce or an instrumentality thereof on the one side, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the states, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce.

Nor was the imposition in violation of § 2 of article 4, as there was no discrimination between the citizens of other states and the citizens of Georgia.

*Judgment affirmed.*

Mr. Justice Harlan dissented.

\*PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK CLEARING HOUSE BUILDING COMPANY, *Plff. in Err.*,

*v.*

EDWARD P. BARKER, Theodore Sutro, and James L. Wells, Commissioners of Taxes and Assessments of the City and County of New York.

(See S. C. Reporter's ed. 279-287.)

*Constitutional law—tax on corporations—equal protection of the laws.*

A corporation is not denied the equal protection of the laws by N. Y. Laws 1857, chap. 456, § 3, which, as construed by the highest court of the state, provides an opportunity, in assessing the property of a corporation, to correct an undervaluation first made by the assessors, without giving the same opportunity to correct an undervaluation of the property of individuals, so long as the corporation is not assessed on any property not legally taxable, or taxed beyond the actual value of its property, and there is no proof of any general custom to undervalue the property of individuals.

[No. 51.]

*Argued October 30, 1900. Decided December 10, 1900.*

IN ERROR to the Court of Appeals of the State of New York to review a decision affirming a judgment sustaining a tax on a corporation. *Affirmed.*

See same case below, 158 N. Y. 709, 53 N. E. 1130.

The facts are stated in the opinion.

Mr. David Willcox argued the cause, and, with Mr. William S. Opdyke, filed a brief for plaintiff in error:

The action of the commissioners subjects the relator to a rule of taxation more onerous than that applying to an individual owning the same property.

*People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13.

The prohibition of the United States Constitution against the denial by a state, to any person within its jurisdiction, of the equal protection of the laws, is binding alike upon all branches of the state government.

*Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Abbott v. National Bank of Commerce*, 175 U. S. 409, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

Corporations are persons within the meaning of this prohibition.

*Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co. v. Mackey*, 127 U. S.

NOTE.—On the general subject of constitutionality of privileges, immunities, and protection,—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (K.) 14 L. R. A. 579.



205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Western U. Teleg. Co. v. Myatt*, 98 Fed. Rep. 335; *Hargraves Mills v. Harden*, 25 Misc. 665, 56 N. Y. Supp. 937.

Classification for purposes of taxation, in order to be constitutional, must distinguish between different kinds of property, not between different ownership of the same kinds of property.

*San Bernardino County v. Southern P. R. Co.* 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 8 Sup. Ct. Rep. 594; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. Rep. 722; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. Rep. 385, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Northern P. R. Co. v. Walker*, 47 Fed. Rep. 681; *Fraser v. McConway & T. Co.* 82 Fed. Rep. 257; *Re McPherson*, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502; *Com. v. Edgerton Coal Co.* 164 Pa. 284, 30 Atl. 125, 129; *Missouri v. Lewis*, 101 U. S. 22, sub nom. *Bowman v. Lewis*, 25 L. ed. 989; *Kentucky Railroad-Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The method of assessment employed violates the constitutional requirement of uniformity of taxation.

*Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Stanley v. Albany County Supers.* 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. Rep. 350; *Railroad & Teleph. Cos. v. Tennessee Bd. of Equalizers*, 85 Fed. Rep. 302; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Randell v. Bridgeport*, 63 Conn. 321, 28 Atl. 523; *Ex parte Fort Smith & V. B. Bridge Co.* 62 Ark. 461, 36 S. W. 1060; *Bureau County Supers. v. Chicago, B. & Q. R. Co.* 44 Ill. 229; *Chicago, B. & Q. R. Co. v. Atchison County Comrs.* 54 Kan. 781, 39 Pac. 1039.

A statute cannot impose a tax on property of corporations, as distinguished from a tax upon their franchises, at a higher rate than that laid upon similar property of natural persons.

*Mobile v. Stonewall Ins. Co.* 53 Ala. 570; *Bureau County Supers. v. Chicago, B. & Q. R. Co.* 44 Ill. 229; *Standard Life & Acci. Ins. Co. v. Detroit Bd. of Assessors*, 95 Mich. 466, 179 U. S.

55 N. W. 112; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *For's Appeal*, 112 Pa. 337, 4 Atl. 149; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318.

Whether the relator is deprived of the equal protection of the laws by the statute or by the action of the officials in administering the statute, the assessment equally offends against the constitutional guaranty of equal protection.

*New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121.

Mr. James M. Ward argued the cause, and, with Messrs. Theodore Connolly and John Whalen, filed a brief for defendants in error:

While the methods by which a result is reached in fixing the value of property for taxation may be erroneous, if the result is such that from the assessment as fixed no grievance results, the courts will not interfere with the determination of assessing officers upon questions of value and appraisal.

*People ex rel. Equitable Gaslight Co. v. Barker*, 66 Hun, 23, 20 Sup. Ct. Rep. 797, Affirmed in 137 N. Y. 544, 33 N. E. 336.

The assessed value of real estate is in theory its actual value.

*People ex rel. Panama R. Co. v. New York Tax Comrs.* 104 N. Y. 244, 10 N. E. 437.

\*Mr. Justice Peckham delivered the [279] opinion of the court:

The plaintiff in error comes here for the purpose of obtaining a review of the judgment of the New York court of appeals, which affirmed the judgments of the courts below dismissing a writ of certiorari.

The relator is a corporation created under the laws of the state of New York and a resident of, and doing business in, the city of New York, and it procured the writ, as provided for in the statute, to review an assessment of \$165,999 made upon its capital in the regular course of proceedings to levy and collect the annual tax budget of the city for the year 1896. Plaintiff sought to review the assessment on the ground \*among [280] others, that it was illegal, and that to levy it, under the facts stated, would be to deny to the company the equal protection of the laws.

The facts upon which the question arises are these: The capital of the company was \$900,000. The tax commissioners of the city of New York, in the course of their proceeding to tax the actual value of that capital, ascertained the actual value of what they termed the total "gross assets" of the company, which they found to have been . . . . . \$1,095,049

This value was arrived at from a statement of its property made by the company to the commissioners. By the term "gross assets," used by the commissioners, is meant the actual value of the capital and surplus of the com-

pany, but not its franchise. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

From this total they deducted—

(a) The debts of the company . . . . .	\$329,050
(b) The assessed value of the real estate of the company, otherwise taxed . . . . .	600,000
	<hr/>
	929,050

Leaving a balance of. . . . \$165,999 which was the amount upon which the company was assessed upon its capital aside from the assessment of \$600,000 separately made upon its real estate.

The company claims that these "gross assets" should have been stated at \$730,049, and the same deduction should be made as in the above statement, which would result in no assessment on the capital.

This difference of gross assets arises in this way: As made up by the commissioners they consist of the actual value of the building and lot owned by the company in New York city, in which it does business, taking it at its cost as admitted by the company in its statement made to the commissioners and which the commissioners found to be its actual value, viz. . . . . \$965,000 And to that is added other property . . . . . 130,050

Making a total of. . . . . \$1,095,049, while the item as claimed by the company [281] is made up of the value of the same building and lot as it was assessed by one of the deputy tax commissioners for the purpose of separate taxation under the law, such assessed value being. . . . . \$600,000 Added to that was the same item of 130,050

for other property as stated by the commissioners, the gross assets of the company by this valuation amounting to. . . . . \$730,050 and the difference between the two items is seen to be \$365,000. The plaintiff in error insists that in arriving at the actual value of the capital for taxation under the statute of 1857 (the 3d section of which is set out below) the real estate which goes to make up a part of such value should be put in at its value as assessed for taxation in a separate manner, while the commissioners claim that as the law provides that the assessment upon the capital shall be at its actual value, it is necessary to arrive at the actual value of the real estate before a particular assessment can be reached in regard to the capital which includes it, and that in arriving at the actual value of the real estate they are not estopped from determining what that actual value is by the fact that for the purpose of a separate assessment the real estate had been

mistakenly and improperly assessed at another and a lower figure.

These conflicting claims arise out of the statute which provides for the taxation of corporations, their capital stock and surplus, and the general statute which provides for the taxation of real estate belonging either to individuals or corporations. That portion of the statute relating to the taxation of the capital of corporations, which provides the method to be pursued, reads as follows:

"The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding 10 per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations, actually owned by such company, which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and \*taxed in the same [282] manner as the other personal and real estate of the county." Laws 1857, chap. 456, § 3.

As the New York court of appeals, in *People ex rel. Twenty-third Street R. Co. v. New York Tax Comrs.* 95 N. Y. 554, has said, there is a most extraordinary confusion of ideas in the above section. Its meaning has, however, in some respects been made tolerably clear by the above-cited case, together with those of *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 435, 12 L. R. A. 762, 27 N. E. 818, and *People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13.

In the first case it was stated that the general purpose of the statutes relating to assessments and taxation is to secure an assessment of all property, real and personal, at its actual value, and they are to be construed and enforced with this purpose in view. A construction of the statute in relation to other questions not material here was given in that case. In the case reported in 126 N. Y. it was held that the phrase "capital stock," contained in the section above quoted, meant, not the share stock owned by the individual members, but the capital owned by the corporation, and that this capital was to be taxed, together with the surplus, after making the reductions provided for in the section, and that the law did not include, for purposes of assessment and taxation, the franchises of the company.

In the *Equitable Gaslight Company Case*, 144 N. Y. 94, 39 N. E. 13, it was held that in arriving at the actual value of the capital for purposes of assessment, the assessors were not concluded by the assessed value of the real estate made for purposes of separate taxation if that assessment were a mistaken one, but might legally disregard such assessed valuation and estimate the real estate at its actual value, although it exceeded its assessed value.

Looking at the manner of assessing the real property of both individuals and corpo-



rations we find the general statute is as follows:

1 Rev. Stat. 393, § 17; 9th ed. p. 1685:

"All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

[283] \*And also 1 Rev. Stat. 389, § 6:

"The real estate of all incorporated companies shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. . . ."

The special statute applying to New York city is substantially the same so far as assessment at full or actual value is concerned. Consolidation act, chap. 410, Laws 1882, § 814.

Under these statutes the tax upon real estate must be imposed in all cases, both of individuals and of corporations, upon its full and true value as found by the assessors. In the case of the individual, however, no resort can be had to any other proceeding by which that tax can be increased by any subsequent assessment upon the difference between the assessed and the actual value of the real estate, if any there should be. In the case of corporations, on the contrary, under the construction given the statute of 1857 by the court of appeals, in the last above-cited case, if the real estate should be mistakenly assessed under the general statute at an undervaluation for purposes of separate taxation, the difference between the assessed and the actual value of the real estate may be reached in making an assessment upon the actual value of the capital under the act above mentioned. By such a result it is claimed the company is denied the equal protection of the laws. It must be remembered there is no claim made that in any event the corporation is taxed upon any property not legally taxable, or that it is taxed beyond the actual value of its property as provided by law. The only claim is that in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws. This is the sole Federal question in the case.

It is seen that the laws of the state provide for no undervaluation of real estate owned by either individuals or corporations. Those laws provide in terms for the assessment of all real estate at its actual value, while the whole force of the contention of the plaintiff in error is based upon the fact of undervaluation, although it is in the very teeth of the statute, and is a plain violation of its provisions. If there were no under-

[284] valuation of \*real estate, or, in other words, if the laws of the state were complied with, the question sought to be raised by the plaintiff could not arise. The failure of the assessors in this one instance to assess the real estate of the company for separate taxation at its actual value, and its assessment at that value in assessing for taxation the actual value of the capital of the company, could  
179 U. S. U. S., Book 45.

obviously work no denial of the equal protection of the laws of the company, if individuals were in fact assessed for their ownership of real estate at its full and true value as required by law. If the law were faithfully carried out, no harm could in any event come to the plaintiff in error by this subsequent assessment of its real estate at its full value, for it would only pay the same as individuals, they being assessed upon their real estate at its full value. To raise the question which the plaintiff in error seeks, it was therefore obviously necessary to allege and prove as a fact that there was habitual violation of law by undervaluation; that, in the language of Mr. Justice Miller, in *Albany County Supers. v. Stanley*, 105 U. S. 305, 318, 26 L. ed. 1044, 1121, the assessors "habitually and intentionally, or by some rule prescribed by themselves or by someone whom they were bound to obey," undervalued real estate for assessment in New York city; or, as stated in *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 155, 25 L. ed. 903, 904, that a rule or system of valuation had been adopted by those whose duty it was to make the assessment, which was designed to operate unequally and to violate a fundamental principle of the Constitution, and that such rule had been applied, not solely to one individual, but to a large class of individuals or corporations. It was said in that case that this was precisely the case made by the bill, and, if supported by the testimony, the court thought relief should be given. There was both allegation and proof.

Both these cases related to the taxation of national bank shares, and the question was whether the tax levied violated the provisions of the national banking act on that subject.

In this record there is no averment and no proof of any violation of law by the assessors of New York. There is no allegation in the petition for the writ of certiorari that there has been any undervaluation of real estate; either with regard to \*individuals [285] or corporations, but, on the contrary, it is therein asserted that the assessed valuation of the real estate of the company was its actual value, and that it had been overvalued in the valuation of the capital of the company. The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value. But we are nevertheless asked by the argument at bar, in the absence of allegations or proof of habitual, or indeed of any, undervaluation, to assume or take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the state. And this we are asked to do in order to reverse a judgment of a state court. Such a presumption of the violation of law and of their duty by the assessors the court  
13

of appeals of New York expressly refused to adopt. *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 996. In delivering the opinion of the court, Judge Haight said, at page 312, 40 N. E. p. 998:

"The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statutes all are intended to mean the *actual value* of the property. The commissioners are sworn officers, and, as such, in the absence of evidence to the contrary, are presumed to have done their duty. They have assessed the real estate at \$7,323,200, and yet, under the method presented by their counsel for ascertaining the value of the relator's personal property, they now estimate the actual value of the real estate to be \$45,591,352. We are aware that it is generally understood that in many localities throughout the state assessors, in violation of their duties, assess the real estate in their localities at a sum less than its actual value, but in the absence of evidence that this has been done by the commissioners of taxes and assessments in the city of New York, we cannot assume that they have so transgressed, for the purpose of approving of their work in this case."

[286] \*Should this court, with reference to the action of the public and sworn officials of New York city, assume without evidence that they have violated the laws of their state, when the highest court of the state itself refuses, in the absence of evidence, to assume any such violation? We think not.

Nor did the court of appeals act upon any judicial notice of the fact of undervaluation in the case of the *Equitable Gaslight Company*, 144 N. Y. 94, 39 N. E. 13, already cited. While the assessed value was stated, the commissioners in their return to the writ of certiorari distinctly showed that the actual was more than the assessed value, and the only question in the case was whether in arriving at the actual value of the capital they were bound by the assessed, and could not be permitted to show the true, value of the real estate. The court held they were not so bound.

What the court remarked about the practice of undervaluation was not the basis of its judicial action, for the facts were distinctly proved. The subsequent case in 146 N. Y. 304, 40 N. E. 996, is a direct authority for the refusal to make any presumption of a violation of official duty.

This court did not presume a violation of duty in *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 155, 25 L. ed. 903, 904. On the contrary, the bill alleged the facts, and the testimony supported the allegations. In extenuation of the practice alleged and proved, the court remarked in passing (page 102, L. ed. p. 906) that it was not limited to the state of Ohio, and that it was matter of common observation that in the valuation of real estate the rule was habitually disregarded. Although the justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the court took judicial notice thereof, but only

those facts which had been pleaded and testimony to sustain which had been duly given formed the basis of judicial action. We will not, and ought not to, presume a violation in the absence of allegations and proofs to that effect.

Whether, if the case were proved, as assumed by counsel, it would in fact amount to any such discrimination against corporations as to work a denial to the plaintiff of the equal protection of the laws, is a question not raised by this record, and therefore not necessary to be decided.

\*We think the plaintiff in error has failed [287] to show any error in the record, and the judgment of the Court of Appeals of New York is, therefore, affirmed.

PEOPLE OF THE STATE OF NEW YORK *ex rel.*  
NEW YORK CLEARING HOUSE BUILDING  
COMPANY, *Plff. in Err.*,  
v.

EDWARD P. BARKER, Theodore Sutro, and  
James L. Wells, Commissioners of Taxes  
and Assessments of the City and County  
of New York.

(See S. C. Reporter's ed. 287.)

[No. 52.]

Mr. Justice Peckham delivered the opinion of the court:

This case involves the taxes of 1897, and the same question in substance arises herein that has just been decided in the preceding case, and the judgment is therefore affirmed.

WISCONSIN, MINNESOTA, & PACIFIC  
RAILROAD COMPANY, *Plff. in Err.*,  
v.

JACOB F. JACOBSON.

(See S. C. Reporter's ed. 287-302.)

*Railroad intersections—statute requiring track connections and interchange of traffic—constitutional rights of railroad companies.*

1. The requirement of track connections and

NOTE.—That state laws cannot regulate interstate commerce—see *Norfolk & W. R. Co. v. Com. (Va.)* 13 L. R. A. 107, and note.

As to state laws interfering with interstate or foreign commerce—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

As to state regulation of commerce—see notes to *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041, and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to what constitutes due process of law—see *Kuntz v. Sumption (Ind.)* 2 L. R. A. 655, and note; *Re Gannon (R. I.)* 5 L. R. A. 359, and note; *Ulman v. Baltimore (Md.)* 11 L. R. A. 224, and note, and *Gilman v. Tucker (N. Y.)* 13 L. R. A. 304, and note. And see notes to *People v. O'Brien (N. Y.)* 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.



facilities for the interchange of cars and traffic at railroad intersections, which is made by Minn. Gen. Laws 1895, chap. 91, § 3, does not constitute an unconstitutional regulation of commerce.

2. Railroad companies are not deprived of property without due process of law by a decision compelling them to furnish track connections where the roads intersect, when this is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the railroad companies, notwithstanding the fact that they may be required to exercise the power of eminent domain and incur a comparatively small expense.

[No. 28.]

*Argued and Submitted March 19, 1900. Ordered for Reargument May 14, 1900. Re-argued October 18, 19, 1900. Decided December 10, 1900.*

**I**N ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming a decision requiring track connections at an intersection of railroads. *Affirmed.*

See same case below, 71 Minn. 519, 40 L. R. A. 389, 74 N. W. 893.

Statement by Mr. Justice **Peckham**:

[288] \*This case comes here by writ of error to the supreme court of Minnesota to review the judgment of that court affirming the judgment of the district court, directing the plaintiff in error and the Willmar & Sioux Falls Railway Company to make track connections with each other at Hanley Falls, in the state of Minnesota, where their respective tracks intersect.

The proceeding was duly commenced by the defendant in error, pursuant to the provisions of chapter 91 of the General Laws of Minnesota of 1895. The 3d section, a part of which is material to the question reviewed, is set forth in the margin.†

†Sec. 3. (a) That all common carriers subject to the provisions of this act shall provide at all points of connection, crossing, or intersection at grade, where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers, property, and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment, or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share  
**179 U. S.**

\*In accordance with the statute, the defendant in error filed his petition before the railroad commission of the state, setting forth the grounds upon which he based the request for an order directing the two companies to make the track connection therein referred to. [289] [290]

Both companies defended. The grounds of defense were substantially alike. The plaintiff in error alleged in its answer, among other matters, that to construct a connecting track, as asked for in the petition and as provided for in the statute mentioned, would require the company to go outside of its right of way and to condemn land for that purpose. [291]

In addition, it was urged that to compel the companies to make such connection would violate the commerce clause and also the 14th Amendment of the Federal Constitution in particulars specially set forth, and it was claimed that the statute was therefore void.

Evidence was taken before the commission, which finally ordered the connection to be made. The two companies appealed to the district court, which heard the case anew, and then made substantially the same order as that made by the commission.

The judgment of the district court declared as follows:

"That it is the duty of the defendants, the Wisconsin, Minnesota, & Pacific Railroad Company and the Willmar & Sioux Falls Railway Company, and they should be and are required to forthwith provide at the place of intersection of their said roads at said Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line or tracks of one of said companies to those of the other, and to forthwith provide, at said place of intersection, equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering property and cars to and from their respective lines."

Payment of the cost of furnishing this

for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the railroad and warehouse commission, and either party shall have the right to appeal from the order of said commission fixing the amount so to be paid, to the district court of the county where said transfer facilities are furnished, by serving a notice in writing on the adverse party within ten (10) days after the making and filing of such order by said commission, and upon the service of such notice there shall be pending in said district court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of said transfer facilities. Pleadings shall be made and filed in said action in conformity to those required by law and rules of practice in said court, and said cause shall be tried in the manner provided for the trial of civil actions in the district courts of this state.



track connection is provided for in § 3 (a) of the statute.

No evidence was offered on the part of the companies either before the commission or the district court. Reliance was placed on the evidence offered upon the part of the defendant in error and upon the admissions made in the district court.

The following are some of the facts appearing in the record herein:

[292] The road of the plaintiff in error runs from Watertown, in the state of South Dakota, near the western boundary of the state of Minnesota, easterly to Morton, in the latter state, where it connects with the Minneapolis & St. Louis Railroad Company, running from Morton to Minneapolis, and thereby constitutes physically one straight line of road from Watertown to Minneapolis. There is a small station called Hanley Falls,

in the state of Minnesota, on the line of the plaintiff in error's road, a short distance east of Watertown. The plaintiff in error has a trackage contract, by virtue of which it connects at Merriam Junction, Minnesota (a station within a few miles of Minneapolis), with the Northwestern system, and in that way reaches Sioux Falls.

The Willmar & Sioux Falls Railway runs from Willmar, Minnesota, some distance south to Hanley Falls, and thence south to Sioux Falls in South Dakota. This road is operated by the Great Northern Railway Company.

It is 181 miles from Hanley Falls to Sioux City via the Willmar & Sioux Falls Railway and its connections, while it is 380 miles between the two places by way of the Wisconsin, Minnesota, & Pacific Railroad and its connections, and it requires forty-six to forty-

(b) All railway companies doing business in this state shall, upon the demand of any person or persons interested, or upon demand of the railroad and warehouse commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this state.

Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and such transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the railroad and warehouse commission may prescribe, as hereafter provided in this act.

Less than carload lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by two (2) or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road.

(c) In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, or fail to establish between themselves the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the other and returned, or fail to provide for the convenient and prompt transfer of such through freight from the cars of the receiving company to those of the connecting line, it shall be the duty of the railroad and warehouse commission of this state, and said commission is hereby directed, upon the application of any person or persons interested, to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this state, and to prescribe the reasonable rules under which any such cars so transferred shall be returned; and in establishing, changing, or revising any such rates they shall take into consideration the average of rates charged by said railway companies operating such connecting lines for joint interstate shipments for like distances.

The rates established by said commission shall go into effect within ten (10) days after

the same are promulgated by said commission, and from and after that time the schedule of rates so established shall be prima facie evidence in all the courts of this state that such rates are reasonable through rates for the transportation of freight and cars upon the railroads for which such schedule has been fixed.

(d) Before the promulgation of such rates or rules, as above provided, the railroad and warehouse commission shall notify the railroad companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of charges provided for in such schedule, and in the event of the failure of the railway companies to agree upon such division and to notify the board of such agreement, said commission shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the commission shall, in all controversies or suits between the railroad companies interested, be prima facie evidence of the just and reasonable division of such charges.

(e) Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is hereby prohibited and declared to be unlawful, and every company or person violating the provisions of this section shall be subject to the penalties prescribed in § twelve (12) of the original act to which this act is amendatory.

(f) Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company when its own line of railroad runs to and reaches the point of destination or the point of connection with another railroad on which such point of destination is located, or to use its track or terminal facilities at terminal points for the handling of cars or traffics of another or competing company: *Provided*, That in no case shall the charges for transportation exceed the established through joint rates between any two points.

(g) Whenever any property is received by any common carrier, subject to the provisions of this act, to be transported from one place to another within this state, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, the common-law liability with reference to such property, while in its custody as a common carrier; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.



eight hours to transport freight over the latter road from Hanley Falls to Sioux City, while but fourteen hours are required to transport it between those places by the Willmar & Sioux Falls Railway. The tariff rates on stock from Hanley Falls to Sioux City are the same on both roads.

Traffic originating on the railroad of the plaintiff in error west of Hanley Falls and destined to Sioux City could, if transferred at Hanley Falls to the Willmar & Sioux Falls Railway, be transported to its destination by that road, which is 200 miles shorter than by the road of plaintiff in error, in from thirty to thirty-five hours' less time, provided the transfer from the road of the plaintiff in error to that of the Willmar & Sioux Falls road could be made at Hanley Falls in carloads without unloading from the cars in which the shipments were first made. No facilities have been provided by either of the companies for the transfer or interchange of business at Hanley Falls, and there is no track connection between them, although they have track connections and transfer facilities at Minneapolis.

[293] \*There is an immense supply of wood along the line of the Great Northern system of which the Willmar & Sioux Falls Railway forms a part, much larger than upon the line of the railroad of plaintiff in error, the wood on the line of the latter company being scarce and becoming more so every day. Citizens of towns west of Hanley Falls upon the line of the railroad of the plaintiff in error are purchasers and consumers of wood and posts, and a connection and transfer facilities at Hanley Falls would cheapen these commodities at such towns. Taking the wood from the Willmar road by transferring the cars might result in somewhat lessening the benefit to the plaintiff in error of a much longer haul of dearer wood along its own line.

The farmers along the line of the road of the plaintiff in error, west of Hanley Falls, have heretofore raised many stock cattle which are ready to be fed and fattened for market, the best market for such cattle being Sioux City, in the state of Iowa, "on account of the supply of feed being more plentiful and cheaper at or near Sioux City, and such stock can be sold to the best advantage in the market having the cheapest and best supply of feed." Making the connection at Hanley Falls would result in the use of the Willmar road from that point to Sioux Falls for certain kinds of cattle which otherwise would probably not be carried there and might be sent to the poorer market of St. Paul or Minneapolis, and thus give the plaintiff in error the benefit of its long haul. The result of the continued lack of these facilities might also be that the trade in that kind of cattle would decline and be extinguished among the people west of Hanley Falls, in which event, while no one would be benefited by such want of facilities, many would be injured. At the station at Hanley Falls the tracks of these respective roads intersect at grade "at a point from 40 to 60 rods distant from the respective depots of the two compa-

nies, and in such manner that it is practicable for them to provide ample, equal, and reasonable facilities by track connections for the transfer from one of said roads to that of the other of any and all cars of whatsoever name or nature used in the business or on the lines of the roads of the two companies mentioned, or either of them."

\*There was evidence showing that on ac-[294] count of the great loss in weight of the cattle known as "stockers and feeders" when arriving at Sioux City over the long haul of 380 miles on the road of the plaintiff in error and its connections, that market had become practically shut out from the owners of such cattle living on the road of the plaintiff in error west of Hanley Falls, while the St. Paul and Minneapolis markets, being poor markets for "stockers and feeders," the trade in that kind of cattle west of Hanley Falls had greatly diminished, and was still diminishing.

Mr. Albert E. Clarke argued the cause for plaintiff in error:

The act assumes to deprive the plaintiff in error of the control of its own property. The right of control is one of its most valuable property rights.

*Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Burlington, C. R. & N. R. Co. v. Dey*, 89 Iowa, 13, 56 N. W. 271.

The plaintiff in error cannot be compelled to exercise its franchise beyond its own line.

*People ex rel. Hempstead v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. Rep. 470; *Little Rock & M. R. Co. v. Little Rock, I. M. & S. R. Co.* 41 Fed. Rep. 562; *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. Rep. 914; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. Rep. 400; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 625.

The act of the state legislature deprives the plaintiff of the right to contract relative to its own business.

*United States v. Sweeney*, 95 Fed. Rep. 450; *Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

The state has no power to establish contract relations between carriers by statute, and prosecute suits in its own courts to enforce their specific performance.

*State ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. Rep. 724; *People ex rel. Hempstead v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631.

The act of the state legislature requiring the plaintiff in error to surrender the traffic which it has secured for transportation over its own line to a destination to which it has constructed and acquired railroad facili-

ties, from which transportation it derives its revenue, is a violation of the charter contract.

*Black, Constitutional Prohibitions, § 14; Planters' Bank v. Sharp*, 6 How. 327, 12 L. ed. 458.

The power to regulate commerce does not include the power to interfere with private contracts.

*Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 589, 22 L. ed. 176.

The act of the state legislature is clearly an ill-disguised attempt to control and regulate interstate traffic.

*Gibbons v. Ogden*, 9 Wheat. 222, 6 L. ed. 76; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 571, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

*Mr. W. B. Douglas* argued the cause and filed a brief for defendant in error:

Public carriers assume public burdens. Their business is therefore affected with a public interest, and they are subject to reasonable exactions in the line of such duties imposed by the state creating them.

*Gladson v. Minnesota*, 166 U. S. 430, 41 L. ed. 1066, 17 Sup. Ct. Rep. 627; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Munn v. Illinois*, 94 U. S. 130, 24 L. ed. 85; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388; 1191; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 179, 32 L. ed. 380, 9 Sup. Ct. Rep. 47; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

The police powers are not restricted to questions of public health, public morals, and public peace. They extend to all other subjects in the use, control, destruction, and preservation of which the general welfare is involved.

*Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *State v. Corbett*, 57 Minn. 349, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *State ex rel. Railroad & Warehouse Commission v. W. W. Cargill Co.* 77 Minn. 223, 79 N. W. 362; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

The 14th Amendment was not designed to, and does not, impair the police power of the state.

*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The legislature of the state has the power

to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars or transfer facilities as are incidental to the business for which the company was chartered.

*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Michigan C. R. Co. v. Smithsonian*, 45 Mich. 212, 7 N. W. 791; *Stalc v. Wabash, St. L. & P. R. Co.* 83 Mo. 144.

Exemption from future general legislation, either by constitutional provision or by an act of the legislature, does not exist unless expressly given in private charters, or unless it follows by an implication equally as clear as if expressed in the plainest phraseology.

*Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; *Pierce, Railroads*, p. 457; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 455, 33 L. ed. 979, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

*Mr. H. W. Childs* argued the cause for defendant in error on reargument.

\**Mr. Justice Peckham*, after stating the foregoing facts, delivered the opinion of the court: [294]

Before entering upon the discussion of the questions in this case, we desire to say that the briefs filed herein during this term are in plain violation of the amendment to Rule 31, adopted at the last term. See 178 U. S. 617, 44 L. ed. 1223. The rule as amended is reproduced in the margin.† The type used in quoting the statute is so small as to be exceedingly difficult to read. Many briefs are still printed on glazed paper. We shall hereafter insist upon a strict compliance with the terms of the rule as amended.

This writ of error has been sued out by the plaintiff in error alone, and various grounds are stated for the claim that the statute upon which the judgment below is founded is a violation of the Constitution of the United States. It is alleged that this judgment, and also the statute, interfere with and regulate interstate commerce, and therefore they violate the commerce clause of the Constitution.

\*Plaintiff in error urges that transporting [295] cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the state of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates

†31. All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.



nor interferes with that commerce, nor does that part of the statute upon which the judgment is founded. Whether any other portion of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution. That is all that has been done by the judgment under review. A state may furnish such facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution. But the supreme court of the state, in the opinion delivered therein, said that there was ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce when considered alone, to justify the ordering of the connection in question.

What is said in the statute in relation to the establishment of joint through rates for the transportation of freight between points on the respective lines of these roads within the state, and the manner of enforcing the establishment of such rates in case of the omission so to do by the companies, and as to any unjust or unreasonable charge for the transportation of freight or cars, are all matters which do not arise under this judgment, and which may never arise as a result of its enforcement. The \*tracks being connected, the making of joint rates is a matter primarily for the companies interested, and it may be that they will agree upon them, and thus do away with the necessity of any resort to the courts. The objection that there is any violation of the interstate commerce clause of the Constitution is, we think, clearly untenable.

Adhering strictly to the question involved in this case, namely, the validity or the invalidity of the judgment actually rendered, we are met by the objection of the plaintiff in error that the judgment itself is necessarily and inherently illegal, because upon the conceded facts, if the judgment be enforced, it can only result in taking the property of the plaintiff in error without due process of law, and in refusing it the equal protection of the laws, and in depriving it of its liberty to contract with such persons or corporations as it may choose. We think not one of these objections is tenable.

At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in or-

der to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable, and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 681, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.

Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. *Olcott v. Fond du Lac County Supers.* \*16 Wall. 678, 694, 21 L. ed. 382, [297] 388; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *United States v. Joint Traffic Asso.* 171 U. S. 505-569, 570, 43 L. ed. 259-287, 288, 19 Sup. Ct. Rep. 25; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465.

It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 694, 21 L. ed. 382, 388. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience.

While this power of regulation exists, it is also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised. Instances where the exercise of this power has been discussed exist in the cases of *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 696, 40 L. ed. 849, 857, 16 Sup.



Ct. Rep. 714; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. ed. 702, 705, 19 Sup. Ct. Rep. 465; *Holden v. Hardy*, 169 U. S. 376, 392, 42 L. ed. 781, 791, 18 Sup. Ct. Rep. 383. The books contain almost countless cases where the question of the police power of the states and its proper limitations and conditions have arisen, but those above cited are sufficient for the purposes of this case.

The argument favoring the invalidity set up by the plaintiff in error, so far as it is founded upon the provisions of the judgment in question, is directed to two alleged facts, the first of which is that by making track connections the plaintiff in error may be deprived of a long haul of a certain kind of cattle, and may be compelled to deliver [299] them in a car to be drawn by the \*Willmar road from Hanley Falls to Sioux City. This long haul exists, as stated, in transporting the cattle from Hanley Falls directly east for about 100 miles to Merriam, near Minneapolis, then south for another 100 miles, and then westerly to Sioux Falls, 180 miles further, consuming in the transit forty-six to forty-eight hours, when, if the car were placed on the Willmar & Sioux Falls road at Hanley Falls, the transportation would cover but 180 miles, and the time consumed in transit would be but fourteen hours.

The other fact referred to relates to the wood transportation. There is now very little wood left along the line of the road of the plaintiff in error east of Hanley Falls, from which to supply consumers west of that station, and the price is dearer than the wood from northern Minnesota along the stations of the Willmar road. But the complaint is that the enforcement of this judgment would compel the plaintiff in error to receive wood from the Willmar road at Hanley Falls, which would thus permit the latter road to enter into competition at stations west of that place with the wood taken from along the line of the road of the plaintiff in error east of that station.

In truth, however, competition in the case of either cattle or wood lies more in assertion than in substantial fact.

First, as to the cattle. This long haul of 380 miles necessarily causes a great loss in weight in the cattle, and much greater liability arises of the lighter cattle being trampled upon and killed by the heavier ones in the same car. Such liability increases the longer the transportation exists. These facts act almost as a complete bar to the traffic in that kind of cattle called "stockers and feeders," from stations west of Hanley Falls over the road of the plaintiff in error to Sioux City. It may be said, therefore, that competition between the roads for the transportation of such cattle to Sioux Falls does not exist. Those who own these cattle and are near enough to Hanley Falls to drive them to that station and there load them upon the Willmar & Sioux Falls Railway do so, but those who are so far off as to make that impracticable have largely given up the attempt to reach Sioux Falls

with their cattle on account of the difficulties and losses above mentioned. Nor does the failure \*of the owners to reach the Sioux City market result in sending all the cattle of the "stockers and feeders" class, which would otherwise go to that market, to Minneapolis or St. Paul, which would give the long haul for those cattle to the road of the plaintiff in error. The evidence is that St. Paul and Minneapolis are much poorer markets for the above named cattle than Sioux City because of the absence of feed in those markets, which is present in large quantities and at cheaper prices at Sioux City. The result has therefore been that this lack of facilities at Hanley Falls has materially injured trade in this particular class of cattle by parties west of Hanley Falls, while the plaintiff in error does not secure any substantially greater amount of such transportation for the Minneapolis or St. Paul market, for the reason just stated.

Second, as to the wood. It seems that there is very little wood along and near the line of the road of the plaintiff in error east of Hanley Falls, and the supply is being rapidly exhausted, but that which yet remains is being brought in decreasing quantities, and comes so dear to the inhabitants of towns west of Hanley Falls that, rather than purchase it they will and do drive from 10 to 15 miles to get to a station on the Willmar road, and there buy wood which they bring back for less than it costs to buy wood on the line of the road of the plaintiff in error coming from stations east of Hanley Falls. The country west of Hanley Falls is rolling prairie and produces no wood. The inhabitants of those towns are buying more wood, and yet are taking less from the road of the plaintiff in error. They obtain wood as stated by drawing it from stations on the Willmar road anywhere from 10 to 15 miles away. To furnish facilities therefore at Hanley Falls so that the wood from the forests of northern Minnesota may be brought there on the Willmar road and transferred in cars to the road of the plaintiff in error, and transported to stations west of Hanley Falls, is not in fact to compete or provide for competition with the plaintiff in error in the article of wood. It is simply affording facilities to people along the line of its road west of Hanley Falls to obtain wood by a short haul on the road of the plaintiff in error, which without such facilities would be obtained by many \*people [300] by drawing it in their own conveyances from stations on the Willmar road.

These are the facts upon which the plaintiff in error must rest its argument, that to enforce the judgment would compel it to pay its share in the cost of the construction of a track to be used for the purpose of depriving the company of its traffic, and transferring it to its competitor. The facts do not afford a fair foundation for the argument.

As has been seen, it is not a case, so far as the cattle are concerned, where the plaintiff in error is deprived of its traffic and compelled to transfer it to another and com-



peting company. The question is whether this company in its effort to compel owners of this class of cattle to transport them over its road to Minneapolis, which is a less favorable market, can rightfully refuse to make track connections with another company, by which the owners of the cattle can reach the more favorable market of Sioux City at such a cost as will render the transportation profitable. In the consideration of this question the further fact must be borne in mind that the failure to get to Sioux City with such cattle does not necessarily result in sending them over the road of the plaintiff in error to either Minneapolis or St. Paul, but the lack of facilities at Hanley Falls simply tends to diminish, if not to extinguish, the trade in such cattle west of that station. Other kinds of cattle would still be sent to St. Paul or Minneapolis the same as ever. Can it be possible that a railroad chartered and built primarily for the accommodation and in the interests of the public can under such facts legally refuse the track connections directed in this case? Can it refuse to obey the commands of the legislature in such case upon the sole ground that it may thereby somewhat lessen the earnings of its road? Or can it refuse to make such connections because, if they were made, wood could be brought from the forests of northern Minnesota to all towns along its line west of Hanley Falls, and there sold for a less price than can now be done, when without such connection being made the demand for the wood along the line of the road of the plaintiff in error is nevertheless constantly decreasing, owing to its quality and price? We think these questions [301] should receive a \*negative answer. The interests of the public should not be thus wholly, and it seems to us unjustifiably, ignored.

Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.

We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the 179 U. S.

public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error.

As we have said, it is unnecessary in this case to determine the question of the validity of the whole act with regard to all its provisions and details. We need express no opinion upon that subject. We simply here determine that the judgment actually rendered, directing this track connection to be made and thus affording track facilities at Hanley Falls, does not violate the constitutional rights of the plaintiff in error.

The distinction between this case and that of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, is plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a \*few of the [302] persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason.

In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself.

Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error. *Worcester v. Norwich & W. R. Co.* 109 Mass. 112; *People ex rel. Green v. Dutchess & O. R. Co.* 58 N. Y. 152, 163; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 67, 58 Am. Rep. 484, 9 N. E. 856.

*The judgment of the Supreme Court of Minnesota is therefore affirmed.*

Mr. Justice White and Mr. Justice McKenna dissented.

DULUTH & IRON RANGE RAILROAD COMPANY, *Plff. in Err.*,

v.

COUNTY OF ST. LOUIS.

(See S. C. Reporter's ed. 302-305.)

*Constitutional law — contracts — impairing*

NOTE.—As to reserved power to alter, amend, or repeal—see note to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961.



*obligation — reserved power to alter, amend, or repeal.*

The reserved power to alter, amend, or repeal a statute constituting a contract with a corporation, exempting it from ordinary taxes, cannot be exercised so as to relieve the state from the effect of the constitutional provision against impairing the obligation of contracts, by a statute which attempts to preserve all the obligations of the corporation in favor of the state, and to take away from the corporation the consideration on the part of the state upon which the duty of the corporation to pay a gross-receipt tax rested, as such statute is a mere arbitrary exercise of power in denial of the equal protection of the laws, and amounts to a deprivation of property without due process of law.

[No. 173.]

*Argued October 17, 1900. Decided December 10, 1900.*

IN ERROR to the Supreme Court of the State of Minnesota to review a decision sustaining a state statute against the contention that it impaired the obligation of a contract. *Reversed.*

See same case below, *sub nom. State v. Duluth & I. R. R. Co.* 77 Minn. 433, 80 N. W. 626.

The facts are stated in the opinion.

**Mr. Frank B. Kellogg** argued the cause, and, with *Messrs. J. H. Chandler, H. J. Grannis, and C. A. Severance*, filed a brief for plaintiff in error.

**Mr. W. B. Douglas** argued the cause and filed a brief for defendant in error.

[303] \***Mr. Justice White** delivered the opinion of the court:

The lands granted to the plaintiff in error to aid in the construction of its line of railroad were swamp lands which had accrued to the state under the act of Congress of March 12, 1860. The granting act did not impose a gross-receipt tax or purport to make any contract with reference to a tax of that character, but provided, in § 2, in express terms, that the lands granted should be exempt. The proviso in question reads as follows: "None of the lands hereby granted shall be subject to taxation until the expiration of five years from the issuance of the patent by the state, unless previously sold or disposed of by said railroad company."

Subsequently to the passage of this act the legislature of Minnesota, in 1873, enacted a law allowing railroad corporations which accepted the provisions thereof, to discharge the tax on all their property, real and personal, by the payment of a gross-receipt tax, with the condition, however, that the land which had been given by the state to aid in the building of the railroad should "be subject to taxation as soon as sold, leased, or contracted to be sold or leased." By this law the railroad property and granted lands of the company were, as the result of the payment of the gross-receipt tax, to be "forever exempt from all taxation and from all assessment." This law became operative

after the adoption of the constitutional amendment relating to gross-receipt taxes. The amendment in question has been fully stated in *Stearns v. Minnesota ex rel. Marr*, decided at this term (179 U. S. 223, *ante*, p. 162, 21 Sup. Ct. Rep. 73). There is no contention that this general law, which was passed after the constitutional amendment in question, was repugnant to the Constitution of Minnesota, since in the *Stearns* \**Case*, 72 Minn. 200, 75 N. W. 210, and in [304] the case at bar (77 Minn. 433, 80 N. W. 626), the supreme court of Minnesota held that the effect of the amendment of 1871 was not only to ratify prior gross-receipt tax laws, but, moreover, to authorize the legislature to enact similar laws in the future, all, however, being subject to the reserved power to repeal, alter, or amend conditioned upon approval by a vote of the people.

If the case rested wholly upon the provisions in the act granting an exemption for a stated period, the issue for decision would be whether an express contract of exemption could lawfully have been made in view of the clauses of the Constitution of the state of Minnesota requiring equality and uniformity, and empowering the legislature to exempt only in certain specified cases. On this question there would be no room for the assertion that prior decisions of the supreme court of the state of Minnesota relating to the validity of acts imposing gross-receipt taxes had recognized the power to make such contract, since such decisions of that court, whatever be the doctrine which they announced as to gross-receipt taxes, have uniformly and consistently denied the authority to grant an exemption. But the controversy which this case presents does not rest on the rights asserted to have been conferred by the exemption contained in the granting act, since the plaintiff in error accepted the provisions of the law of 1873, and has from the time of such acceptance paid the gross-receipt tax therein provided. Although it be that the law imposing the gross-receipt tax, and which was accepted by the corporation, did not give rise to an irrevocable contract protected from impairment by the contract clause of the Constitution of the United States, since the right to repeal, alter, or amend was reserved, the question yet remains whether the act of the legislature of Minnesota, which was submitted to a vote of the people, and which is here relied upon as manifesting the exercise of the reserved power to repeal, alter, or amend, has such effect. The repealing or amending act relied upon in this case is the same one which was involved in the case of *Stearns v. Minnesota ex rel. Marr*, just decided, and its text was fully stated in that case. Here, as there, to treat the act in question as a repeal, alteration, or \*amend- [305] ment of the contract would be to preserve all the obligations of the corporation in favor of the state, and to take away from the corporation the consideration on the part of the state upon which the duty of the corporation to pay the gross-receipt tax rested. For this reason, we conclude that the act which, it is



asserted, repealed or amended the contract, was void, because a mere arbitrary exercise of power giving rise, if enforced, not only to a denial of the equal protection of the laws, but to a deprivation of property without due process of law. The reasons by which we are led to this conclusion were fully expressed in the concurring opinion of four members of the court in *Stearns v. Minnesota*, and need not be here repeated.

*Judgment reversed*, and case remanded for further proceedings not inconsistent with this opinion.

Mr. Chief Justice **Fuller**, Mr. Justice **Brewer**, Mr. Justice **Shiras**, and Mr. Justice **Peckham** concur in the result.

JOHN M. AVERY *et al.*, *Plffs. in Err.*,  
v.

IGNATZ POPPER *et al.*

(See S. C. Reporter's ed. 305-316.)

*Error to state court—Federal question—rights of purchaser on execution from Federal court.*

1. The mere fact that the plaintiff in error was a purchaser at a marshal's sale of property sold under execution from a Federal court does not entitle him to a writ of error from the Supreme Court of the United States to a state court to bring up questions under state law with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof, where there is no question as to the validity of the judgment or the regularity of the proceedings in the Federal court, and the question is as to the validity of a chattel mortgage upon property sold under the execution, as affected by the sufficient identification of the property.
2. The question whether a right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee is not a Federal question, even when a purchase has been made under an execution from a Federal court, if no discrimination be made against executions from those courts.

[No. 72.]

*Submitted November 7, 1900. Decided December 3, 1900.*

**I**N ERROR to the Supreme Court of the State of Texas to review a decision against the claim of a purchaser under execution from a Federal court. *Dismissed.*

See same case below, 92 Tex. 337, 48 S. W. 572, 49 S. W. 219, 50 S. W. 122.

**NOTE.**—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

179 U. S.

Statement by Mr. Justice **Brown**:

\*This was an action originally instituted [306] in the district court of Hunt county, Texas, by Ignatz Popper and Edward Popper (doing business under name of I. Popper & Brother), to recover upon a certain promissory note executed May 26, 1891, by John H. Cooke and Mary E. Cooke, his wife, to Thomas H. King, for \$1,940, and for the foreclosure of a chattel mortgage upon certain personal property hereinafter described, and (in their amended petition) also for a personal judgment against John M. Avery and his sureties upon certain replevin bonds.

An interest in the note to the amount of \$775 was transferred by King, the payee, on April 10, 1892, to the firm of I. Popper & Brother, and the residue of such note and interest to Robert R. Neyland, under the name and style of R. R. Neyland & Company.

To secure the payment of such note John H. Cooke and wife, on May 26, 1891, executed and delivered to King a chattel mortgage upon fifty cows, with their calves of that spring, which cows were branded "Cook" on the left side and "O K" on the left hip, the calves not being branded; also one bay-mare colt, one gray-horse colt and one black-mule colt. This instrument was legally filed and registered as a chattel mortgage on May 30, 1891.

On June 14, 1893, the marshal of the United States levied upon, among others, the above-mentioned property, by virtue of an execution issued out of the circuit court of the United States at Dallas on June 8, 1893, upon a judgment rendered in favor of W. W. Avery against John H. Cooke and certain sureties upon a supersedeas bond, but not against his wife, Mary E. Cook. This judgment was rendered in pursuance of the mandate of this court in *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340. At the marshal's sale, which took place on June 28, 1893, the property was bid in by John M. Avery as attorney for and in the name of W. W. Avery, and all of such property was then and there delivered to John M. Avery.

\*On the following day, June 29, 1893, I. [307] Popper & Brother brought this action in the district court of Hunt county against John H. and Mary E. Cooke, W. W. Avery, and John M. Avery, to recover of the Cookes the amount of plaintiffs' interest in the note (\$775), and to foreclose against all the defendants their mortgage upon the property described. On the same day R. R. Neyland & Company brought a separate suit against the same parties to recover the balance due on such note after deducting the amount due Popper & Brother, and likewise to foreclose the mortgage. These suits were consolidated January 16, 1894. The property was seized while in the possession of John M. Avery by virtue of writs of sequestration issued in these actions. After such seizure, John M. Avery replevied and resumed possession of the property, drove it out of Hunt county, and within a short time thereafter sold and disposed of it.

At the time the mortgage was executed to

secure the note, there were many more animals of the same description mingled with those upon which the mortgage was given; but the state court found the evidence sufficient to show that, just prior to the execution of the mortgage, the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there any such separation when the execution in favor of Neyland was levied upon the property in controversy. The court further found that the fifty head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mary E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Avery; that the fifty calves were born during the marriage of Cooke and wife, after the cows became the separate property of Mrs. Cooke, and were therefore, at the time the mortgage was given and the execution in favor of Avery levied, the community property of John H. and Mary E. Cooke. Also, that the horses and mule involved in this suit were the offspring of the [308] separate property of Mary E. Cooke during her marriage with John H. Cooke, and were likewise the community property of Cooke and his wife at the time the mortgage was given and the execution levied.

The case appears to have been first tried in 1894, and judgment rendered against the plaintiffs in error; but on appeal by them the mortgage was held to be invalid, the judgment reversed, and the case remanded by the court of civil appeals for a new trial. *Avery v. Popper*, 34 S. W. 325. The case was again tried in October, 1897, and resulted in a judgment in favor of Popper & Brother against John H. Cooke in the sum of \$1,637 and in favor of Neyland, whose suit was consolidated with the other, in the sum of \$1,974. The mortgage was foreclosed on the fifty cows, one mare, one horse and one mule, and a further judgment rendered against John M. Avery and the sureties upon his replevin bond in the sum of \$850, the value of the property disposed of by him. The court further found that as to the fifty calves the mortgage was invalid, and a foreclosure of the mortgage to that extent was denied.

The case was again carried to the court of civil appeals by John M. Avery and his sureties, which affirmed the judgment against Cooke and wife, but increased the judgment against John M. Avery and his sureties in the sum of \$534, the value of seventeen two-year old steers and thirty-two two-year old heifers. 45 S. W. 951. The court found the district court to have been in error in holding that the mortgage executed by the husband and wife was not a lien upon all the property embraced in it, whether separate or community. On appeal to the supreme court the judgments of the court of civil appeals and of the district court were reversed,

and a judgment ordered in favor of Popper & Brother and Neyland against the plaintiff in error, John M. Avery, and his sureties in the sum of \$850, interest and costs. 92 Tex. 337, 48 S. W. 572, 49 S. W. 219, 50 S. W. 122. The court found that "no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. The power was given to sell certain cows and their calves, which could only be done by selecting them from the herd, and it being necessary to the execution of the express authority to sell, the law will imply the authority to take the \*fifty [309] cows and calves from the larger number. *Owsheer v. Watt*, 91 Tex. 124, 41 S. W. 466. The chattel mortgage was valid between the parties to it. "Upon default in payment, King or the holders of the note had the right to select from John H. and M. E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed, before Avery converted the stock."

Whereupon Avery and his sureties sued out a writ of error from this court.

**Mr. John M. Avery** submitted the cause for plaintiffs in error:

The Supreme Court of the United States has jurisdiction of this case.

*Clements v. Berry*, 11 How. 398, 13 L. ed. 745; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; *Collier v. Stanbrough*, 6 How. 14, 12 L. ed. 324; *Hurst v. Cobb*, 61 Fed. Rep. 1.

**Mr. Benjamin F. Looney** submitted the cause for defendants in error:

There is no question raised in this case for the jurisdiction of this court, as the final judgment of the supreme court of the state of Texas did not draw in question the validity of a statute of, or an authority exercised under, the United States, and there was no decision by said court against any title, right, privilege, or immunity set up or claimed by plaintiffs in error under any statute or authority under the United States.

*Day v. Gallup*, 2 Wall. 97, *sub nom. Derby v. Gallup*, 17 L. ed. 855; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 506, 32 L. ed. 785, 9 Sup. Ct. Rep. 331.

This court will respect the law of the state of Texas as decisive in respect to any case arising with reference to chattel mortgages, as those questions are not of general



commercial law, and each state has the right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity.

*Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565.

[309] \*Mr. Justice **Brown** delivered the opinion of the court:

The plaintiffs in error invoke the jurisdiction of this court upon the ground stated in the 3d clause of Rev. Stat. § 709, of a "title, right, privilege, or immunity claimed under . . . an authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed." The special right claimed was a right as purchaser under the marshal's sale upon execution to a priority of payment from the goods sold as against the chattel mortgage. The claim set up in the second assignment of error was that the mortgage was invalid as against such execution for the reason that there were many more animals of the same description mingled with those upon which the mortgage was given, and that the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from

[310] the United States court was levied \*upon the property in controversy, that no lien attached to any particular animals in the herd, nor did the mortgage give a lien upon an undivided interest in the herd, and as a matter of law was invalid as against the execution; and that in giving priority to the mortgage the supreme court of Texas failed to give full force and effect to the judgment of the circuit court of the United States.

It should be borne in mind that this action was not begun until the day after the termination of the action in the Federal court by a sale of the property to Avery, the payment of the money, and apparently the return of the execution satisfied; and that the question litigated was not the legality of this particular judgment, which was admitted to be valid, but the general question whether, under the laws of Texas, an execution is valid as against a mortgage upon animals which are not identified, and not separated from others of the same description with which they are mingled. Briefly stated, the question is whether the mere fact that the plaintiff in error was a purchaser at a marshal's sale of the property entitles him to bring into this court questions under the state law with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof.

There are many authorities upon the general question of the rights of purchasers at marshals' sales as against lienholders under laws of the several states, from which the true rule may be deduced. The question is analogous to the one decided at the last term of this court in *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, and *De Lamar's Nevada Gold* 179 U. S.

*Min. Co. v. Nesbitt*, 177 U. S. 525, 44 L. ed. 873, 20 Sup. Ct. Rep. 715, to the effect that the mere fact that parties claim adversely to each other under the mining laws or under patents of the United States does not entitle them to a writ of error from this court, unless there be a question made as to the meaning and construction of a Federal statute, or of an authority exercised under the United States.

Of the cases bearing more directly upon the question here involved of the relations of a purchaser under a marshal's sale to others claiming the same property, the earliest is that of *Collier v. Stanbrough*, 6 How. 14, 12 L. ed. 824. Collier was the purchaser \*under [311] a marshal's sale upon execution against one David Stanbrough of certain personal property which was claimed by Josiah Stanbrough, the defendant, who insisted that the property was not legally seized or levied upon, and that it was not legally appraised or advertised as required by law. Jurisdiction under the writ of error to the supreme court of Louisiana was sustained upon the obvious ground that the sale by the marshal was directly attacked, and the invalidity of plaintiff's title set up as a defense.

In *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655, Erwin was the purchaser at a marshal's sale of certain land and negroes, and was sued by Lowry, who claimed as curator of the estate to which the property belonged. The question was the same as that in *Collier v. Stanbrough*, namely, whether the marshal's deed to Erwin was void for the reason that it was not supported by a lawful judgment, or for want of compliance with any legal requirement in conducting the seizure and sale. The jurisdiction was also sustained in this case.

In *Clements v. Berry*, 11 How. 398, 13 L. ed. 745, the suit was by Daniel Berry against the marshal directly, in replevin; to recover property levied upon as the property of Charles F. Berry, and the sale was stopped by a writ of replevin issued from the state court. As the marshal was a party defendant to the suit, and his right to sell the property was directly attacked, the jurisdiction was sustained. For the same reason that the marshal was made a defendant to the suit in the state court; and justified under process from the Federal court, jurisdiction was sustained in *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; and *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677.

In *Day v. Gallup*, 2 Wall. 97, *sub nom. Derby v. Gallup*, 17 L. ed. 855, the suit was by Gallup against Derby and Day, execution creditors, Allis, their attorney, and Gear, marshal of the United States, who justified under a judgment of the Federal court against one Griggs. The suit was discontinued as to the marshal before trial. The case turned on the ownership of the goods seized, and judgment went against Derby and Day, which was affirmed by the supreme



court of Minnesota. The suit was not begun [312] until after the execution \*from the Federal court had been returned and the action completely terminated. Upon writ of error from this court it was held that at the time Gallup brought his action there was no case pending in the Federal court respecting the goods which had been attached under process from that court; that it did not appear that the authority of Gear as marshal to take the goods was drawn in question, and that, from the return of the execution satisfied, the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs, the original defendant in the Federal court, had been decided, the money made on the execution and the debt paid. In commenting on that case in *Buck v. Colbath* (p. 342, L. ed. p. 260), it was said: "It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

We do not undertake to say that the mere fact that the action in the Federal court is no longer pending would oust the jurisdiction of this court to re-examine the action of the state court, if the validity of the judgment of the Federal court, or the proceedings by the marshal under that judgment were directly attacked; but in *Day v. Gallup* it appeared that not only had the proceedings in the Federal court terminated, but that the real question was the ownership of the goods as between the attaching creditors and Gallup. Gallup claimed under a sale of the goods which the attaching creditors insisted was a fraud.

In *Dupasseur v. Rocherau*, 21 Wall. 130, 22 L. ed. 588, Rocherau, a judgment creditor of one Sauv , brought an action in the state court against Dupasseur, alleging that he had taken possession of a plantation belonging to Sauv  upon which he, Rocherau, held a mortgage, and charging that the plantation was bound for the debt, and that Dupasseur was bound either to pay the debt or give up the plantation. Dupasseur defended upon the ground that he had bought the property at a marshal's sale, upon an execution in his own favor against Sauv , "free of all mort- [313]gages \*and encumbrances, and especially from the alleged mortgage of the plaintiff," Rocherau. Upon writ of error from this court it was held that, as the question at issue was the effect to be given to the judgment of the Federal court and to the proceedings under the execution in that court, and to the sale by the marshal free of all mortgages and encumbrances, jurisdiction should be sustained. Here the validity of the sale by the marshal was directly attacked. Notwithstanding the fact that Dupasseur purchased the property under the execution sale on May 5, 1876, and Rocherau did not begin his action until

June 7, 1866, the jurisdiction was sustained, because Dupasseur's title under that purchase was attacked by the other party.

In *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365, an assignee in bankruptcy resorted to a state court to set aside a conveyance by the bankrupt as in fraud of creditors; but as no question was raised there as to the power of the assignee under the acts of Congress, or as to the rights vested in him as assignee, but only as to what should be deemed a fraudulent conveyance, and as to the application of the evidence in reaching that decision, we held that the case presented no Federal question, and the writ of error was dismissed.

*Per contra*, in *O'Brien v. Weld*, 92 U. S. 81, 23 L. ed. 675, the question arose whether, under the bankrupt law, the district court had authority to make a certain order, and, as the decision of the state court was against such authority, jurisdiction was sustained. Such was also the case in *Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679, where the effect to be given to a sale of property under an order of a district court was in question, the authority of the court to direct a sale free from encumbrances being denied.

In *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754, the action in the state court was directly against officers of the United States, and ultimately against the government itself. Jurisdiction was sustained upon that ground.

Finally, in *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238, the question arose whether \*due effect was accorded [314] to certain foreclosure proceedings in circuit courts of the United States, under which plaintiff in error claimed title to the land and property in question. Under these proceedings a sale of railroad property had been made, subject to certain outstanding bonds prior in lien to the mortgage and to all other, if any, paramount liens thereon, and that the decree should not in any manner prejudice or preclude the holders of such paramount liens. Plaintiff in error contended that the state court did not give due effect to these decrees of the circuit courts of the United States, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question; but postponed or subordinated these rights to a lien upon such property, which, it was alleged, was created or attempted to be created while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for the purposes of being administered. As the question concerned the effect to be given to a sale under process from the Federal courts, and to the construction of the decree of those courts, jurisdiction was sustained.

With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authori-



ties is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat. § 709.

[315] Applying this test to the case under consideration, it is evident from the record that no question was made as to the validity \*of the judgment, or the regularity of the proceedings in the Federal court; and that the case turned upon the question whether, under the laws of Texas, a chattel mortgage upon property sold under execution is good which does not identify the particular property covered by it, but leaves such property to be subsequently identified by selection of the mortgagor. In regard to this the supreme court of that state held (92 Tex. 337, 48 S. W. 572, 49 S. W. 219, 50 S. W. 122) that the chattel mortgage upon the fifty cows with their calves, out of a designated herd of one hundred, with power to the mortgagee to sell on default, gave him the right to select such cows from the larger number; and that such mortgage, implying, as it did, a power of selection on the part of the mortgagee, was, when duly registered, notice of his rights to the purchaser of the mortgagor's interest—following in these particulars *Oxshcer v. Watt*, 91 Tex. 124, 41 S. W. 466. That this was no new doctrine in the state of Texas is also evident from the case of *Elliott v. Long*, 77 Tex. 467, 14 S. W. 145, decided in 1890, three years before the property was sold upon execution in this case. See also *Wofford v. McKinna*, 23 Tex. 46. We are referred to two cases which apparently conflict with these (*Cleveland v. Williams*, 29 Tex. 212, 94 Am. Dec. 274, and *Moss v. Sanger* (Tex.) 12 S. W. 616), but if any such conflict existed, it was for the supreme court to settle it, as it seems to have done in *Elliott v. Long*, by overruling the former cases. Whether the right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee, is not a Federal question, if no discrimination be made against executions from Federal courts.

This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to state courts. Conceding that, if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no  
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means follows that we can do so upon writ of error to a state court, whose opinion upon a question of general law is not reviewable here.

\*Other questions are raised in the assign- [316] ments of error, but they bear even more remotely upon a Federal right. The decision already made covers them.

*The writ of error must therefore be dismissed.*

*Ex parte DE BARA, Petitioner.*

(See S. C. Reporter's ed. 316-322.)

*Criminal law—fraudulent use of mails—cumulative punishments.*

A single sentence on conviction under several indictments for several offenses committed within the same six months, on a prosecution under U. S. Rev. Stat. § 5480, for fraudulent use of the mails, need not be limited to the sentence prescribed for one offense by that section, since the provisions which authorize the joinder of three offenses in one indictment, and the imposition of a single sentence therefor, do not have the effect of making all the offenses committed within six months amount to a single continuing offense.

[No. 15, Original.]

*Submitted November 5, 1900. Decided December 3, 1900.*

ON PETITION for Writ of Habeas Corpus to release a person from the House of Correction at Detroit, Michigan, under sentence for several offenses in the use of the mails for fraudulent purposes. *Rule discharged.*

The facts are stated in the opinion.

*Mr. D. W. Baker* submitted the cause for petitioner:

Unless sentences are stated by the court to run successively, they must be construed as running concurrently.

*United States v. Patterson*, 29 Fed. Rep. 775; *Re Jackson*, 3 MacArth. 24.

Where a sentence of this kind is upheld as being partly valid, as soon as the legal period has expired the person imprisoned can be discharged on a writ of habeas corpus.

*People ex rel. Woolf v. Jacobs*, 66 N. Y. 8; *People ex rel. Trainor v. Baker*, 89 N. Y. 460; *Re Taylor*, 7 S. D. 382, 64 N. W. 253.

If the court has jurisdiction of the subject-matter and of the party, it must also act within its jurisdiction in pronouncing sentence; and if it does not, the proceedings of the court can be reviewed on habeas corpus.

*Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Re Mills*, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323.

If the sentence is in excess of that au-  
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thorized, and cannot be separated, the whole sentence is void, or if it is in excess of the authority authorized, and separable, then the excess is void and the party is entitled to be discharged.

*United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

Even if the sentence is voidable, the party is entitled to be discharged on writ of habeas corpus after the legal part of the sentence has been satisfied.

*Re Graham*, 138 U. S. 461, *sub nom. Graham v. Weeks*, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363.

*Solicitor General Richards* submitted the cause for respondent:

There is nothing in the provision of the statute authorizing the joining of three separate offenses committed in the same six months, and declaring that when joined there is to be a single sentence for all, to indicate an intention to make a single continuous offense, punishable only as such, out of what, without it, would be several distinct offenses, each complete in itself.

*Re Henry*, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142.

The act authorizing the joinder of offenses in one indictment was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the government and of the defendant, and not practically to merge two or more distinct offenses into one for the benefit of the latter.

*Ex parte Hibbs*, 26 Fed. Rep. 426.

The offense is not the devising of the scheme to defraud, but it is the depositing of the letter in the postoffice, or the taking of the letter therefrom. Each such act is a distinct offense.

*Re Henry*, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142.

[316] \*Mr. Justice **McKenna** delivered the opinion of the court:

Upon filing the petition in this case a rule to show cause was issued to John L. M. Donell, superintendent of the House of Correction at Detroit, Michigan, by whom it is alleged the petitioner is illegally restrained of his liberty.

The petition shows that the petitioner was convicted in the United States district court for the northern district of Illinois, upon the charge of violating § 5480 of the Revised Statutes of the United States, which prohibits the use of the mails for fraudulent purposes, and that on June 17, 1899, he was sentenced as follows:

"Came the parties by their attorneys, and the defendant in his own proper person in the custody of the marshal, to have the sentence and the judgment of the court pronounced upon him, he having heretofore, to [317] wit, on the 5th day of June, 1899, \*one of the days of this term of court, been found guilty by a jury in due form as charged in the indictment filed herein against him; and the defendant, being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pro-

nounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and the judgment of the court upon the verdict of guilty so rendered by the jury as aforesaid, that the defendant Edgar De Bara be confined and imprisoned in the House of Correction at Detroit, Michigan, for and during the term of three years."

That the sentence was made to run from June 20, 1899, and since said day the petitioner has been confined in the House of Correction at Detroit, Michigan. That although there was but one offense committed by him there were filed against him numerous indictments, all of which charged in a different way the same offense, and all were for violating § 5480.

That the record shows that the petitioner was convicted of the offense set out in said section, and that he was sentenced to a greater punishment than prescribed therein; that there was pronounced against him but one sentence, "as upon his having been found guilty by a jury in due form, as charged in the indictment filed against him, and that the said several other indictments were mere surplusage, and a restatement of the matter contained in indictment No. 3012, and that no evidence was given against your petitioner except evidence of the offense stated in indictment No. 3012," and that the "sentence was null and void, and of no effect."

That petitioner could not be imprisoned for a longer period than eighteen months; and that under the commutation for good behavior he would be entitled to a deduction of three months from said sentence; and that he has been confined for a full period of eighteen months, less the deduction of which he is entitled, and has fully satisfied any sentence which could be imposed on him, and he is therefore unlawfully restrained of his liberty.

A copy of the record is attached to the petition.

In his return to the rule the superintendent of the Detroit \*House of Correction justified the detention of the petitioner by the judgment and sentence of the district court as follows:

Saturday, June 17, A. D. 1899.

The District Court of the United States for the Northern Division of the Northern District of Illinois met at 9 o'clock A. M. pursuant to adjournment.

Present: The Hon. Christian C. Kohlsaat, judge of said court, presiding; the clerk and marshal.

The United States }  
vs. } 3012, § 5480 vio.  
Edgar De Bara. } postal laws.

Came the parties by their attorneys, and the defendant in his own proper person, in custody of the marshal, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, A. D. 1899, one of the days of



this term of this court, being found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the state of Michigan, for and during a period of three years.

The record contains only the indictment in cause No. 3012, and the return to the rule shows that the judgment and sentence under which the petitioner is held is designated by that number.

The indictments in the other case do not appear in the record, nor does the record contain the evidence, but the following does appear:

The United States vs.	}	3012.
Edgar De Bara, Fannie De Bara.		

[319] Come the parties by their attorneys, and in the presence of the defendants, and with their consent, agree that causes numbered 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017 shall be consolidated and tried with this cause, and that all of said causes be tried together by the same jury.

Thereupon it is ordered by the court that said causes be consolidated.

It further appears that on the 1st of June, 1899, under the same title and number, an order was entered reciting that on the 15th of May, 1899, pleas of not guilty to the several indictments were interposed, and that a jury (naming them) were duly impaneled and sworn "in causes numbered 3007, 3008, 3010, 3011, 3013, 3014, 3015, 3016, and 3017 consolidated, in all of which said causes the United States is the plaintiff and Edgar De Bara and Fannie De Bara are the defendants, a true verdict to render according to the evidence."

It also appears from the record that in cause No. 3012 the jury returned into the court with a verdict, and upon their oaths did say:

"We, the jury, find the defendants Edgar De Bara and Fannie De Bara guilty as charged in the indictments 3009, 3012, 3015, and all the counts therein; we also find the defendants Edgar De Bara and Fannie De Bara guilty in counts two and three as charged in indictments Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016, 3017.

"Thereupon the defendants, by their attorneys, move the court for a new trial herein."

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On the 17th day of June, 1899, the following order was entered:

The United States vs.	}	3012.
Edgar De Bara, Fannie De Bara.		

Comes the United States by S. H. Bethea, Esq., district attorney, and declines to prosecute the first count in each indictment in cases numbered 3007, 3008, 3010, 3013, 3014, 3016, and 3017, whereupon it is ordered by the court that a *nolle prosequi* be and the same is hereby entered herein, as to said first count in each of said indictments.

\*It is not correct, therefore, as contended by [320] counsel for petitioner, that the judgment and sentence of the district court were confined to indictment in case No. 3012. The proceedings were entitled as of that case because of the consolidation, but the other cases did not lose thereby their identity and consequences. The judgment and sentence must be construed by the cases which were tried and upon which the jury rendered its verdict. The petitioner was found guilty as charged in the indictment in 3012 on all counts; also on all counts in 3009 and 3015, and on all counts 2 and 3 of the indictments in Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016 and 3017.

Therefore the only question for our determination is whether the court had the power under § 5480 to give a single sentence for several offenses, in excess of that which is prescribed for one offense. The section provides as follows:

"If any person having devised, or intending to devise, any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the postoffice establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any postoffice of the United States, or take or receive any therefrom, such person, so misusing the postoffice establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

The question raised upon the statute is not an open one in this court. It is substantially ruled by *Re Henry*, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142. In that case there were two indictments, each charging three \*of [321] offenses. The petitioner was convicted on both indictments and sentenced on both. Upon

serving out his first sentence he applied to be discharged on habeas corpus because, as he alleged, "the court had no jurisdiction to inflict a punishment for more than one conviction of offenses under this statute committed within the same six calendar months."

In passing on the contention the court, by the Chief Justice, said:

"We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the postoffice for the purposes of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of a letter or packet from the postoffice, in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.' It is not, as in the case of *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated.

"It is indeed provided that three distinct offenses committed within the same six months may be joined in the same indictment; but this is no more than allowing the joinder of three offenses for the purposes of a trial. In its general effect this provision is not materially different from that of § 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more indictments found in such cases. Under the present statute three separate offenses committed in the same six months may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself."

[322] \*We need not add much to this language. The contention of the petitioner would make the punishment depend upon the manner of pleading, and, may be, upon the discretion of prosecuting officers, rather than upon the violation of the law. And to what end? In mitigation of ultimate punishment? But that function is confided to the court. To it is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offense. It may, though it is not required to, do more upon three offenses, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of a defendant, and, to use the language of the statute, "proportion the punishment especially to the degree

in which the abuse of the postoffice establishment" enters as an instrument "in the defendant's fraudulent scheme and device."

*The rule is discharged.*

WABASH RAILROAD COMPANY, *Plff. in Err.*,  
v.

PETER TOURVILLE.

(See S. C. Reporter's ed. 322-327.)

*Garnishment—of foreign judgment—plea of attachment.*

1. A judgment of a state court is foreign to another state, and therefore not subject to garnishment there.
2. To sustain the validity of a plea of attachment, the attachment must have preceded the commencement of the suit in which the plea is made.

[No. 36.]

*Submitted October 9, 1900. Decided December 3, 1900.*

IN ERROR to the Supreme Court of the State of Missouri to review a judgment affirming a judgment which refused to give effect to a garnishment in another state. *Affirmed.*

The facts are stated in the opinion.

See same case below, 148 Mo. 614, 50 S. W. 300.

Mr. Wells H. Blodgett submitted the cause for plaintiff in error; Mr. George S. Grover was with him on the brief:

Even if the first proceedings in East St. Louis were irregular, the judgment was in the plaintiff's favor, and he is therefore estopped from here questioning them.

Herman, Estoppel, § 53, p. 46, and cases cited; Freeman, Judgm. § 249, and cases cited; *Strong v. Phoenix Ins. Co.* 62 Mo. 289, 21 Am. Rep. 417; *Henry v. Woods*, 77 Mo. 280; *Shelbina Hotel Asso. v. Parker*, 58 Mo. 327; *Caldwell v. White*, 77 Mo. 471.

The payment by defendant of the first judgment here under consideration is a perfect defense to this action.

*Stevens v. Dillman*, 86 Ill. 233; *Drake*, Attachment, § 699; *Osborne v. Schutt*, 67 Mo. 712; *Hombs v. Corbin*, 20 Mo. App. 497; *Minor v. Rogers Coal Co.* 25 Mo. App. 78; *Marchildon v. O'Hara*, 52 Mo. App. 523.

The legal effect of the appeal to the circuit court in Missouri was to vacate and annul the judgment of the justice of the peace rendered in that state.

*Earl v. Hart*, 89 Mo. 268, 1 S. W. 238.

And the effect of the reversal of the first judgment, rendered by Judge Withrow, was to vacate it also, and to restore the parties thereto to the same condition in which they were prior to its rendition.

*Crispen v. Hannover*, 86 Mo. 160.

The second judgment in Illinois against defendant as garnishee destroyed plaintiff's



right to recover the same sum from the defendant in this proceeding, as that judgment was entitled to full faith and credit in the courts of Missouri.

Freeman, Judgm. § 559, and cases cited; *State use of Goodwin v. Williamson*, 57 Mo. 192; *Turner v. Johnson*, 95 Mo. 431, 7 S. W. 570; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651, 29 S. W. 1010; 12 Am. & Eng. Enc. Law, p. 148; *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *J. S. Mcken Co. v. Brinkley*, 94 Tenn. 721, 31 S. W. 92; *German Bank v. American Ins. Co.* 83 Iowa, 491, 50 N. W. 53; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905; *Mills v. Duryce*, 7 Cranch, 481, 3 L. ed. 411; *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 536, 6 Sup. Ct. Rep. 242; *American Bank v. Rollins*, 99 Mass. 313; *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347; 2 Kent. Com. 122, and cases cited; *Drake, Attachm.* § 700, and cases cited; 1 Mo. Rev. Stat. 1889, § 4881, p. 1099; 1 Starr & C. Anno. Stat. (Ill.) chap. 51, § 13, p. 1081; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

A judgment is subject to garnishment.

Waples, Garnishment, § 362, and cases cited.

A void judgment does not bar a subsequent action to recover the same debt.

Freeman, Judgm. § 117, and cases cited; *Hopc v. Blair*, 105 Mo. 85, 16 S. W. 595.

And the first judgment, even if it was valid, not having satisfied the debt, cannot be pleaded in bar by the defendant to the second attachment proceeding in Illinois.

Waples, Garnishment, § 955, and cases cited; *Drake, Attachm.* §§ 707, 708, and cases cited; *Barton v. Allbright*, 29 Ind. 489.

Rights of the parties which may have accrued subsequent to the rendition of the original judgment and which were not in issue in the original proceedings in which it was rendered, would not be adjudicated therein.

*Chouteau v. Allen*, 74 Mo. 59; *Troyer v. Wood*, 96 Mo. 478, 10 S. W. 42; *Freeman, Judgm.* § 154, and cases cited; *Young v. Thrasher*, 123 Mo. 312, 27 S. W. 326; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 36 S. W. 29; *Hawkins v. Blake*, 108 U. S. 422, 27 L. ed. 775, 2 Sup. Ct. Rep. 804.

The case of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, is decisive of the present controversy.

**Mr. John D. Johnson** submitted the cause for defendant in error; **Mr. Virgil Rule** was with him on the brief:

A judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final. Therefore the judgment of the St. Louis court of appeals is *res judicata*.

*Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; *Winthrop Iron Co.* 179 U. S.

*Meeker*, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; *Daince v. Kendall*, 119 U. S. 53, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Talley v. Curtain*, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. Rep. 5; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. Rep. 535; 1 Black, Judgm. p. 34; *McKinney v. Harral*, 36 Mo. App. 337; *Teichman Commission Co. v. American Bank*, 35 Mo. App. 472; *Belch v. Miller*, 37 Mo. App. 628; *Lane v. Chicago, R. I. & P. R. Co.* 35 Mo. App. 567; *Creelius v. Bierman*, 68 Mo. App. 34; *Southwest Lead & Zinc Co. v. Phoenix Ins. Co.* 41 Mo. App. 406; *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. ed. 302.

Said judgment being final, the circuit court had no power to reopen the case and hear the evidence offered by defendant, or to adjudicate the rights of defendant which accrued pending the appeal, or to consider or determine matters not included in the duty of entering the judgment as directed.

*Young v. Thrasher*, 123 Mo. 312, 27 S. W. 326; *State ex rel. Bauer v. Edwards*, 144 Mo. 467, 46 S. W. 160; *Rees v. McDaniel*, 131 Mo. 681, 23 S. W. 178; *Stump v. Hornbeck*, 109 Mo. 272, 18 S. W. 37.

Constructive service can confer no jurisdiction unless the requirements of the statute have been strictly complied with; and the record must show affirmatively that jurisdiction of defendant has been properly acquired.

*Thormcyer v. Sisson*, 83 Ill. 188; *Haywood v. Collins*, 60 Ill. 328; *Starr & C. Anno. Stat.* (Ill.) 1896, chap. 51, §§ 50-53, p. 473; *Hinman v. Andrews Opera Co.* 49 Ill. App. 135; *People v. Jarrett*, 7 Ill. App. 566; *Evans v. Pierce*, 3 Ill. 469; *Bines v. Proctor*, 5 Ill. 174; *Nelson v. Rockwell*, 14 Ill. 377; *Baldwin v. Ferguson*, 35 Ill. App. 394.

The record of the second garnishment proceedings failing to show proper service on Tourville, the presumption is conclusive that the judgment is void.

1 Wade, *Attachm.* § 47; *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Tift v. Griffin*, 5 Ga. 185; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Williams v. St. Louis, I. M. & S. R. Co.* 8 Mo. App. 135; *Haywood v. Collins*, 60 Ill. 328; *Haywood v. McCrory*, 33 Ill. 459.

In Illinois, justices of the peace have jurisdiction only in their respective counties. *Starr & C. Anno. Stat.* (Ill.) chap. 79, § 16.

The judgment of the Illinois court in the second garnishment proceedings, as well as in the first, being void for want of jurisdiction, even though it had been prior to this judgment, would be no protection.

2 Wade, *Attachm.* §§ 46, 401; 1 Freeman, *Judgm.* § 120, and cases cited; *Mercier v. Chace*, 9 Allen, 242; *Houston v. Musgrove*, 35 Tex. 594; *Ponder v. Moseley*, 2 Fla. 207, 48 Am. Dec. 194; *Shriver v. Lynn*, 2 How. 43, 11 L. ed. 172; *Noble v. Thompson Oil Co.* 79 Pa. 354, 21 Am. Rep. 66; *Borden v. Fitch*, 15 Johns. 121; *Gage v. Hill*, 43 Barb. 44;

*Bissell v. Briggs*, 9 Mass. 468, 6 Am. Dec. 88; *Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374.

Flannigan stood in the shoes of Tourville, and could not be placed in a better position than was Tourville himself.

*Weil v. Tyler*, 38 Mo. 545, 9 Am. Dec. 441; *Heege v. Fruin*, 18 Mo. App. 141; *McPherson v. Atlantic & P. R. Co.* 66 Mo. 103; *Funkhouser v. Excland*, 3 Mo. App. 602; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 596.

A garnishee must for his own protection see that jurisdiction of the defendant has been properly acquired by the court.

*Tourville v. Wabash R. Co.* 61 Mo. App. 532; *Drake, Attachm.* § 695; *McCloon v. Beattie*, 46 Mo. 391; *Epstein v. Salorgne*, 6 Mo. App. 352.

And plead the defendant's exemptions.

*Chicago & A. R. Co. v. Ragland*, 84 Ill. 376; *Chicago, R. I. & P. R. Co. v. Mason*, 11 Ill. App. 525.

Had the garnishee introduced the Illinois statute in the second garnishment proceedings, instead of making default, judgment would not have gone against it.

Ill. Laws 1891, § 3, p. 141.

The pendency of this suit against the garnishee will defeat the subsequent garnishment proceeding in a court of another jurisdiction.

*Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *Mack v. Winslow*, 8 C. C. A. 134, 16 U. S. App. 602, 59 Fed. Rep. 319; *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163; *Wood v. Lake*, 13 Wis. 94.

A debt due on a judgment in one jurisdiction cannot be garnished in another jurisdiction.

*Mover v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; *Henry v. Gold Park Min. Co.* 5 McCrary, 70, 15 Fed. Rep. 649; *Loomis v. Carrington*, 18 Fed. Rep. 97; *Tourville v. Wabash R. Co.* 148 Mo. 614, 50 S. W. 300; *Drake, Attachm.* § 625; *Sieners v. Woodburn Sarven Wheel Co.* 43 Mich. 275, 5 N. W. 311; *Young v. Young*, 2 Ill. L. 426; *Franklin v. Ward*, 3 Mason, 136, Fed. Cas. No. 5,055; *Clodfelter v. Cox*, 1 Sneed, 336.

A judgment in one state is not the subject of garnishment in another state.

*Renier v. Hurlbut*, 81 Wis. 32, 14 L. R. A. 562, 50 N. W. 783; *American Bank v. Snow*, 9 R. I. 11, 98 Am. Dec. 364; *Shinn v. Zimmerman*, 23 N. J. L. 150, 55 Am. Dec. 260; *Jones v. New York & E. R. Co.* 1 Grant Cas. 457.

A judgment of a Federal court is not subject to garnishment in a state court.

*Henry v. Gold Park Min. Co.* 5 McCrary, 70, 15 Fed. Rep. 649; *Burrill v. Letson*, 2 Speers, L. 378; *Thomas v. Wooldridge*, 2 Woods, 667, Fed. Cas. No. 13,918; *Perkins v. Guy*, 2 Mont. 16.

Plaintiff in error is not the same corporation as the Wabash Railroad Company of Illinois, the garnishee. The consolidation of interests of Missouri and Illinois corporations of the same name does not change their distinctive character as separate corporations.

*Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Farnum v. Blackstone Canal Co.* 1 Sumn. 46, Fed. Cas. No. 4,675; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595.

\*Mr. Justice **McKenna** delivered the [323] opinion of the court:

The plaintiff in error is a consolidated railway corporation, separately organized under the laws of Illinois and Missouri. It was indebted to the defendant in error, whom we shall designate by his name, Tourville, for work and labor performed in St. Louis, Missouri, in the sum of \$81.98. Tourville was indebted on a promissory note for \$132 to one Flannigan, who lived in East St. Louis, state of Illinois.

On the 10th of June, 1891, Tourville commenced an action before a justice of the peace of the city of St. Louis, against the plaintiff in error, for his wages, and obtained a judgment by default for the sum of \$75 on the 22d of June, 1891. From this judgment the plaintiff in error appealed to the circuit court of the city of St. Louis.

Prior to the suit by Tourville against plaintiff in error, to wit, on the 3d of June, 1891, Flannigan commenced suit against him before a justice of the peace of East St. Louis, Illinois, and caused the plaintiff in error to be summoned as garnishee. Tourville was not personally served, but plaintiff in error orally notified him and his attorney in time for him to make defense to the suit. He did not appear, and judgment was entered against him by default on July 13, 1891, for \$132.

The plaintiff in error appeared in the action brought by Flannigan, and admitted indebtedness to Tourville in the sum of \$71.83, and pleaded and claimed for him the exemption allowed by the laws of Illinois and Missouri; and also pleaded and proved that Tourville had recovered a judgment against plaintiff in error for his wages in the courts of Missouri, and that such wages were earned in Missouri under a contract made there, and were payable in the city of St. Louis, "and nowhere else," and were exempt from attachment by laws of that state. "because Tour- [324] ville was the head of a family, residing with the same in the state, and had no property except his wearing apparel.

The Illinois exemption was allowed, which amounted to \$50, but the Missouri exemption was disallowed, and judgment was rendered against plaintiff in error on the 25th of July, 1891, for the sum of \$21.83. The company appealed to the city court of East St. Louis.

On the 21st of December, 1891, the case came on for trial in the city court of East St. Louis. Tourville did not appear. The plaintiff in error appeared and demanded a jury. The attachment was sustained, and a verdict found against Tourville for the sum of \$132, and against the company as garnishee in favor of Tourville for the use of Flannigan for \$21.83 and costs,—amounting in all to \$43.38. Execution was issued, and



the company paid the judgment against it as garnishee.

On the trial of the action of Tourville against the company in the circuit court of St. Louis the facts stated above were stipulated, and the case submitted to the circuit judge sitting as a jury, and judgment was rendered in favor of Tourville as follows:

Whole amount of wages..... \$81 98  
Less judgment and costs paid by defendant in East St. Louis..... 43 38

Judgment against defendant..... \$38 60

The plaintiff Tourville took an appeal to the St. Louis court of appeals which reversed the judgment, holding that the proceedings in garnishment were void on the ground that the justice's court of East St. Louis had no jurisdiction, because there was no personal service on Tourville, and the directions of the statute for substituted service had not been observed, and because plaintiff in error had failed to make this defense, although it appeared by the papers on file in the justice's office.

The opinion concluded as follows: "It results from the foregoing that the court erred in holding that the defendant company was entitled to credit for the amount paid by it in the garnishment proceedings. The judgment is reversed and the \*cause remanded, with directions to the trial court to enter judgment for plaintiff for \$81, the amount sued for and admittedly due if we disregard the garnishment proceedings." 61 Mo. App. 527.

The mandate was issued, and the court ordered "to enter judgment for plaintiff for \$81, the amount sued for."

On the 21st of April, 1895, and before the mandate reached the circuit court, Flannigan instituted another suit by attachment against Tourville before a justice of the peace in East St. Louis, and the defendant in error was again summoned in garnishment.

On the return of the mandate of the Missouri court of appeals to the circuit court of St. Louis the proceedings in said suit and garnishment were offered in evidence, but ruled out, and the company excepted.

Judgment was then entered in favor of Tourville for \$81 in pursuance of the mandate. The company again excepted, and moved to set the judgment aside, and for a new trial, on the ground that by entering said judgment and rejecting said evidence the court refused to give full faith and credit to proceedings against the defendant in a sister state, in violation of § 1, article 4, of the Constitution of the United States. The motion was overruled, and the defendant excepted. Subsequently a motion was made to modify the judgment, and in support thereof the proceedings in garnishment were again offered, and again ruled out. Execution was issued on the judgment.

On the 12th of October, 1895, a motion was made to quash the execution, based on the same grounds as former motions, which was also denied. The company then appealed to the supreme court of the state.

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That court sustained the rulings of the lower court and affirmed its judgment. 148 Mo. 614, 50 S. W. 300.

The supreme court said:

"The circuit court committed no error in rejecting the evidence of the proceedings in the second attachment suit in Illinois, in rendering judgment for the plaintiff, or in refusing to modify that judgment. It is true, if the judgment of the circuit court had been simply reversed and the cause remanded the \*case would have stood as though no judgment had ever been rendered, and the parties would have been entitled 'to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been decided by any court.' *Crispen v. Hanovan*, 86 Mo. loc. cit. 160. But such was not the case. The cause was remanded to the circuit court with directions 'to enter judgment for the plaintiff for \$81,' and the circuit court had no judicial discretion in the matter. It had no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed. *State ex rel. Bauer v. Edwards*, 144 Mo. 467, 46 S. W. 160; *Rces v. McDaniel*, 131 Mo. 681, 33 S. W. 178; *Young v. Thrasher*, 123 Mo. 308, 27 S. W. 326; *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37; *Chouteau v. Allen*, 74 Mo. 56.

"3. The court committed no error in issuing execution on the judgment, nor in overruling defendant's motion to quash the same. The judgment of the St. Louis court of appeals rendered on the 26th of March, 1895, was a final judgment in the cause. *Young v. Thrasher*, 123 Mo. 308, 27 S. W. 326; 1 Black, Judgm. § 34, p. 40, and cases, note 64; *Mower v. Fletcher*, 144 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566.

"The entry of that judgment in the circuit court was a purely ministerial act, carrying into execution the judgment of the appellate court of the date and effect as rendered by that court. One of the effects of that judgment was to merge the cause of action, the debt sued for, in the judgment. 'It was drowned in the judgment.' It thereby 'lost its vitality,' and 'all its power to sustain rights and enforce liabilities terminated in the judgment.' *Cooksey v. Kansas City, St. J. & C. B. R. Co.* 74 Mo. 477; 1 Freeman, Judgm. § 215; 2 Black, Judgm. § 674. On the 26th of March, 1895, the old debt of the company to the plaintiff ceased to exist, and thereafter could not sustain any liability imposed thereon by the subsequent garnishment proceedings under the second attachment suit in Illinois. 15 Am. & Eng. Enc. Law, p. 341."

To the judgment of the supreme court this writ of error was sued out.

It is contended that full faith and credit were not given to the proceedings in garnishment, and in support of it counsel has ably and fully discussed the law and effect of garnishment. We do not think it necessary to enter into that discussion as fully as

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counsel have. The judgment of the court of appeals was undoubtedly final. It completed the litigation, and left nothing to the lower court but to enter judgment for Tourville for \$81. The lower court had no option or jurisdiction to do anything else. The rule precludes in that state the adjudication of rights occurring subsequently to the rendition of the original judgment. *Young v. Thrasher*, 123 Mo. 308, 27 S. W. 326.

This disposes of the various motions of defendant in error preceding the entry of the judgment on the mandate, and the motions to set aside the same and to grant a new trial. Is the motion to quash the execution entitled to different consideration? It is not clear from the opinion of the supreme court whether the lower court under the local procedure had as little power over the execution on the judgment as it had over the judgment entered on the mandate of the court of appeals. The supreme court, however, did hold that the judgment was foreign to Illinois, and therefore not subject to garnishment there. In this the court is sustained by the weight of authority. *Drake*, *Attachm.* § 625, and cases compiled in 14 *Am. & Eng. Enc. Law*, pp. 775, 776.

This court has held that to sustain the validity of a plea of attachment the attachment must have preceded the commencement of the suit in which the plea is made. *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95.

*Judgment affirmed.*

Mr. Justice **Brewer** dissented.

[328]\*ISAAC M. MASON, Auditor of City of St. Louis, Missouri, *Plff. in Err.*,  
v.

STATE OF MISSOURI *ex rel.* JAMES  
McCAFFERY *et al.*

(See S. C. Reporter's ed. 328-335.)

*Equal protection of the laws—registration law discriminating between citizens.*

A registration law applicable to cities having more than 300,000 inhabitants (Mo. act May 31, 1895), being held valid by the highest

NOTE.—On the general subject of constitutionality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

As to validity of class legislation—see *State v. Loomis* (Mo.) 21 L. R. A. 789, and note; and *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note.

*Validity of registration laws.*

It has been generally held that states have the power to pass reasonable registration laws. In cases where the Constitution provides for registration or is silent on the subject. *Re Polling Lists*, 13 R. I. 729; *State ex rel. Harris v. Scarborough*, 110 N. C. 232, 14 S. E. 737; *Detroit v. Rush*, 82 Mich. 532, 10 L. R. A. 171, 46 N. W. 951; *State ex rel. Garesche v. Bond*, 214

court of the state under the state Constitution, does not deny to citizens residing in the only city of the state which has a population of 300,000 the equal protection of the laws, although it may be thought to be less effectual in protecting the right of voting than the statute applicable to other cities.

[No. 258.]

*Argued October 25, 26, 1900. Decided December 10, 1900.*

IN ERROR to the Supreme Court of the State of Missouri to review a decision awarding a writ of mandamus to compel the performance of duties under an election law the constitutionality of which was contested. *Affirmed.*

See same case below, 155 Mo. 486, 55 S. W. 636.

Statement by Mr. Justice **White**:

By an act of the general assembly of the state of Missouri, approved on May 31, 1895, provision was made for the registration of voters in cities which then had or thereafter might have a population of over 100,000 inhabitants. This law became operative in the cities of St. Louis, Kansas City, and St. Joseph. On June 19, 1899, the governor of Missouri approved an act of the general assembly, known as the Nesbit law, which made provision for the registration of voters in cities in Missouri which then had or might thereafter have a population of over 300,000 inhabitants. At the time the Nesbit law went into operation it affected only the city of St. Louis, which was the only city in Missouri having a population of over 300,000 inhabitants.

\*The defendant relators were appointed a [329] board of election commissioners under the Nesbit law, and certain expenditures having been incurred in carrying the law into effect, the board applied to the plaintiff in error, in his official capacity as auditor of the city of St. Louis, to examine, audit, and pass upon the accounts of the board, as required by law. Compliance with such request having been refused, the present litigation was commenced by the filing on January 5, 1900, in the supreme court of Missouri of a petition for a writ of mandamus to compel the per-

33 Mo. 425; *People ex rel. Foley v. Kopplekom*, 16 Mich. 342; *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L. R. A. 124, 14 So. 383; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *State ex rel. Boyle v. State Bd. of Examiners*, 21 Nev. 67, 9 L. R. A. 385, 24 Pac. 614; *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

But in *White v. Multnomah County Comrs.* 13 Or. 317, 57 Am. Rep. 20, 54 Am. Rep. 832, note, 10 Pac. 484, this power was squarely denied where the Constitution was silent, as the requirement of registration placed an unauthorized restriction on the voter. From the dissenting opinion it seems that the act was objected to as imposing restrictions as to time, and for many details that were not commend-

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formance by the plaintiff in error of the duty in question. An alternative writ having issued, a return was filed, in which it was averred that the law under which the relators claimed to act was void, because repugnant both to the Constitution of Missouri and the Constitution of the United States. The incompatibility between the law in question and the Constitution of the United States was rested upon the contention that the provision of the law "deprives the citizens of the United States residing in the city of St. Louis of their right to the equal protection of the laws, and imposes on citizens of said city unconstitutional requirements as preliminary to their right to vote and hold office."

Issue having been joined by the filing of a reply, the matter was heard by the supreme court of Missouri, and that court awarded a

peremptory writ. 155 Mo. 486, 55 S. W. 636. It also overruled a petition for a rehearing. A writ of error was thereupon allowed by the chief justice of the state supreme court.

As the most convenient form of stating the contentions of the plaintiff in error, we excerpt from the brief of counsel a statement of the proposition relied on:

"We maintain that this Nesbit law does deny to the citizens of St. Louis the equal protection of the laws in these respects:

"(a) It denies them the right of appeal to any court from the action of the precinct boards of registration and from the action of the board of election commissioners in striking their names from the registration lists, as qualified voters, while in cities of 100,000 inhabitants and up to 300,000 inhabitants, under the provisions of the law

able in all particulars, but the court put the decision alone on the question of power.

A clause in a registration act requiring other qualification than that of the Constitution is not valid as to such clause; but a registration law giving reasonable time to register is not invalid, although some may be barred of the right to vote on election day, and the law may be local. *Com. v. McClelland*, 83 Ky. 686.

As to what is a reasonable time to register, the cases do not agree, but it was held in *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788, that closing the books on the 3d Tuesday prior to election was reasonable.

In *State ex rel. Harris v. Scarborough*, 110 N. C. 232, 14 S. E. 737, and *State ex rel. Garesche v. Bond*, 38 Mo. 435, the time for closing the books was not stated.

And in *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632, the books were kept open to the day of election, and in *Re Polling Lists*, 13 R. I. 729, they were closed ten days prior to election.

And in *People ex rel. Foley v. Kopplekom*, 16 Mich. 342, the board did not meet at all, and gave no opportunity for some to vote.

In *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407, the court referred to *Com. v. McClelland*, 83 Ky. 686, where three days were allowed.

In *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L. R. A. 124, 14 So. 383, the lists were to be published two weeks prior to the election, and notice was to be given, for two days, of time and place to revise the lists in regard to a municipal election.

In *State ex rel. Boyle v. State Bd. of Examiners*, 21 Neb. 67, 9 L. R. A. 385, 24 Pac. 614, the board adopted a general registration list for a special election held three months after a general election.

In *Patterson v. Bariow*, 60 Pa. 54, the voter could have his name placed on the list on the day of election, except in Philadelphia, where the time closed ten days prior thereto.

In *State v. Butts*, 31 Kan. 537, 2 Pac. 618, the books closed ten days prior to the election.

In *Brewer v. McClelland*, 144 Ind. 423, 17 L. R. A. 845, 32 N. E. 299, fifty-nine days were required, which exceeded the residence qualification given in the Constitution.

The legislature has power to enact that an elector who changes his place of residence from or within his ward and district after registration shall not be qualified to vote without a new registration at least twenty days before the election. *Moore v. Sharp*, 98 Tenn. 491, 41 S. W. 587.

That a registration law does not provide for registration or voting of those who become com-  
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petent to vote after registration is closed, ten days prior to the election, will not render the law invalid. *Well v. Calhoun*, 25 Fed. Rep. 865.

But if the voter is not allowed a reasonable time to register, the statute will not be sustained. *Stephens v. Albany*, 84 Ga. 630, 11 S. E. 150; *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388.

It was said in *Gooding v. Brown*, 22 Fla. 437, that the legislature could not provide a registration law that did not give the voter a reasonable time in which to register, but that was not the question involved.

So, the law was held invalid where the voter had only three days within which to register. *Owensboro v. Hickman*, 90 Ky. 629, 10 L. R. A. 224, 14 S. W. 688.

So, where only four days were given. *State ex rel. Stearns v. Corner*, 22 Neb. 265, 34 N. W. 499.

So, where only seven days were given. *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832, 3 N. E. 538.

And in *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272, it was held that a registration act not providing for a voter whose qualifications to vote may be complete after the time for registration has closed is unconstitutional and void. This act provided for closing the registration books ten days prior to election, and required ten days' residence before registration, and is contrary to Pa. Const. art. 3, § 1, providing for ten days residence in the district, as the effect would be to require 20 days' residence.

So, the provision of the South Carolina registration act of 1882, closing the registration on July 1st preceding the general election in November, and permitting only those to register, during the four months preceding the election, who become of age during that time, abridges the constitutional right of a citizen to vote when he has been a resident of that state for one year, and of the county in which he offers to vote for sixty days next preceding the election. *Mills v. Green*, 67 Fed. Rep. 818, rev'd on other grounds 16 C. C. A. 516, 69 Fed. 852, 30 L. R. A. 90.

A registration statute not applying alike to all persons, or requiring different residence from that in the Constitution, or requiring one to prove in advance that he will be a voter at the coming election,—proof not provided for in the Constitution,—is void, although the Constitution may provide for registration of qualified voters. *Morris v. Poweill*, 125 Ind. 281, 9 L. R. A. 326, 25 N. E. 221.

An act providing that a majority of votes cast at an election for subscription shall prevail is invalid where qualified voters may not



[330] of 1895, this right is secured. \*It is secured so completely by the last-named law that an appeal lies even to the highest court of the state.

"(b) It denies them the right of appeal to any court or judicial tribunal from the action of the precinct boards of registration or from the action of the election commissioners in admitting to registration, or in refusing to strike from the registration lists of qualified voters, persons who are not entitled to register or to vote,—a right secured to all citizens by the law of 1895 in cities and counties of 100,000 and not exceeding 300,000 inhabitants.

"(c) It allows a partisan board to add hundreds and even thousands of names to the registration lists, which names are unknown to the voters till the day of election, and have been subjected to no canvass as to their right to remain on the lists as registered qualified voters. If a citizen of St. Louis registers in his own precinct, under the Nesbit law, or names are placed on the registration lists in the precinct by the precinct boards of registration during the three days allowed by the law for registration in the precinct, the Nesbit law requires, as does the law of 1895, that the clerks, representing parties of opposite politics, shall go together to each house or room from which the party registers, and ascertain, by personal inquiry, whether or no the party registered actually resides at that place.

have registered for that election, and the Constitution requires a majority vote of all the qualified voters of the county for such an election. *Chester & L. Narrow Gauge R. Co. v. Caldwell County Comrs.* 72 N. C. 486.

But no constitutional right of qualified electors is abridged, nor is any unreasonable regulation as to registration made, by the provision of an act authorizing a municipality to issue bonds in aid of railroads, that on the day of the election a new registration of all the legal voters should be had, which should be exclusive evidence of the true number of legal voters, and that no person not so registering should vote or be counted in determining the result. *Pacific Improv. Co. v. Clarksdale*, 20 C. C. A. 635, 41 U. S. App. 68, 74 Fed. Rep. 528.

And the submission of the question of the proposed issue of municipal bonds for public improvements will not be deemed unconstitutional because the act authorizing such submission disfranchised some electors by adopting the last official registration as the test for qualification, where it does not affirmatively appear that the result would have been different had the illegality not existed. *State ex rel. Fletcher v. Ruhe*, 24 Nev. 251, 52 Pac. 274.

Mass. Stat. chap. 345, § 7, forbidding registration of naturalized persons within thirty days from naturalization, is void as adding qualifications not defined or authorized by the Constitution of the state. *Kinneen v. Welis*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916.

And a registration law unreasonable as to proof of naturalization required, or which excludes male inhabitants of Michigan living in the state on June 24, 1835, and authorized to vote, under the Constitution, without regard to birth or naturalization, is void. *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388.

And statutes allowing officials to revise reg-

"But if the party has registered at the office of the board of election commissioners, which he may do on all such days on which registration is not conducted in the precincts, which days of precinct registration are the Tuesday four weeks before the election, the Saturday following, and the third Tuesday before the election, and which he may do even on the Thursday, Friday, and Saturday immediately preceding the election,—there is no canvass or examination whatever provided by the Nesbit law of his right to do so; his name is placed on the registration and poll books by the commissioners, their deputy or clerks—all appointed by vote of a majority of the board,—and it appears on the day of election as the name of a qualified voter of the precinct. Thus a marked distinction is made by the Nesbit law between those who register or have their names placed on the registration lists at the office of the election commissioners, and \*those who register in their own precinct. [331] The latter are subjected to close and bi-partisan scrutiny; the former go unchallenged and uncontested. Under the law of 1895 this cannot occur, for no registration under that law can be made in the office of the board of election commissioners, but all must be made in the several precincts, and all is subject to rigid bi-partisan scrutiny and canvass. This latter is the law in all cities of 100,000 and up to 300,000 inhabitants, and the former is the Nesbit law for all cities

istration lists so as to exclude qualified voters will be held inoperative as to such part. *State v. Staten*, 6 Coldw. 233; *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L. R. A. 124, 14 So. 383.

Miss. Code, § 3612, forbidding registration of a delinquent taxpayer, is contrary to the state Constitution, § 241, providing for registration of voters, and authorizing the voter to satisfy the election officers at the time of election that he has paid the tax. *Bew v. State*, 71 Miss. 1, 13 So. 868.

In *People ex rel. Nichols v. Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624, 29 N. E. 327, it was said that no statute regulating the conduct of elections should be so construed as to place arbitrary or unreasonable obstructions in the way of citizens in the exercise of the right to vote; if it did, it would conflict with the Constitution; but this was not the question involved.

So, the requirement of a registration act, that the certificate issued to the voter be produced at the polls, or his vote be rejected, is an abridgment of the right of the constitutional voters of the state to cast their ballots,—especially in view of the unreasonable conditions imposed by the act upon the voter in case of his removal or the loss of the certificate. *Milis v. Green*, 67 Fed. Rep. 818.

A registration law providing for reasonable proof of the right of the elector to vote will be upheld. *Byler v. Asher*, 47 Ill. 101; *Re McDonough's Election*, 105 Pa. 488; *State ex rel. Wood v. Baker*, 38 Wis. 71; *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177.

While the Constitution of Pennsylvania provides that a voter shall not lose his right because unregistered, and has fixed the qualifications of voters, and it is not in the power of the legislature to enlarge or abridge them, a statute requiring those who are unregistered to take an affidavit giving the particulars as to birth, residence, naturalization, and the pay-



—meaning St. Louis alone—of over 300,000 inhabitants.

“(d) Under the Nesbit law the judges and clerks of election for each precinct, who are also the registration and canvassing officers for those precincts, are all appointed by vote of a majority of the board of election commissioners,—a majority necessarily partisan. This majority selects them arbitrarily,—true, the law says they shall be of ‘opposite politics,’—but whether of opposite politics or not, whether fit persons or not, whether intelligent or not, is left to the uncontrolled, arbitrary, and exclusive determination of the majority of the board. This in St. Louis alone. In all other cities of 100,000 and up to 300,000 inhabitants ‘the commissioner or commissioners shall select the judges and clerks to represent the party to which said commissioner or commissioners belong,’ and the person selected shall be intelligent, educated, etc., and ‘shall be recognized members of the party from which selected.’ The names of those selected shall be filed in the circuit court and published, and any elector may file objections to the persons so selected, and have his objections heard and determined by the court. If sustained, new names are submitted by the commissioners until fit persons are secured; and, that being done, the appointments made by the commissioners are confirmed by the court. The court names no one; it only hears and passes on names objected to, and

then confirms the approved appointees of the commissioners.

“(e) The Nesbit law is so partisan as to deny to all citizens in St. Louis, not members of the political party to which the two majority members of the board belong, the equal protection of the law. This is apparent on the face of the law. In this \*respect[332] it is in strong contrast with the law of 1895. In our statement we have set forth the leading features of the two laws, and we will not repeat them here, but refer to that statement in support of this proposition. Where a state recognizes political parties by its laws, as does the state of Missouri by numerous provisions, then it must do so equally for all; it must grant to all its citizens equality of right and protection; and this it has not done in the enactment of this Nesbit law; and in that has violated the 14th Amendment to the Constitution of the United States. It has done this, not only as between St. Louis and all other cities of over 100,000 inhabitants, but in St. Louis itself it has made such distinction between parties in that city as to deprive all citizens of that city, who are not members of the political party to which the majority of the board belongs, of the equal protection of the law.

“(f) The Nesbit law involves a denial of the equal protection of the laws, in that it provides penalties which are different in degree and character for offenses than are prescribed for the same offenses by the law of 1895 and by the general statutes of the state;

ment of tax is valid as not unreasonable. *Re Cusick's Election*, 136 Pa. 459, 10 L. R. A. 228, 20 N. E. 574.

But the unconstitutionality of the South Carolina registration act of 1882, in preventing a voter who failed to register, when duly qualified, from voting at any subsequent election, is not cured by the convention act of 1894, permitting such registration when the applicant files an affidavit setting forth his full name, age, or occupation and residence at the time of the general registration in 1882, or at the time thereafter when he became entitled to register, and the places of his residence since that time, supported by the oath of two reputable citizens who were of voting age when he was entitled to register. *Mills v. Green*, 67 Fed. Rep. 813.

A registration law should be uniform in its effects, or it will be void. *Re Appointment of Supervisors*, 52 Fed. Rep. 254; *Brewer v. McClelland*, 144 Ind. 423, 17 L. R. A. 845, 32 N. E. 299.

And a registration law failing to provide for inspectors in some of the districts as registering officers is void. *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388.

Under the Missouri Constitution, providing for registration every two years, an act requiring supplemental registration is not invalid for lack of uniformity, as the Constitution does not prohibit intermediate registration. *Ensworth v. Albin*, 46 Mo. 450.

A registry law to identify and distinguish the true electors is constitutional, and uniform regulations are not enjoined by the Pennsylvania Constitution; the only clause of injunction is that elections shall be free and equal. *Patterson v. Barlow*, 60 Pa. 54.

The provisions of the charter of Newport, withholding the right to vote for aidmen and councilmen from registered voters, and confer-

ring the right to vote exclusively on electors who are qualified to vote for the imposition of a tax or the expenditure of money, are unconstitutional and void. *Re Newport Charter*, 14 R. I. 655.

Mo. Const. 1875, art. 8, § 2, defining voters, and § 5, providing for statutes of registration in cities and counties of certain size, and art. 9, § 7, showing that special charters of cities were not affected without supplemental legislation, did not affect a previous city charter providing for registration. *State ex rel. Harrison v. Frazier*, 98 Mo. 426, 11 S. W. 793.

Under Kan. Const. art. 5, § 4, requiring that the legislature shall pass such laws as may be necessary for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage, a registry law is not void as not of uniform operation, although it applies only to cities of first and second class; nor invalid as imposing an additional qualification. *State v. Butts*, 31 Kan. 537, 2 Pac. 618.

The prohibition of the Missouri Constitution against the enactment of certain special or local laws was not violated by the enactment of Mo. Laws 1899, p. 179, providing for the registration of voters in cities “now having or which may hereafter have 300,000 inhabitants or more,” as this is a general law. *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

Authority to enact such a statute is conferred by Mo. Const. art. 8, § 5, requiring the general assembly to provide for the registration of all voters in cities and counties having more than 100,000 inhabitants, and authorizing such legislation for cities having between 25,000 and 100,000 inhabitants, “but not otherwise.” *Ibid.*

For a collection of cases on the question how far the right to vote is absolute, see note to *State ex rel. Allison v. Blake* (N. J. L.) 25 L. R. A. 480.



that is, the same offense committed in the city of St. Louis is punished one way under the Nesbit law; if committed in Kansas City or St. Joseph, or in any other city of 100,000 and not having 300,000 inhabitants, it is punished in another way under the law of 1895; and if committed in the state at large it is punished in yet another way under the general laws. Furthermore, certain acts are crimes if committed in one locality in the state, but not so when committed in another.

"(g) The law also imposes unconstitutional requirements on the citizens of St. Louis as requisite to the right to vote, in that it provides that a voter shall have resided in his election precinct at least twenty days prior to the election, and is not 'directly interested in any bet or wager depending upon the result of the election.' No such requirements are in article 8 of the state Constitution; to enforce them on the citizens of St. Louis is for the legislature to attempt to add tests to them not authorized by the state Constitution, and not applied to the other citizens of this state."

Messrs. **George D. Reynolds** and **George H. Shields** argued the cause, and, with Messrs. **Ben. Schnurmacher** and **John W. Noble**, filed a brief for plaintiff in error:

On this question the United States Supreme Court is not bound by the state court.

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Boyd v. Nebraska ex rel. Thayer*, 148 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890.

The 14th Amendment protects the right of suffrage, and requires equal protection of the laws.

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State ex rel. Stearns v. Corner*, 22 Neb. 265, 34 N. W. 499; *State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *Kinnce v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *Monroe v. Collins*, 17 Ohio St. 666; *State ex rel. Knowlton v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Paine, Elections*, § 340; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

The classification by the state court is unreasonable and arbitrary.

*State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 439, 13 S. W. 677; *Safe Deposit & T. Co. v. Fricke*, 152 Pa. 231, 25 Atl. 530;

*Ayars's Appeal*, 122 Pa. 281, 2 L. R. A. 577, 16 Atl. 356; *Re Ruan Street*, 132 Pa. 273, 7 L. R. A. 193, 19 Atl. 219; *Com. ex rel. Fertig v. Patton*, 88 Pa. 258; *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199; *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711; *Mo. Const. art. 9, §§ 7, 20, 25*; *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 46 N. W. 976, 41 N. W. 1094.

This arbitrary classification is contrary to the 14th Amendment.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989.

**Mr. Samuel B. Jeffries** argued the cause, and, with **Mr. Edward C. Crow**, filed a brief for defendants in error:

The opinion of the state court will be followed as to all questions affecting the violation of the state Constitution. It is the peculiar privilege of state courts to construe their own statutes under the light of their own Constitution; and the Supreme Court of the United States will not review their decisions on such questions.

*Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Powell v. Brunswick County Supers.* 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 166; *Turner v. Wilkes County Comrs.* 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Commercial Bank v. Buckingham*, 5 How. 319, 12 L. ed. 170; *Lawler v. Walker*, 14 How. 149, 14 L. ed. 364; *Kipley v. Illinois*, 170 U. S. 187, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550; *Miller v. Cornwall R. Co.* 163 U. S. 134, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Porter v. Foley*, 24 How. 415, 16 L. ed. 740; *Levy v. San Francisco City & County Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Sage v. Louisiana Bd. of Liquidation*, 144 U. S. 647, 36 L. ed. 577, 12 Sup. Ct. Rep. 755; *Thatcher v. Powell*, 6 Wheat. loc. cit. 127, 5 L. ed. 221; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

The 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is operated. It merely requires that all persons under like circumstances and conditions, subject to such legislation, shall be treated alike both in the privileges conferred and the liabilities imposed.

*McPherson v. Blacker*, 146 U. S. 39, 36 L. ed. 878, 13 Sup. Ct. Rep. 3; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Black, Const. Law*, p. 407; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Wurts v. Hoagland*, 114 U. S. 606,



29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734.

It has been properly held that this amendment does not affect the state organism or its functions. The equality of rights guaranteed by it prohibits only the enactment of such laws as fail to accord equal protection and privileges to persons of a class and locality.

*United States v. Cruikshank*, 92 U. S. 549, 23 L. ed. 590; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Bradwell v. Illinois*, 16 Wall. 130, 27 L. ed. 442; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; 2 Tucker, Const. § 389.

The hardship, impolicy, or injustice of state laws is not necessarily an objection to their Federal constitutionality and validity. The remedy for evils of that character should come from the state legislature.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

The right of suffrage is not a natural one. *Paine, Elections*, §§ 10, 11; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459; *Blair v. Ridgely*, 41 Mo. 161, 97 Am. Dec. 248; *Cooley, Const. Lim.* pp. 756, 757; *McCrary, Elections*, §§ 1-64.

Because the law of registration may be made operative in and apply only to cities and towns of a certain class, it will not be held unconstitutional. It is sufficient if every person who may be within the relation and circumstances described is brought under its protection.

*McCrary, Elections*, § 128; *Guild v. Chicago*, 82 Ill. 472; *Hundley v. Lincoln Park Comrs.* 67 Ill. 559.

State laws will not be subject to constitutional attack under the 14th Amendment, if all persons within their jurisdiction and influence, under the same conditions, are treated alike.

2 Tucker, Const. § 389; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Walston v. Nevin*, 128 U. S. 582, 32 L. ed. 546, 9 Sup. Ct. Rep. 192; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734.

and further directed that the general assembly "may provide for such a registration in cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise." A law approved May 13, 1895, applied to all cities having a population in excess of 100,000 inhabitants, and before the adoption of the Nesbit law the act of 1895 was operative in the city of St. Louis. The Nesbit law, which applied to cities having a population of over 300,000 inhabitants, necessarily withdrew the city of St. Louis from the operation of the earlier statute.

The contention that the Nesbit law denied to citizens of St. Louis the equal protection of the laws, in violation of the 1st section of the 14th Amendment to the Constitution of the United States, is based upon certain propositions elaborated in the argument of counsel, which we have reproduced in the statement of the case.

The assertions referred to, it must be borne in mind, are made by a public official who is seeking to avoid the performance of duties enjoined upon him by the law in question, and who does not allege that any particular rights possessed by him as an individual have been expressly invaded. Whether under the ruling in *Wiley v. Sinkler*, 179 U. S. 58, ante, 84, 21 Sup. Ct. Rep. 17, the plaintiff in error could properly raise the objection in question, we shall not determine, \*in view of the fact that the supreme court [334] of Missouri entertained and considered the question whether the law in question violated the Constitution of the United States.

In its final analysis it is apparent that the reasoning urged to sustain the propositions relied on must rest upon the assumption that under the Constitution of Missouri but one registration law can be enacted applicable to cities having a population in excess of 100,000 inhabitants, whatever the maximum number of inhabitants may be; that, as a natural consequence, the citizens of St. Louis cannot be classified separately from cities having a population in excess of 100,000 but less than 300,000 inhabitants; and that as the law of 1895 more effectually protected the exercise of the right and privilege of voting, and threw about the enjoyment of the right of suffrage greater safeguards than does the later law, therefore the last enactment denies to the citizens of the city of St. Louis the equal protection of the laws.

But the state supreme court has, in this case, decided that the provision of the state Constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed of cities having a population in excess of 100,000 inhabitants, and hence that the Nesbit law was not repugnant to the state Constitution. This conclusion must be accepted by this court. *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 566, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; *Merchants' & Mfrs.' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 462, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829, and cases cited.

[333] \*Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The Constitution of Missouri in force at the time of the enactment of the law of June 19, 1899, usually referred to as the Nesbit law, in addition to prescribing certain qualifications as necessary to the right to vote, empowered the general assembly of the state to "provide by law for the registration of voters in cities and counties having a population of more than 100,000 inhabitants;" 179 U. S.

In one aspect the argument urged against the validity of the provisions of the Nesbit law depends merely on comparison of the requirements of that law with the act of 1895. All the other contentions are reducible to the proposition that a violation of the 14th Amendment to the Constitution of the United States has resulted from the putting in force by the general assembly of Missouri, in cities having a population of over 300,000 inhabitants, of a registration law which, in the mind of a judicial tribunal, may not as effectually safeguard the right and privilege of voting as might be devised, considered alone or with reference to a prior enactment.

[335] \*But the obvious answer is that the law in question has been declared to be valid under the Constitution of the state. The general right to vote in the state of Missouri is primarily derived from the state (*United States v. Reese*, 92 U. S. 214, 23 L. ed. 563), and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise "as regulated and established by the laws or Constitution of the state in which it is to be exercised." *Blake v. McClung*, 172 U. S. 249, 43 L. ed. 436, 19 Sup. Ct. Rep. 165, quoting from the opinion of Mr. Justice Washington at circuit in *Coryfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230. The power to classify cities with reference to their population having been exercised in conformity with the Constitution of the state, the circumstance that the registration law in force in the city of St. Louis was made to differ in essential particulars from that which regulates the conduct of elections in other cities in the state of Missouri does not in itself deny to the citizens of St. Louis the equal protection of the laws. Nor did the exercise by the general assembly of Missouri of the discretion vested in it by law give rise to a violation of the 14th Amendment to the Constitution of the United States. *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 474, 475, 43 L. ed. 520, 521, 19 Sup. Ct. Rep. 268, and cases cited; *Maxwell v. Dow*, 176 U. S. 581, 598, 44 L. ed. 597, 603, 20 Sup. Ct. Rep. 448, 494.

*Judgment affirmed.*

LOUIS J. GABLEMAN, Jr., by His Next Friend, Louis J. Gableman, Sr., *Plff. in Err.*,

*v.*

PEORIA, DECATUR, & EVANSVILLE RAILWAY COMPANY, Edward O. Hopkins, Receiver of the Peoria, Decatur, & Evansville Railway Company, and George Colvin.

(See S. C. Reporter's ed. 335-342.)

*Action against receiver—removal into Fed-*

*eral court—cases arising under Federal laws.*

The bare fact that the appointment of a receiver was by a Federal court does not make all actions against him cases arising under the Constitution or laws of the United States, which he can remove on that ground into a Federal court, where his appointment was made under the general equity powers of courts of chancery, and not under any provision of the Federal Constitution or laws, and his liability depends on general law, and his defense does not rest on any act of Congress.

[No. 438.]

*Submitted November 16, 1900. Decided December 10, 1900.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit raising questions as to the right to remove an action against a receiver into a Federal court. Questions answered in the negative.

See same case below, 101 Fed. Rep. 1.

Statement by Mr. Chief Justice Fuller:

\*The certificate in this case was as follows: [336]

"This action was brought originally in the superior court for Vanderburg county, in the state of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error, in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the state of Indiana, and the defendant, George Colvin, is a citizen of Indiana. The defendant, Edward O. Hopkins, was, at the time the injuries were received and the suit was commenced, receiver of the defendant railway company, by appointment of the United States circuit court for the southern district of Illinois, and was, at the time of the injuries, in the sole control and management of the railway company, having an office in Vanderburg county, in the state of Indiana, the defendant Colvin being in his employment as a locomotive engineer, and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant, Colvin, extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence, or the citizenship of Hopkins, as an individual.

"In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the circuit court for the district of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand

NOTE.—On removal of causes generally—see notes to *Whelan v. New York, L. E. & W. R. Co.* 220

(C. C. N. D. O.) 1 L. R. A. 63; *Butler v. National Home for Disabled Volunteer Soldiers*, 179 U. S.



was entered by the plaintiff in error, and overruled by the circuit court for the district of Indiana; and, at the trial subsequently, a verdict was, by direction of the court, returned for the defendants in error.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

[337] \*“(1) Did the circuit court of the United States for the district of Indiana have, upon these facts, jurisdiction to try the cause?”

“(2) Was the cause one properly removable into the circuit court of the United States?”

**Mr. William Allan Cullop** submitted the cause for plaintiff in error:

A case not depending upon the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court to a United States circuit court as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's own statement; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

*Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Postal Teleg. Cable Co. v. United States*, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Oregon Short Line & U. N. R. Co. v. Conlin*, 162 U. S. 498, 40 L. ed. 1051, 16 Sup. Ct. Rep. 871.

The state court had jurisdiction.

*East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

The right of removal exists only where it is given by statute.

*Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

No Federal question is raised here; no Federal law is involved; neither statutory, constitutional, nor treaty provision; and none could be involved, as appears from the averments of the complaint or the certified questions propounded to this court.

*Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

The liability of the defendants arose under the general law, and was not created or raised under the Constitution or laws of the United States.

36 L. ed. U. S. 346; *Torrence v. Shedd*, 36 L. ed. U. S. 528.

*On removal of causes generally from state to Federal courts, where the Constitution of the United States, or an act of Congress, or a treaty comes in question*—see note to *Little York* 179 U. S.

*Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

The fact that the receiver was appointed by a Federal court raises no Federal question in this litigation. His right to act as such receiver is in no way involved, and no law, order or decree of the court appointing him is called in question, in this litigation.

*Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 251, 44 L. ed. 1057, 20 Sup. Ct. Rep. 854; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 580, 43 L. ed. 818, 19 Sup. Ct. Rep. 500.

**Mr. Walter S. Horton** submitted the cause for defendants in error:

The plaintiff could not have commenced his suit in the state court without leave of the Federal court but for the act of March 3, 1887.

*Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

The action is against a person whose powers come from a Federal court, and the suit one which can be maintained only by virtue of an act of Congress. It is, then, one arising under the Constitution and laws of the United States.

Act of Congress March 3, 1887; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Rouse v. Hornsby*, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 610; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Black's Dillon. Removal of Causes*, § 125; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

Inasmuch as the receiver's authority is dependent upon his appointment by a court existing under the Constitution and laws of the United States, his right to remove a cause against him has been likened to that of a marshal.

*Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

It has been decided that the circuit court has jurisdiction of a suit against a marshal as one so arising.

*Sonnentheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Bachrack v. Norton*, 132 U. S. 337, 33 L. ed. 377, 10 Sup. Ct. Rep. 106.

It has also been decided that the marshal may remove a suit brought against him in his official capacity.

*Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677.

That the position of the two officers is similar is further illustrated by the holding that actions against the receiver are, in law, actions against the receivership or the funds in the hands of the court, and his liabilities are official, and not personal.

*Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656.

*On removal of actions against Federal receivers*—see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.

*McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

And a suit against a corporation organized under the laws of the United States is removable, though the act of the corporation complained of may have had no connection with the Federal law.

*Pacific Railroad Removal Cases*, 115 U. S. 1, *sub nom. Union P. R. Co. v. Myers*, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703.

The question cannot arise whether it appears in the declaration that the suit is one arising under the laws of the United States, since it must be assumed that the facts properly appear as set forth in the certificate.

*Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703.

The above cases have been accepted very generally by the circuit courts as decisive of the right of a receiver of a United States court to remove a cause as was done here.

*Jewett v. Whitcomb*, 69 Fed. Rep. 417; *Chamberlain v. New York, L. E. & W. R. Co.* 71 Fed. Rep. 636; *Landers v. Felton*, 73 Fed. Rep. 311; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 523; *Sullivan v. Barnard*, 81 Fed. Rep. 886; *Van Wert County Comrs. v. Peirce*, 90 Fed. Rep. 764; *Pitkin v. Cowen*, 91 Fed. Rep. 599; *Carpenter v. Northern P. R. Co.* 75 Fed. Rep. 850; *Keihl v. South Bend*, 36 L. R. A. 228, 22 C. C. A. 618, 44 U. S. App. 687, 76 Fed. Rep. 921.

[337] \*Mr. Chief Justice **Fuller** delivered the opinion of the court:

The general policy of the act of March 3, 1887, corrected by the act of August 13, 1888 (24 Stat. at L. chap. 373, p. 552; 25 Stat. at L. chap. 866, p. 433), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the circuit courts. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 462, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654, and cases cited.

And it is well settled that a case cannot be removed from a state court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

It has also been determined that when the application rests on that ground, and there is more than one defendant, all the defendants must join. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854.

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And in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are charged with direct or concurrent or concerted wrongful action. *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, *ante*, 121, 21 Sup. Ct. Rep. 67.

In this case the pleadings are not before us, and the certificate \*states that the receiver removed the cause into the circuit court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States." A motion to remand was made and denied. 82 Fed. Rep. 791. This decision was afterwards reversed by the circuit court of appeals, but, as is admitted, a rehearing was granted, and this certificate was then made. 101 Fed. Rep. 1.

The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court; and, upon this record, our opinion of the tenability of that ground is requested.

Section 3 of the acts of 1887 and 1888 reads:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act.

As, however, the receiver, as the officer of the court, holds the property for the benefit of all who have an interest in it, and is not to be interfered with in its administration and disposal \*by the judgment or process of [339] another court, the closing clause of the section, out of abundant caution, provides that when the receiver is sued, without leave, "such suit shall be subject to the general equity jurisdiction of the court in which said receiver or manager was appointed, so far

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as the same shall be necessary to the ends of justice."

Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in *Texas & P. R. Co. v. Johnson*, 151 U. S. 103, 38 L. ed. 89, 14 Sup. Ct. Rep. 250, "the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

In *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 243, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867, we said, in the language of previous opinions, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The inquiry we are pursuing does not fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may have, except as specifically restricted.

[340] Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference \*with Federal process, or the due faith and credit to be accorded judgments, in point.

The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined as the circuit court of appeals properly held in this case. *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 879; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *McKenna v. Simpson*, 129 U. S. 179 U. S.

S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104.

In *Bausman v. Dixon* we ruled that a judgment against a receiver appointed by a circuit court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the state of Washington, though the receiver was the officer of the circuit court, and we said: "It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a Federal question under § 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law \*applicable to the facts, and not in any way on the terms of the order." And although that was the case of a writ of error to a state court, we applied the reasoning in *Pope v. Louisville, N. A. & C. R. Co.*, in which the right of appeal to this court from the circuit court of appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal court. We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We said: "The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere order of a Federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the circuit court of appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction

of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States."

The question there was as to whether or not the decision of the circuit court of appeals was made final by the sixth section of the judiciary act of March 3, 1891, and we held that it was, and dismissed the appeal. [342] We could not, however, have arrived \*at that conclusion if the jurisdiction had rested on the ground that the case arose under the Constitution or laws of the United States, as such cases are not among the classes enumerated in that section, in which the decisions of that court are made final. We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case. *Rouse v. Letcher*, 156 U. S. 49, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431; *Carey v. Houston & T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537. In *Rouse v. Letcher* we pointed out that the intention could not be attributed to Congress of allowing judgments on every incidental controversy to be brought to this court for review, while denying such review to the principal decree; and any other conclusion would be manifestly inconsistent with the avowed object of the act of March 3, 1891.

It should be added that while these actions against receivers may be brought in other courts, they may, nevertheless, also be brought in the court by which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration.

We have just held in *Baggs v. Martin*, 179 U. S. 206, *ante*, 155, 21 Sup. Ct. Rep. 109, that where a receiver sued in the state court had removed the action to the circuit court which had appointed him, and the plaintiff had not moved to remand but had accepted the jurisdiction thus invoked, a judgment in that court in plaintiff's favor might be sustained, because the court would have had original jurisdiction, and it did not lie in the mouth of the receiver, under such circumstances, to deny the jurisdiction he had sought.

The judgments in *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; and *Rouse v. Hornsby*, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 510, cited by counsel, are consistent with the result reached in *Baggs's Case*, as well as in this, although there are expressions in the opin-

ions in those cases which are modified by what has since been said. \*

*The questions propounded are answered in the negative.*

\*WILLIAM B. AUSTIN, *Plff. in Err.*, [343]  
v.

STATE OF TENNESSEE.

(See S. C. Reporter's ed. 343-388.)

*Interstate commerce—original packages of cigarettes—judicial notice—police power to prohibit sale of cigarettes.*

1. A product, such as tobacco, that has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must be recognized as a legitimate article of commerce, although it may to a certain extent be within the police power of the states.
2. The court cannot take judicial notice of the fact that tobacco in the form of cigarettes is more noxious than in any other form.
3. A legislative restriction on or prohibition of the sale of cigarettes, the use of which is somewhat generally believed to be deleterious, particularly to young people, is within the police power of the legislature, provided it does not apply to original packages, or make any discrimination against cigarettes imported from other states, and if there is no doubt that the statute is designed for the protection of the public health.
4. Paper packages of cigarettes, each 3 inches in length and 1½ inches in width, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company, in a basket which it furnishes, in which it carries them and from which it empties them on the counter of a consignee in another state, do not constitute original packages of interstate commerce, but, if there is any original package in the shipment, it is the basket.

[No. 25.]

*Argued November 9, 10, 1899. Decided November 19, 1900.*

IN ERROR to the Supreme Court of the State of Tennessee to review a decision affirming a judgment of conviction for sale of cigarettes in violation of statute. *Affirmed.*

NOTE.—For a discussion of police power generally—see *State v. Marshall* (N. H.) 1 L. R. A. 51, and note; *Electric Improv. Co. v. San Francisco* (C. C. N. D. C.) 13 L. R. A. 131, and note; and *State v. Schlemmer* (La.) 10 L. R. A. 135, and note.

As to police power as affecting commerce—see note to *People v. Budd* (N. Y.) 5 L. R. A. 559, and *State v. Indiana & O. Oil, Gas & Min. Co.* (Ind.) 6 L. R. A. 579.

On importations in original packages—see notes to *Re Wilson* (D. C.) 12 L. R. A. 624; *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616, and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.



See same case below, 101 Tenn. 563, 48 S. W. 305.

Statement by Mr. Justice **Brown**:

[343] \*This was a writ of error to review the conviction of Austin for the sale of cigarettes in violation of an act of the general assembly of Tennessee (Acts of 1897, chap. 30) the material portion of which reads as follows:

"Be it enacted by the general assembly of the state of Tennessee, That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than \$50."

[344] Defendant was convicted in the circuit court of Monroe county, fined \$50, and committed until the fine should be paid; and upon appeal to the supreme court of Tennessee the judgment of the circuit court was affirmed. 101 Tenn. 563, 48 S. W. 305.

**Messrs. W. W. Fuller and John G. Johnson** argued the cause, and **Messrs. W. W. Fuller and J. Parker** filed a brief for plaintiff in error:

The only test as to whether or not an article is a commercial article in which a right of traffic exists, that has ever been before suggested by a court, is whether it is recognized by the commercial world, the laws of Congress, and the decisions of the courts as such.

*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Cigarettes are commercial articles recognized by the laws of Congress.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

Cigarettes have been recognized as commercial articles by the decisions of the courts.

*Re Minor*, 5 Inters. Com. Rep. 329, 69 Fed. Rep. 233; *State v. McGregor*, 76 Fed. Rep. 956; *State v. Goetze*, 43 W. Va. 495, 27 S. E. 225; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041.

The silence of Congress does not mean its intention to submit to the several states the decision as to what shall and what shall not be articles of commerce.

*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The right to sell an article imported is an inseparable incident to the right to import it.

*Leisy v. Hardin*, 135 U. S. 100, 43 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

In the absence of congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state.

other continues until a sale in the original package in which the article was introduced into the state.

*Re Rahrer*, 140 U. S. 545, sub nom. *Wilkinson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The original package was and is the package as it existed at the time of its importation from one state into the other. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is a subject of interstate commerce.

*McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041.

The size of the package, and the fact that it was suitable for retail trade, cannot deprive it of its character as an original package in the true commercial sense.

*Leisy v. Hardin*, 135 U. S. 159, 34 L. ed. 150, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Beine*, 42 Fed. Rep. 545; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

Congress has prescribed, under heavy penalties, what shall be an original package of cigarettes, and the package sold by plaintiff in error in this case was such a package.

*State v. Goetze*, 43 W. Va. 495, 27 S. E. 225; *Guckenheimer v. Sellers*, 81 Fed. Rep. 997.

It is its identifiability as an import, and the fact that it is still in the channels of commerce, that give to an import its immunity from state legislation which attempts to regulate or prohibit its sale.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

Something must be done to clearly identified and self-identifiable imports besides breaking the package in which they are shipped, before they can be said to have become commingled and mixed with the mass of property in the state.

*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Re Minor*, 5 Inters. Com. Rep. 329, 69 Fed. Rep. 233.

**Mr. G. W. Pickle** argued the cause and filed a brief for defendant in error:

A state, in the absence of Federal regulation of the subject, may lawfully enact a statute to protect the lives, health, and morals of its citizens against evil consequences of such pronounced character as the sale and use of cigarettes entail.

*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers' Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 15

S. 664, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *New York v. Miln*, 11 Pet. 139, 9 L. ed. 662; *Kidd v. Pearson*, 128 U. S. 23, 32 L. ed. 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 101, 32 L. ed. 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

This court entertains a very strong, if not conclusive, presumption in favor of the validity of a state statute, enacted in good faith to protect the lives, health, and safety of its citizens, and reasonably appropriate for that purpose.

*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 664, 31 L. ed. 211, 8 Sup. Ct. Rep. 273.

State statutes that stop absolutely the flow of interstate commerce fifty-two days (Sundays) in the year have been held valid.

*Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Norfolk & W. R. Co. v. Com.* 93 Va. 749, 34 L. R. A. 105, 24 S. E. 837.

State statutes requiring examinations and licenses of railroad employees, though engaged in conducting interstate commerce, have been sustained as reasonable police regulations for the safety of the traveling public.

*Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

Likewise a state statute has been sustained which requires railway trains, though engaged in interstate transportation, to stop at all stations within the state.

*Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

So, a state statute forbidding the heating of trains in a particular manner, and applying to trains running interstate, was held valid as a reasonable regulation for the safety and comfort of the public.

*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

So, a state statute requiring railroads engaged in interstate and other commerce to stop three trains each way daily, Sundays excepted, has been sustained as a reasonable regulation for the public convenience.

*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

Likewise, state statutes requiring separate coaches, in interstate travel as well as local, for white and colored persons.

*Smith v. State*, 100 Tenn. 494, 41 L. R. A. 432, 46 S. W. 566; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

The reserved power of the states to guard the health, morals, and safety of their people is more vital to the existence of society than their power in respect of trade and commerce, having no possible connection with these subjects.

*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 226

S. 524, 31 L. ed. 720, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The legislation of Congress that will deprive the states of the right to legislate upon a subject under their reserved police powers must, it seems, have direct reference to the subject of commerce, and be utterly inconsistent with such power in the states.

*Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 308, 43 L. ed. 711, 19 Sup. Ct. Rep. 465.

The sale in question was not of an original package, but of a part of an original package that had been broken by the importer or by his agent after its introduction into the state.

*Brown v. Maryland*, 12 Wheat. 446, 6 L. ed. 688; *License Cases*, 5 How. 574, 12 L. ed. 287.

Fraudulent and indirect schemes to evade state laws have never met with favor in this court.

*Mitchell v. Leavenworth County Comrs.* 91 U. S. 206, 23 L. ed. 302.

The proposition that a package retains its character as an import, even if it has been inclosed with other packages of like kind for convenience of shipment, and the inclosure has been broken and one of the packages taken out, is contrary to the overwhelming weight of reason and authority.

*McGregor v. Come*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041.

Nor is it necessary that the box, barrel, crate, or other receptacle in which goods are imported shall be fastened or inclosed, to constitute it, and not the smaller packages constituting its contents, the original package of commerce.

*State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430, 8 So. 353.

\*Mr. Justice **Brown** delivered the opinion—[344] ion of the court:

It is charged that the act in question, in its application to the facts of this case, is an infringement upon the exclusive power of Congress to regulate commerce between the states. This is the sole question presented for our determination.

We are not disposed to question the general principle that the states cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless (*Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213), or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the state, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Henderson v. New York*, 92 U. S. 259, 179 U. S.



*sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87. In this connection we indorse fully what was said by this court in *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The supreme court of Tennessee placed its decision of this case upon two grounds: First, that cigarettes were not legitimate [345] \*articles of commerce; second, that the sale shown to have been made was not the sale of an original package in the true commercial sense.

1. We are not prepared to fully indorse the opinion of that court upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the states. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles, the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation and importation. Cigarettes are but one of the numerous manufactures of tobacco, and we cannot take judicial notice of the fact that it is more noxious in this form than in any other. Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which Congress recognizes in so many ways is not a legitimate article of commerce. The language of Chief Justice Taney in the *License Cases*, 5 How. 504, 12 L. ed. 256, with reference to intoxicating liquors is so pertinent to this case that it deserves to be here repeated:

"But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other  
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commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may \*prescribe what article of merchandise [346] shall be admitted and what excluded; and may, therefore, admit or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no state has a right to prohibit their introduction."

"But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The same ruling with regard to the power of the states to prohibit the sale of intoxicating liquors was made in *Bartemyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929, in which it was held the right to sell such liquors was not a privilege or immunity which, by the 14th Amendment, the states were forbidden to abridge. And in the later case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it was held that a company chartered "for the purpose of manufacturing malt liquors in all their varieties" held its franchise subject to the police power of the state, and that, if the public safety or public morals required the discontinuance of such \*manufactures, the legislature might so [347] provide, notwithstanding individuals and corporations might thereby suffer inconvenience. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, and *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, the principle of this case was extended so far as to hold that such laws might be enforced against persons who, at the time, happened to own property whose chief value consisted in its fitness for manufacturing intoxicating liquors, without compensating them for the

diminution in value resulting from such prohibitory enactments; and in *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97, it was regarded as the settled doctrine of this court that such laws, prohibiting the sale and manufacture of intoxicating liquors, were not repugnant to the Constitution of the United States.

How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this court. Nor is it necessary to the decision of this case. It was held, however, in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, that a statute of Pennsylvania prohibiting the manufacture or sale of oleomargarine was a lawful exercise by the state of its power to protect by police regulations the public health, and that it neither denied to persons within the jurisdiction of the state the equal protection of the laws, nor deprived them of their property without compensation, and was not otherwise repugnant to the 14th Amendment. Said Mr. Justice Harlan: "It [this court] cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. The court is unable to affirm that this legislation has no real or substantial relation to such objects." So, too, in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, a statute of Massachusetts prohibiting the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and so brought into the state, was decided not to be in conflict with the commerce clause of the Constitution.

[348] \*These cases recognize the fact that intoxicating liquors belong to a class of commodities which, in the opinion of a great many estimable people, are deleterious in their effects, demoralizing in their tendencies, and often fatal in their excessive indulgence; and that, while their employment as a medicine may sometimes be beneficial, their habitual and constant use as a beverage, whatever it may be to individuals, is injurious to the community. It may be that their evil effects have been exaggerated, and that, though their use is usually attended with more or less danger, it is by no means open to universal condemnation. It is, however, within the power of each state to investigate the subject and to determine its policy in that particular. If the legislative body come deliberately to the conclusion that a due regard for the public safety and morals requires a suppression of the liquor traffic, there is nothing in the commercial clause of the Constitution, or in the 14th Amendment to that instrument, to forbid its doing so. While, perhaps, it may not wholly prohibit the use or sale of them for medicinal purposes, it may hedge about their use as a general bev-

erage such restrictions as it pleases. Nor can we deny to the legislature the power to impose restrictions upon the sale of noxious or poisonous drugs, such as opium and other similar articles, extremely valuable as medicines, but equally baneful to the habitual user.

Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the supreme court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, \*or to prohibit [349] their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health.

We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the 14th Amendment to the Constitution, that, if the action of the state legislature were as a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce. While, as was said in *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383, "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." Thus, while in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 463, 24 L. ed. 527, it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican, or Indian cattle into the state, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature chose to impose. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488. So, too, although it was held in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 179 U. S.



5 Sup. Ct. Rep. 357, and in *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void, if it conferred upon the municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, [350] or the propriety of the place selected for carrying on business. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. In delivering the opinion Mr. Justice Matthews observed: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We are therefore of opinion that although the state of Tennessee may not wholly interdict commerce in cigarettes it is not, in the language of Chief Justice Taney in *The License Cases*, "bound to furnish a market for it [them], nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government."

2. There is no reason to doubt the good faith of the legislature of Tennessee in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another state, we are remitted to the inquiry whether a paper package of 3 inches in length and 1½ inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the state while in the hands of the importer? This we regard as the vital question in the case.

The whole law upon the subject of original packages is based upon a decision of this court, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, in which a statute of Maryland, requiring all importers of foreign articles, "by bale or package," or of intoxicating liquors, and other persons selling the same, "by wholesale, bale or package, hogshead, barrel or tierce," to take out a license, was held to be repugnant to that provision of the Constitution forbidding states from laying a duty upon imports, as well as to that declaring that Congress should have power to regulate commerce with foreign nations. There was thought to be no difference between a power to prohibit the sale of an [351] article while it was an import and the power to prohibit its introduction into the country. The one would be the necessary consequence

of the other. No goods would be imported if none could be sold. But, in delivering the opinion of the court, Mr. Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states.

A casual remark, however, made by Chief Justice Marshall in that case, that "we suppose the principles laid down in this case to apply equally to importations from a sister state" was subsequently considered in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, and was held to have no application to commerce between the states, the court deciding that the term "import," as used in that clause, which declares that "no state shall levy any imposts or duties on imports or exports," did not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. In that case an ordinance [352] of the city of Mobile, authorizing a tax upon sales at auctions, was held to be applicable to products of states other than Alabama, although the articles were sold in the original and unbroken packages.

The principle of this case was subsequently applied in *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, became intermingled, on arrival there, with the general property of the state of Louisiana, and was subject to taxation under the laws of that state, although it might be, after arrival, sold from the vessel upon which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a for-

sign port. In delivering the opinion of the court Mr. Justice Bradley observed:

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, *still in the original packages*, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, *being there for the purpose of remaining there until used or sold*, and constituting part of the great mass of commercial capital—provided, always, that the assessment be a general one, and made without discrimination between goods the product of New York and goods the product of other states? Of course, the assessment should be a general one, and not discriminative between goods of different states. The taxing of goods coming from other states as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate [353] commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But, if, after their arrival within the state—that being their place of destination for use of trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

The principle of this case was applied subsequently in that of *Pittsburgh & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, 122 quarter barrels of beer, 171 one-eighth barrels of beer, and 11 cases of beer were seized by the city marshal of Keokuk under a state statute prohibiting the sale of intoxicating liquors. It was held that, being articles of lawful commerce, the state could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state; or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the state so long as they remained in the casks in which they were imported and continued to be the property of the importer. No question was made with regard to the casks being original packages, or as to the fact that, according to the custom of brewers, beer was usually and ordinarily imported from one state to another in casks of this size.

In the still later case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, oleomargarine was recognized as a lawful article of commerce, and one which could not be wholly excluded from importation into a state from another state where it was manufactured, and so long as it remained in its original packages could be sold, notwithstanding a statute of the state prohibiting such sale. The oleomargarine in that case was imported and sold in packages of 10 pounds weight; but it appeared in the special verdict that the package was an original package, as required by the act of Congress, and was of such "form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course \*of actual commerce and the [354] said form, size, and weight were adopted in good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant."

Most pertinent to this case, and, as we think, covering its principle completely, is the opinion of this court in *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976, decided at the last term. This involved the validity of certain tax assessments made by the city of New Orleans upon the merchandise and stock in trade of the plaintiff, which consisted of dry goods imported from foreign countries, upon which duties had been levied by and paid to the general government. The goods were put up and sold in packages, a large number of such packages being inclosed in wooden cases or boxes for the purposes of importation. Upon arrival at New Orleans the boxes were opened, the packages taken out and sold unbroken. The question was whether the box or case containing these packages, or the packages themselves were the original packages within the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. It was conceded that, so long as the packages remained in their original cases, they were not subject to taxation, but the court held that this immunity ceased as soon as the boxes were opened. As stated by Mr. Justice Harlan in delivering the opinion of the court (p. 508, L. ed. p. 1169):

"In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the state as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the state. It was not a tax on the plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale



in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution \*a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the state the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the government, and, in many instances, with the intent to protect the industries of this country against foreign competition.”

The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the state cannot prohibit the sale in its original package of an article brought from another state, the size of the package is material, although some of the expressions in *The License Cases* seem to foreshadow the consequences likely to result from the argument of the defendant. Thus, it is stated by Mr. Justice Catron (5 How. 608, 12 L. ed. 303), that “to hold that the state license law [of New Hampshire] was void, as respects spirits coming in from other states as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequences of which would be that the dealers in New Hampshire would sell only spirits produced in other states, and that the products of New Hampshire would find an unrestrained market in the neighboring states having similar license laws to those of New Hampshire.” And also in the opinion of Mr. Justice Woodbury, rendered in the same case (p. 625, 12 L. ed. 311): “If the proposition was maintainable, that, without any legislation by Congress as to the trade between the states (except that in coasting, as before explained, to prevent smuggling), anything imported from another state, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or any internal [355] regulation of a state,\* then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring state. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.” These words are certainly prophetic in their applicability to this case.

Similar questions have arisen in the Federal courts of original jurisdiction, whose decisions have generally been in favor of the position taken by the plaintiff in error in this case. The same question has been considered in the courts of several states, and their decisions have been with almost equal unanimity the other way.

In *Com. v. Zelt*, 138 Pa. 615, 11 L. R. A. 602, 21 Atl. 7, a distiller manufacturing over the state line established a store or agency within the state, put up his liquors in bottles ranging in capacity from 1 quart down to ½ pint, and, packing them in unsealed barrels, sent them to the Pennsylvania store, where they were taken from the barrels, put upon the shelves and sold to customers. The question was submitted to the jury, which, as stated by the court, evidently regarded defendant's method as a trick and an evasion of the state statute. The judgment was affirmed. In *Com. v. Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 27 Atl. 30 (not the case reported in 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757), an original package is defined to be “such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling, and security in transportation of merchandise between dealers in the ordinary course of actual commerce.” Where a mode of putting up a package is not adapted to meet the requirements of interstate commerce, but the requirements of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package. The opinion contains a very vigorous denunciation of the methods resorted to by this class of dealers. The following paragraphs are sufficiently illustrative of the general purport of the decision: “Intrenched behind the \*interstate commerce [357] clause so construed, citizens of other states could prey upon our people, trample upon our laws, and make gain out of a traffic forbidden to our citizens only to be delivered up absolutely and unconditionally to them. It would require only that such citizen of another state should establish a local store in some of our towns or cities, or in all of them, conduct a local business, to meet a local demand, and, when called upon by the officers of the law, make the reply that he made the goods in some other state, and, as a manufacturer, supplied himself, as a local dealer, with wares of a foreign origin. Neither the foreign origin of the goods sold, nor of the seller, nor of both together, will convert a business that is local and intrastate into one that is general and interstate within the meaning of the Constitution of the United States. . . . One who plants his foot squarely upon the police laws of this state, and defies its officers to suppress or to punish his unlawful trade, must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any state to protect themselves from evils that by common consent throughout the civilized world need to be restrained and removed by snita-

ble legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several states, and render all attempts at its exercise ineffectual and useless."

In the case of *Com. v. Bishman*, 138 Pa. 639, 21 Atl. 12, defendant sold liquor in pint and quart bottles, each of which was inclosed in a pasteboard box, sealed with a strip of paper pasted across the lid, and stamped with the name of the firm. These packages were shipped in boxes and barrels to defendant's agent, who unpacked them when they arrived, and placed the pasteboard packages on his shelves. The court held that there was abundance of evidence to submit to the jury whether the whole matter was not a scheme to evade the license laws. Said the court: "The defendant was engaged in selling liquor at retail, and his claim that he was selling only by 'original packages' was little better than a burlesque."

[358] In *Com. v. Paul*, 170 Pa. 284, 30 L. R. A. 396, 33 Atl. 82, a small tub of \*oleomargarine, containing 10 pounds, prepared in another state and brought into Pennsylvania to be sold unbroken to a customer for his use as an article of food upon his table, and actually so sold, was held not to be an original package within the meaning of the law relating to interstate commerce. Said the court: "If a pint bottle of whisky is an original package under the protection of Congress, and can be sold as such, regardless of the police legislation of the state, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along state lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any state, if the things sold have come into the retailer's store from a nonresident manufacturer or shipper. . . . Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another state, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce, and set the police laws of the state at defiance."

In *Haley v. Nebraska*, 42 Neb. 556, 60 N. W. 962, the same result was reached upon precisely the same state of facts; as well as in *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411; and *Smith v. State*, 54 Ark. 248, 15 S. W. 882.

In *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041, the question arose as to packages of cigarettes of the same size as those involved in the present case. These packages were placed in a common pine box for convenience of shipment without any other packing or inclosure about the packages, and were shipped by the company from its factory in New York to its warehouse in

Chicago, and thence to the defendant's place of business in Iowa. Upon the arrival of the box the defendant opened the box by taking the lid off, and sold one of the packages containing cigarettes. It was held that the pine box was the original package, and that \*the [359] defendant was liable, notwithstanding that the internal revenue department had, for the purposes of taxation, declared the small packages sold by defendant to be original packages. This case seems to have overruled the cases of *State v. Coonan*, 82 Iowa, 400, 3 Inters. Com. Rep. 670, 48 N. W. 921; *Collins v. Hills*, 77 Iowa, 181, 3 L. R. A. 110, 41 N. W. 571; *Hopkins v. Lewis*, 84 Iowa, 690, 15 L. R. A. 397, 51 N. W. 255; *State v. Miller*, 86 Iowa, 638, 53 N. W. 330, where a contrary view was expressed.

The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words "original package" in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the state with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of \*a par- [360] ticular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its



authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the state and import it in minute quantities.

There could hardly be stronger evidence of fraud than is shown by the facts of this case, which we quote from the opinion of the court:

"The defendant purchased from the American Tobacco Company, at its factory, in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant's purchase the American Tobacco Company piled upon the floor of its warehouse, in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by \*express to the defendant's town in Tennessee, and there an agent of the same express company took the basket to defendant's place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted."

And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case we think it is the basket, and not the paper box.

Suppose the state of Tennessee in the exercise of its police powers should prohibit the manufacture within its limits of cigarettes, whether they were manufactured to be sold in that state, or to be sent to other states for sale, could the validity of such legislation be questioned, as in violation of the Constitution?

stitution of the United States, upon the ground that it infringed the liberty which is secured to the citizens by the 14th Amendment? "The liberty mentioned in that amendment," this court has said, "means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427.

There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a state, with reference to its own people, to declare, under penalties, that cigarettes should not be manufactured within its limits. No one could say that such \*legislation trespassed upon the liberty of the citizen by preventing him from pursuing a lawful business. Now the result of defendant's argument in this case is that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that state from other states cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation. In other words, it is decided that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the state in a matter confessedly involving, in the judgment of its legislature, the health of its people. We cannot accept this view. The doctrine that the silence of Congress as to what property may be of right carried from one state to another means that every article of commerce may be carried into one state from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the state to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the state, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one state from another state, then the action of a state by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the states to pass



laws that had substantial relations to the health of their people. Of course, it is one thing to force into a state, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a state, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health.

[363] \*Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, § 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty, or one hundred cigarettes each. This, however, is solely for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with § 3243, which provides that “the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state.” As was said in *Plumley v. Massachusetts*, 155 U. S. 461, 466, 39 L. ed. 223, 225, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, it is manifest this section was adopted to make it clear that Congress had no purpose to restrict the power of the state over the manufacture and sale of particular articles. “The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any state which lawfully forbade such manufacture or sale.” The question is not in what packages the law requires the cigarettes to be packed for the purpose of taxation, but, what are the packages in which they are usually transported from one state to another where the transaction is bona fide and for the legitimate purposes of trade and commerce?

We are satisfied the conclusion of the Supreme Court of Tennessee was correct, and it is therefore affirmed.

Mr. Justice **White** concurring:

I do not understand that anything in the opinion of the court impairs the doctrine protecting original packages from interference by the police or any other power of a state, as announced by so many opinions of [364] this court, especially as expounded \*in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, and *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, and the authorities which are cited in the opinions of the court in both of those cases. If I thought either the opinion of the court just announced or the conclusion which it reaches had the effect of weakening the doctrine upheld by the au-

thorities to which I have just referred, I should be unable to concur. Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package.

Mr. Justice **Brewer** with whom concurred the **Chief Justice**, Mr. Justice **Shiras** and Mr. Justice **Peckham**, dissenting:

I dissent from the opinions and judgment in this case. The plaintiff in error was convicted of a violation of the following act of the general assembly of Tennessee:

“Be it enacted by the general assembly of the state of Tennessee, That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than \$50.”

The facts shown by the testimony, as appears from the record, are as follows:

“This defendant was on the 1st day of November, 1897, a \*resident of and merchant [365] in the town of Madisonville, said Monroe county, Tennessee, and in no way connected with the American Tobacco Company, as agent or otherwise; that just prior to said November, 1897, the defendant purchased, in the state of North Carolina, from the American Tobacco Company, a corporation of the state of New Jersey, and having a factory for the manufacture of cigarettes in Durham, N. C., and similar factories at other points in the United States, but having no factory, office, nor warehouse in the state of Tennessee, a number of packages, each containing ten Duke of Durham cigarettes; that these cigarettes were manufactured by the American Tobacco Company at its factory in said town of Durham, etc., and these packed by it in quantities of ten in pasteboard slide-boxes, upon each of which such boxes or packages were printed the names of the manufacturers of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal revenue collections or manufacturing district in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States. the



internal revenue stamp for ten cigarettes pasted across the end of such box or package, so as to act as a seal thereon and thereof, and which had to be broken and destroyed to open said box or package, and all the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. A package in all respects similar to those bought by defendant at Durham, N. C., is hereto attached, marked 'Exhibit A.' These packages were packed and manufactured by said American Tobacco Company at Durham, N. C., and were by it shipped from said town of Durham, N. C., to defendant by the Southern Express Company, without case, covering, or inclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N. C., and said Southern Express Company notified to come and get them, and said express company, by its agent, took them, the said inclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these \*packages were brought to the place of business of defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket on to the counter in the place of business of defendant, and so delivered to and receipted for by the defendant; that said basket was not left with defendant at all, but was carried away from defendant's business by said agent of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without breaking, and sold one of them on said November 1, 1897, to W. G. Brown, an adult resident of said Monroe county, Tennessee, said sale being in Monroe county, Tennessee, and within one year before the finding of this indictment."

Upon these facts the supreme court of Tennessee sustained the conviction, and thereupon the defendant sued out this writ of error. His contention is that the act is, as applied to the importation of cigarettes and subsequent sale thereof in the packages in which they were imported, in conflict with the Constitution of the United States.

It will be perceived that the statute in terms expressly prohibits the sale of cigarettes, or the bringing them into the state for the purpose of sale. If valid, it not only prohibits an individual within the state from selling cigarettes manufactured therein, but also prohibits anyone bringing cigarettes from another state into Tennessee for the purpose of sale. It will therefore stop all importations of cigarettes for sale, and the only permissible importations will be those for personal use. The power of the state, therefore, to put an end to commerce between other states and itself, except so far as the importation is for the use of the importer, is broadly and distinctly asserted by this statute. Claiming the right to determine absolutely what shall be sold within

its limits, Tennessee attempts to prohibit the sale, or the importation for sale, of cigarettes. As said by its supreme court: "The statute under which the conviction was had unconditionally prohibits all sales of cigarettes, whether manufactured in this state or elsewhere."

\*It may be well to consider what this statute is not. It has none of the elements of inspection. It does not attempt to distinguish between cigarettes made of tobacco free from any drug, wrapped in paper untouched by any poison, from those (of which we are assured by counsel in their argument there are many) whose tobacco has been mixed with opium or some other drug, and whose wrapper has been saturated in a solution of arsenic. There is no attempt to distinguish between the pure and impure; no attempt to protect a purchaser from the purchase of an adulterated article. On the contrary, it stamps tobacco wrapped up in the form of a cigarette as in and of itself noxious, and to be wholly forbidden. The supreme court of Tennessee rightly interpreted this statute as an absolute prohibition of the sale of cigarettes, no matter what the character of the paper wrappers or the condition of the tobacco within them, and it asserted the power of the state to enact the statute on the ground that cigarettes are "inherently bad, and bad only." I quote from its opinion:

"Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.

"There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true (*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; 1 Greenl. Ev. § 6; 1 Wharton, Ev. § 282; 1 Jones, Ev. §§ 129, 134; *Lanfear v. Mestier*, 18 La. Ann. 497; s. c. 89 Am. Dec. 658, and notes 693; *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158); nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take \*judicial notice of them. *Boullemet v. State*, 28 Ala. 83; 12 Am. & Eng. Enc. Law, p. 199.

"It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than



for any other, and perhaps every other, reason.

"It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea and alone for the protection of the people of the state from an unmitigated evil."

No one can question the sincerity of the legislature of Tennessee in thus enacting what it deemed for the health of its citizens, or the conviction of the members of its supreme court of the validity of such legislation by reason of the greatness of the supposed evil which it was intended to restrain. And yet there is no consensus of opinion as to the fact of such evil. As illustrative of which statement see the articles in the *Medico-Legal Journal* of March and September, 1898, and the large collection therein of the opinions of medical and other scientific gentlemen in respect to the matter. Further, the report for 1899 of the Commissioner of Internal Revenue (p. 436) shows that the number of cigarettes manufactured in the United States during the year 1899 were two billion eight hundred and five million one hundred and thirty thousand seven hundred and thirty-seven (2,805,130,737), on which the government collected a tax of four million two hundred and thirteen thousand two hundred and fifteen dollars and twenty-five cents (\$4,213,215.25). These figures are enormous, and in addition this fact may be noted, a fact obvious to all who have had occasion to travel in other countries (particularly those occupied by different branches of the Latin race), that the use of cigarettes is there far more common than in this country.

[369] In view of these and other facts it is perhaps not surprising \*to find Mr. Justice Brown, speaking for himself and three associates, stating "we are not prepared to fully indorse the opinion of that court" (supreme court of Tennessee) "that cigarettes are not legitimate articles of commerce," or that "they are inherently bad, and bad only." The truth is that, whatever differences of opinion may exist as to whether cigarettes are or are not hurtful, they are confessedly a common and well-recognized article of commerce, and as such when the subject of interstate commerce are under the control of that body to which by the Constitution of the United States is given the power to regulate commerce between the states.

It will be seen by an inspection of the opinion of the supreme court of Tennessee that that court sustained the conviction on two grounds: First. That cigarettes were not a legitimate article of commerce, and therefore the state of Tennessee by virtue of its police power had a right to prohibit absolutely their importation and sale, no matter in what form they were so imported and sold; and, secondly, that if it had no such general power it could prohibit the importation and sale of cigarettes in packages of the size in which these were imported and sold. In view

of the adherence by Mr. Justice White to the opinions heretofore announced by this court in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, and other cases in respect to the inability of the state by virtue of its police power to prohibit the importation and sale in original packages of articles, which are recognized articles of commerce although the subjects of conflicting opinions as to the deleteriousness of their use, it would seem unnecessary to enter into any lengthy consideration of the first ground. Especially is this so inasmuch as there is no expressed attempt to overrule *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, decided two years ago last May, in which decision three of the justices concurring in the affirmance of the judgment herein concurred, and in which it was distinctly ruled (p. 23, L. ed. p. 57, Sup. Ct. Rep. 765): "In the absence of congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." Although it may be noticed in passing that this case, as decided by the supreme court of \*Pennsylvania, where it is reported under the title, *Com. v. Paul*, 170 Pa. 284, 30 L. R. A. 396, 33 Atl. 82 (see 171 U. S. 5, 43 L. ed. 51, 18 Sup. Ct. Rep. 757), is both cited and quoted from in support of this decision. A ruling we have reversed is the authority now relied upon. Inasmuch, however, as Mr. Justice Brown, in his opinion, has, in addition to this citation, quoted some expressions which may seem to tend towards giving an enlarged scope to the police power of the state, it may not be a waste of time to show concisely what this court has decided, and what may therefore now be considered settled law.

In the first place, Congress has supreme and exclusive control over interstate commerce. I shall not attempt to restate the oft-repeated historical argument that one of the chief reasons leading to the formation of the Federal Constitution was the necessity, disclosed by the experience of the colonies under the confederation of preventing any discriminating or retaliatory legislation by any state in respect to the commodities produced or manufactured in another, and the consequent importance of having commerce between the states placed absolutely within the control of a legislative body representing all the states. And yet it may not be out of place to quote these words from the concurring opinion of Mr. Justice Johnson, in *Gibbons v. Ogden*, 9 Wheat. 1, 224, 6 L. ed. 23, 77:

"For a century the states had submitted, with murmurs, to the commercial restrictions imposed by the parent state; and, now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws



and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the states, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."

And these from Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688:

[371] "It may be doubted whether any of the evils proceeding \*from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states."

The plain language of the Constitution affirms this. Second only to the power "to collect taxes" and "to borrow money" is the power given to Congress by § 8, article 1, of the Constitution "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Thus next in order, as though next in importance to the power of maintaining itself by taxation and borrowing money, is the power to regulate commerce between the states as well as between the United States and foreign nations.

While this nation is as between it and the states one of enumerated powers, it is within the scope of those enumerated powers supreme, and, as the power to regulate commerce between the states is expressly given to Congress, and no division provided for, it follows that it is wholly withdrawn from state control; and such has been the uniform ruling of this court. In the case just quoted from, *Gibbons v. Ogden*, Chief Justice Marshall, delivering the opinion of the court, on page 196, L. ed. p. 70, thus declared the scope and limit of that power:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the [372] same restrictions \*on the exercise of the power as are found in the Constitution of the United States."

And in the other case referred to, *Brown v. Maryland*, on page 446, L. ed. p. 688, the Chief Justice put this question and gave this answer:

"What, then, is the just extent of a power  
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to regulate commerce with foreign nations, and among the several states?"

"This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior."

In *The Passenger Cases*, 7 How. 283, 12 L. ed. 702, Mr. Justice McLean, after referring to many prior cases, to the discussions in the convention which formed the Constitution, and the language, among others, of Mr. Madison in that discussion, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority," summed up his conclusion in these words (p. 400, L. ed. p. 751):

"Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, reiterated in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power 'to regulate commerce with foreign nations, and among the several states,' by the Constitution, is exclusively vested in Congress."

In the *Head Money Cases*, 112 U. S. 580, 590, *sub nom. Edge v. Robertson*, 28 L. ed. 798, 801, 5 Sup. Ct. Rep. 247, Mr. Justice Miller, considering a statute passed by Congress requiring the master or owner of every vessel bringing immigrants into the United States to pay a tax of 50 cents for each immigrant, to create a fund for the expense of regulating immigration, the care of immigrants, and for the relief of such as were in distress, and holding that it constituted a regulation of commerce, said in reference to it and other like statutes:

"That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the \*protection of the people in whose midst they [373] are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the states. That decision did not rest in any case on the ground that the state and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the states and the general government, has conferred this power on the latter to the exclusion of the former."

In *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10

Sup. Ct. Rep. 681, Chief Justice Fuller thus stated the rule:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

I might multiply quotations like these, but it is unnecessary. See the following among other cases for like affirmations: *United States v. Coombs*, 12 Pet. 72, 78, 9 L. ed. 1004, 1006; *State Freight Tax Case*, 15 Wall. 232, 279, 281, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146, 162, 163; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 9, 10, 24 L. ed. 708, 710; *Mobile County v. Kimball*, 102 U. S. 691, 696, 697, 699, 700, 702, 26 L. ed. 238, 239, 240, 241; *Webber v. Virginia*, 103 U. S. 344, 351, 26 L. ed. 565, 567; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 466, 26 L. ed. 1067, 1069; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 60, 27 L. ed. 383, 384, 2 Sup. Ct. Rep. 87; *Moran v. New Orleans*, 112 U. S. 69, 72, 73, 28 L. ed. 653, 655, 5 Sup. Ct. Rep. 38; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 211, 29 L. ed. 158, 162, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 630, 631, 632, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Re Rahrer*, 140 U. S. 545, 554, 555, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865.

The power of Congress to regulate commerce between the states being, as we have seen, supreme, its failure to impose any restrictions or regulations is to be taken as a declaration that, in its judgment, such commerce shall be free. There is no necessity of an affirmative declaration on its part, for, as it alone has power to restrict or prescribe regulations, its failure to do so leaves the commerce unburdened. This, too, is a proposition which has been so often declared by this court as to be one of the settled rules of constitutional law. Thus, in *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. ed. 347, 350, it was said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled."

In *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, Mr. Justice Bradley summed up the matter in these words and with these citations:

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 222, 6 L. ed. 23, 52, by Mr. Justice Grier in *The Passenger Cases*, 7 How. 283, 462, 12 L. ed. 702, 777, and has been affirmed in subsequent cases. *State Freight Tax Case*, 15 Wall. 232, 279, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146, 162; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 469, 24 L. ed. 527, 529; *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 240; *Brown v. Houston*, 114 U. S. 622, 631, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; *Walling v. Michigan*, 116 U. S. 446, 455, 29 L. ed. 691, 694, 6 Sup. Ct. Rep. 454; *Pickard v. Pullman Southern Car. Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4."

See also *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

In this case the words of Mr. Justice Brown were, page 212, L. ed. p. 966, Inters. Com. Rep. p. 653, Sup. Ct. Rep. p. 1090: "But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the nonaction of Congress indicates its will that such commerce shall be free and untrammelled."

It is true there are many cases in this court in which have been sustained acts of a state which do in a measure affect interstate commerce, but the thought underlying those cases has been that the acts complained of were not direct regulations of interstate commerce, not in restriction, but in furtherance, of it, and being purely local in character might rightfully be upheld until Congress should by its legislation direct the contrary.

That the transportation from one state of its products into another state for purposes of sale is not a matter of purely local interest to the latter state is evident. It concerns the right of the producer or manufacturer in the former state to his market. We are told by the learned attorney general of Tennessee, as an evidence of the good faith of the state in this legislation, that it has many areas of territory especially valuable for the growth of tobacco, and that it is one

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of the large tobacco producing states in the nation. That is, therefore, a valuable industry in Tennessee. Suppose the legislatures of all the other states should become possessed of the idea that the use of tobacco was injurious, and prohibit the importation and sale thereof. Could it fairly be said that such legislation was in respect to a matter of only local interest in the separate states passing such legislation? Could not Tennessee rightfully contend that it was a matter affecting one of its large industries, and which was likely to be destroyed by such adverse legislation?

[376] It is undoubtedly true that the police power is not by the Constitution delegated to Congress. It may, therefore, under article 10 of the Amendments, be regarded as reserved to the states respectively, or to the people, but it is equally clear that no power which is impliedly reserved to the states can limit or detract from the full scope of any power expressly delegated \*to the nation, to be exercised by Congress. In other words, the state cannot, in the exercise of the police power, interfere with the supreme control by Congress over interstate commerce. This has been repeatedly affirmed by this court. In *Henderson v. New York*, 92 U. S. 259, 271, *sub nom. Henderson v. Wickham*, 23 L. ed. 543, 549, it was said by Mr. Justice Miller:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471, 472, 24 L. ed. 527, 530, 531, it was said by Mr. Justice Strong:

"But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. . . . It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

Again, by Mr. Justice Harlan, in *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 521, 6 Sup. Ct. Rep. 252:

"Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

Again, in reference to quarantine laws, by Mr. Justice Miller, in *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 179 U. S.

S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 241:

"For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such \*powers are [377] so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Henderson v. New York*. 92 U. S. 259, 272, *sub nom. Henderson v. Wickham*, 23 L. ed. 543, 549; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252."

Further may well be quoted the words of Mr. Justice Catron in the *Liccnse Cases*, 5 How. 504, 599, 12 L. ed. 256, 299, quoted with approval in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 489, 31 L. ed. 700, 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, and again referred to with like approval in *Leisy v. Hardin*, 135 U. S. 100, 113, 34 L. ed. 128, 134, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, and also in *Re Rahrer*, 140 U. S. 545, 557, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 575, 11 Sup. Ct. Rep. 865:

"The assumption is that the police power was not touched by the Constitution, but left to the states, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and Congress, cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the states. If, from its nature it does not belong to commerce or if its condition from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the Federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, *Brown v. Maryland*, and *New York v. Miln* (11 Pet. 103, 9 L. ed. 648). What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular \*state; and having declared [378] that ardent spirits and wines were deleterious to morals and health, they ceased to be

commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

See also *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rehman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 641.

[379] We have thus, first, the express language of the Constitution delegating to Congress the power "to regulate commerce . . . among the several states;" second, the repeated rulings of this court that that power is supreme and exclusive; third, an equal volume of decision that the failure of Congress to prescribe any limitations to interstate commerce in respect to any particular article is equivalent to a declaration by that body that it intends that such commerce shall be free; and, fourth, the equally often repeated ruling that the reserved police power of the states is subordinate to and does not limit or take from the supreme control by Congress over matters of interstate commerce.

It would seem from this concurrence of rulings that the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, had now become the settled law, and that henceforth it is not to be questioned; that no state can, under the guise of a police regulation, directly restrain the importation and sale of articles brought in from other countries and

other states, which are recognized articles of commerce, no matter what may be the local opinion as to the injurious effects of the use of such articles. The opinion of the supreme court of Tennessee on the first proposition suggested must, therefore, be considered as definitely overruled.

I pass now to the second proposition, which is that the packages in which these cigarettes were imported are so small, or the manner of their importation so peculiar, that the power of Congress over interstate commerce is as to them lost, and the power of the state has become controlling. That this is the question upon which also the reversal is ordered is evident, for it is said by Mr. Justice Brown, in his opinion, after referring to the matter of the police power:

"We are remitted to the inquiry whether a paper package of 3 inches in length and 1½ inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the state while in the hands of the importer? This we regard as the vital question in the case."

And by Mr. Justice White, in his concurring opinion:

"Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is: Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court?"

I come to the consideration of this question with the conceded fact that Congress has supreme and exclusive control over interstate commerce; that no state in the exercise of its police power \*can directly re- [380] strain such commerce; and inquire why the size of the package or the manner of importation determines the limit of national control?

And first as to the matter of size, we are told that the cigarette package is 3 inches in length and 1½ inches in width, and contains ten cigarettes. I have no doubt of the accuracy of this measurement, but I in vain search the Constitution of the United States for any intimation that the power of Congress over interstate commerce ceases when the packages in which that commerce is carried on are of any particular size. Mr. Justice Brown quotes this language of Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, wherein, having adverted to the fact that the importer might after the importation so break up the packages, or so handle the goods, as to show an intent to incorporate them into the mass of the general property of the state, he says:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the



original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

And upon this quotation this observation is made:

"This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases."

And yet, curiously enough, after this declaration, although the cigarettes sold by the defendant were "in the original form or package in which they were imported," although there had been no breaking of any package, it is held that the power of the nation does not protect him in that sale. Necessarily, there is impliedly added to the language of the Chief Justice words like these, "provided such package be of considerable size, at least larger than 3 inches in length and 1½ inches in width." Of all the justices of this court, Chief Justice Marshall [381] has hitherto been credited with marvelous accuracy of statement, but it would seem from the construction now given that he omitted a most important particular in defining the relative powers of the nation and the state. Even now there is a singular failure to give the size of the package which takes the importation out of the power of Congress and intrusts it to the control of the state. Recently, in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, we held that an importer had a right to import oleomargarine in 10-pound packages, and sell it in such a package at retail to a consumer. Apparently, the dividing line as to the size of packages must be somewhere between that of a 10-pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from state to state in 10-pound packages?

If it be said that diamonds are not a subject of police regulation, and that a different rule obtains in reference to them than to matters of police regulation (as might be implied from the scope of the opinion) I can only say that the conclusion seems to me strange. Concretely, it amounts to this: The police power of the state, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whisky, but cannot prevent the importation and sale of a barrel; or, in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the state to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense. I see no logical half-way place between a recognition of the power of the nation to regulate commerce between the states in all things which are the subjects of commerce (in whatever form or manner they may be imported) and a concession of the power of the state to prevent absolutely the importation and sale of articles deemed by it prejudicial to the

health or morals of its citizens. Either the state has, in the exercise of its police power, the right to prohibit the importation and sale of articles deemed by it injurious to the health and morals of the community—no matter in what size or form of package the importation is made—or else it has no \*such power, and the determination of the [382] question of importation and sale is one to be left to Congress. The attitude of one who affirms the supreme power of the nation over interstate commerce, including therein the right of Congress to regulate the importation and sale in large packages of things whether or not deemed by any state deleterious in their use, and yet holds that that supreme power of Congress is exhausted the moment the importation is in a package of small size, finds something of a parallel in the attitude of the citizen of a state which has adopted prohibition, who upholds the law, but objects to its enforcement.

The size of the package seems to be the troublesome matter in the minds of some of my brethren. Let me put that question of size to this test. Suppose Congress, assuming that it had power over interstate commerce, should enact that all transportation of cigarettes between states should be in packages of ten cigarettes each, would that be a regulation of interstate commerce? Or would my brethren say that that was beyond the power of Congress? The power of Congress over commerce between the states is given in the same section and in the same language as its power over commerce between this nation and foreign nations. Is this court prepared to say that, if Congress should enact that no importations of cigarettes from abroad should be otherwise than in packages of ten cigarettes each, such legislation was beyond its power because it affected a package of a small size? Mr. Justice White, evidently appreciating the logic of these suggestions, escapes their force by this declaration, and I quote from his opinion that which succeeds the quotation heretofore made:

"I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the \*facts and circum- [383] stances of the case, after arrival be segregated so as to cause each to become an original package."

I regret that the decision of a great constitutional question like that here presented turns on the shifting opinions of individual judges as to the peculiar facts of a particular case. No one can tell from this announcement where is the dividing line between the power of the state and the power of the nation. Obviously the mere size of the package does not in this view determine. It would seem that constitutional limitations



should be stated by the courts with precision. I think, and I say it with all respect, that no case involving a constitutional question should be turned off on the simple declaration that upon its peculiar facts it falls on one side or the other of some undisclosed line of demarcation. It seems to me, and yet I speak hesitatingly, in view of the indefiniteness of his declarations, that Mr. Justice White thinks there was something in the conduct of this importer in evasion of the state statute. But can any statute be deemed to be evaded which has no application to the particular matter? If the regulation of interstate commerce is a matter within the sole jurisdiction of Congress, surely no act of the state restraining an importation and sale can have any application thereto. If the state may not say whether the importation shall be in large or small packages, if that is a regulation of interstate commerce within the sole power of the United States, then no act of the importer in fixing the size of the package can be adjudged either in conflict with or an evasion of any state statute. There is but one of two alternatives. Either the state may regulate the size of the package or Congress has the power. If a state has the right, then of course it may prevent the importation of packages other than those of a large size; but if Congress alone can regulate it, then the state has nothing to do with the question of the size of the package, and no act of the importer in fixing the size of the package can be adjudged in conflict with its statute.

Congress has prescribed the sizes of the packages in which cigarettes are to be put up, and while it is true, as indicated in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, that the primary purpose of such legislation is the collection of internal revenue\* taxes, and not the regulation of commerce between the states, yet it is also true that it is not within the power of the states to declare that the use of packages of the size prescribed by Congress is illegitimate. There cannot be imputed to Congress the purpose to in any way interfere with the full power of the states over matters committed to their care, nor can the use by an individual of packages such as Congress has authorized be condemned as an evasion of state laws. The use of such a package legitimate for one purpose is legitimate for others, and a state by its statutes cannot in any way nullify or weaken the effect of congressional enactment. So although these packages are small in size, they have the approbation of Congress, and must be considered as legal, and their use cannot be made illegal by state laws.

And here it is well to refer to the language of Chief Justice Marshall, quoted, *supra*. It is: "In the original form or package in which it was imported." Not in which "it might have been" or "ought to have been imported." Obviously, it did not occur to him that the form or package which the importer might adopt in any way affected the power of Congress over the importation. One will search the opinion of the Chief Justice

in vain to ascertain the size or form of the package then before the court. If Congress should see fit to describe a form or package, it was within its power. If it did not do so, it left the matter to the determination of the importer. There seems to be in the minds of those of my brethren with whom I differ the thought that, because this importer did not import in a customary way, the control of Congress in the matter ceased. The cost of transporting a single package of cigarettes from the manufactory in Durham, N. C., to any part of Tennessee may be great, and therefore such transportation is not ordinarily undertaken. It may be true, and undoubtedly is true, that a manufacturer of yeast cakes in the city of New York would not feel warranted in going to the expense of shipping a single yeast cake, or, for that matter, a hundred, to Covington, Ky., and yet that same individual, if he had a manufactory in Cincinnati, might find that the most convenient and inexpensive way of filling orders from Covington was to send them in separate \*packages in his delivery wagons across the bridge from the one city to the other. In each case the transportation would be one of interstate commerce, and it cannot be possible that Congress has the power to regulate the transportation from New York to Covington, and not that from Cincinnati to Covington.

Another matter which must not be ignored in measuring the control of Congress over interstate commerce is the changes in the modes of transportation. At the time that Chief Justice Marshall wrote the opinion in *Brown v. Maryland* transportation was carried on by water in sailing vessels and by land largely in lumber wagons. It is not strange that at such time all transportation was of goods packed in large boxes, securely fastened to prevent accidents from the rough and tumble way of transportation. There were then no express companies for carrying small packages. All that mode of transportation has grown up in this country within the last sixty years, but the express companies carrying their small packages from state to state are just as certainly engaged in interstate commerce as the old-fashioned lumber wagons carrying commodities between the same places. The facilities of transportation are increasing rapidly, and with them the cost of such transportation is diminishing, so that more and more will it be true that the smallest packages will be the frequent subject of transportation, even between state and state. But it has often been said that the grants of power in the Constitution to the national government were expressed in such broad and general language that, notwithstanding the many changes in the modes of doing business, in the forms and conditions of social life, the needed control was still found to be vested in Congress. Can it be that an exception to this rule is now to arise in the matter of the full and complete power given by that instrument to Congress over interstate commerce?

Again, let me go back to the opinion of



Chief Justice Marshall, and quote pages 439-446, L. ed. pp. 685-688:

[386] "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence \*of the other. No goods would be imported if none could be sold.

"If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

Now, if cigarettes cannot be brought into the state of Tennessee and sold in the packages in which they were manufactured, but must be brought in and sold only in barrels or boxes of large size, the right of importation is practically defeated, for no consumer would buy a barrel or box for his own use, and no importer could sell it to a second party with the idea of a resale, because the moment the first sale is accomplished, the law of the state interposes to prevent the second. In other words, this contention that an imported package must be of a large size in order to secure the right of sale is simply a convenient way of declaring that the right of importation for purposes of sale may be denied. Not such was the thought of this court, as expressed in the opinion of Chief Justice Marshall. The idea then was that the right of sale was an incident to the right to import; that the state could neither directly forbid the importation, nor indirectly prevent it by embarrassing the right of sale with restrictions which, in fact, stop all importation for purposes of sale.

[387] \*I do not doubt that the importation and sale of many things may wisely be restrained, but the question is as to the body by which such regulations shall be made. We may all agree that the importation and sale of liquors should be restrained or prohibited. We may doubt as to whether a like rule obtains as to the importation and sale of oleomargarine. Believing that the settled ruling of this court has been that that question is one to be determined by Congress, I think  
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that this decision is a plain departure therefrom.

Nor is there reason to apprehend that any unfortunate results will flow from the supreme power of Congress in the matter. Take the case of intoxicating liquors. When it was found by the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, that interstate commerce in such liquors (they being recognized articles of commerce) could not be regulated by the states, Congress promptly passed an act providing that liquors imported into any state should upon arrival therein be subject to the local laws (26 U. S. Stat. at L. 313, chap. 728), the validity of which legislation was sustained in *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. So it cannot be doubted that if that body which represents all the states shall be of opinion that the use of any particular article is freighted with injury to public health, morals, or safety, it will absolutely prohibit interstate commerce therein, or if in its judgment (as in the case of intoxicating liquors) there is in certain localities such a feeling in reference to any article that commerce therein may wisely be regulated by the state, it will provide therefor. Although some temporary disadvantage or inconvenience may result from this assertion of the supremacy of Congress, it is not fitting, in view of the constitutional provisions, to ignore or limit the full scope of that supremacy; and, it may properly be added, it is better that in certain instances one state should be subjected to temporary annoyance rather than that the whole framework of commercial unity created by the Constitution should be destroyed by relegating to each state the determination of what particular articles it will permit to be imported into its borders.

"The power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, \*without congressional permis-[388] sion. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances." *Lyng v. Michigan*, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

For these reasons I dissent from the opinions and judgment in this case.

I am authorized to say that the Chief Justice, Mr. Justice Shiras and Mr. Justice Peckham concur in this dissent.

CHESAPEAKE & OHIO RAILWAY  
COMPANY, *Plff. in Err.*,  
*v.*  
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 388-395.)

*Statute as to separate accommodations for white and colored passengers—conclusiveness of state decision.*

The decision of the highest court of the state sustaining the constitutionality of Ky. Stat. 1892, § 1, requiring separate coaches for white and colored passengers, on the ground that the statute applies only to transportation between points in that state, or, if not, that the regulation of such transportation is severable from that as to interstate business, constitutes a determination of the local law, which is binding on the Supreme Court of the United States.

[No. 103.]

*Argued November 13, 14, 1900. Decided December 3, 1900.*

**I**N ERROR to the Court of Appeals of the Commonwealth of Kentucky to review a decision affirming a conviction for violation of a statute requiring separate coaches for white and colored passengers. *Affirmed.*

See same case below, 21 Ky. L. Rep. 228, 51 S. W. 160.

NOTE.—As to state laws as rules of decision in Federal courts—see notes to *Wilson v. Perlin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553, and *Griffin v. Overman Wheel Co.* 9 C. C. A. 548.

As to construction and effect of state laws and Constitutions, and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to when the United States Supreme Court follows decisions of state courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

*Constitutionality of statutes requiring separate accommodations for white and colored passengers.*

No badge of slavery or involuntary servitude contrary to the 13th Amendment of the United States Constitution is imposed by an act requiring equal but separate accommodations for the white and colored races by providing separate coaches or compartments. *Ex parte Plessy*, 45 La. Ann. 80, 18 L. R. A. 639, 11 So. 948; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18.

Nor are the equal privileges or immunities of citizens abridged by such an enactment. *Ex parte Plessy*, 45 La. Ann. 80, 18 L. R. A. 639, 11 So. 948.

The Kentucky statute requiring all railroad companies to furnish separate coaches or compartments for colored and white passengers does not violate U. S. Const. 14th Amend., prohibiting discrimination by a state because of race or previous condition of servitude, as it prohibits any discrimination in the quality,

Statement by Mr. Justice **Brown**:

\*This was a writ of error to review the conviction of the railway company for failing to furnish separate coaches for the transportation of white and colored passengers on the line of its road, in compliance with a statute of Kentucky enacted in 1892, the 1st section of which reads as follows:

"§ 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad line or track within this state; and all railroad companies, person, or persons, doing business in this state, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person, or persons operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this state; and all foreign corporations, companies, person, or persons organized under charters granted, or that may be hereafter granted, by any other state, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this state, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall

convenience, or accommodations in the cars and compartments set apart for the different classes of passengers. *Anderson v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 764, 62 Fed. Rep. 46.

So, a state statute providing for equal but separate railway coaches or compartments for the white and colored races, and the assignment of passengers to such coaches or compartments, according to their race, by conductors, is not in conflict with the 14th Amendment to the Federal Constitution. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

The court, referring to the various provisions of the act, said: "While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the 14th Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the 2d section of the act, that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act that exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise in the record in this case, since the only issue made is as to



be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

The 2d section requires such companies to make no difference or discrimination in the quality, convenience, or accommodations in such coaches; and the 5th provides that conductors "shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car, or coach, or compartment; and should any passenger refuse to occupy the car, coach, or compartment to which he or she might be assigned by the conductor or manager, the latter shall have the right to refuse to carry such passenger," and may put him off the train. The 7th section contains an exception of employees of railroads, or persons employed as nurses, or officers in charge of prisoners.

[390] The indictment followed the language of the statute above quoted. The defendant demurred upon the ground that the law was repugnant to the Constitution of the United States, in that it was a regulation of interstate commerce. The demurrer was overruled, and the case tried before a jury which found the defendant guilty, and fixed its fine at \$500. The case was carried by appeal to the court of appeals, and \*the conviction affirmed. The court delivered a brief opinion to the effect that its judgment was concluded by the case of the *Ohio Valley R. R.*

the unconstitutionality of the act so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race."

A state statute which applies only to commerce within the state is not an unconstitutional regulation of commerce because it requires railroads to provide equal but separate accommodations for white and colored passengers by providing separate cars or separate divisions of a car for colored persons. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348, Affirming 66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 6 So. 203.

So, the requirement of separate coaches for white and colored passengers, which is made by Ky. Stat. §§ 795, 801, does not, at least as applied to carriage wholly within the state, violate the interstate commerce or any other clause of the Federal Constitution, although the line extends beyond the state. *Ohio Valley R. Co. v. Lander*, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882.

And no question of interference with interstate commerce can arise under such a statute, where the company enforcing it operates a purely local line with both its termini within the state. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

But a state law requiring separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. *State ex rel. Abbott v. Hicks*, 44 La. Ann. 770, 11 So. 74; *Anderson v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 764, 62 Fed. Rep. 46.

Thus, a statute requiring all railroads in the state to furnish equal but separate accommodations for the white and colored races, and requiring conductors to assign passengers to their respective places, when applied to a pass-

*Co. v. Lander*, 20 Ky. L. Rep. 913, 47 S. W. 344.

**Mr. John T. Shelby** argued the cause, and, with *Mr. H. T. Wickham*, filed a brief for plaintiff in error:

A statute requiring railroad companies to furnish separate coaches for white and colored interstate passengers, and to transport such passengers of the two races in separate coaches, is invalid as being in conflict with the commerce clause of the Constitution.

*Hall v. De Cuir*, 95 U. S. 495, 24 L. ed. 547.

The Kentucky separate coach act, properly construed, is applicable to the transportation of all passengers, whether interstate or intrastate, of the two races.

*Ohio Valley R. Co. v. Lander*, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

Said act, if unconstitutional in its application to interstate passengers, cannot be held valid for any purpose, but must be held invalid *in toto*.

*Virginia Coupon Cases*, 114 U. S. 305, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 197, 5 Sup. Ct. Rep. 903; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Trade Mark Cases*, 100 U. S. 82, *sub nom. United States v. Steffens*, 25 L. ed. 550; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763.

enger from another state on an interstate railroad line, invades the powers conferred on Congress by the commerce clause of the Constitution. *Carrey v. Spencer*, 5 Inters. Com. Rep. 636, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886.

To the contrary is *Smith v. State*, 100 Tenn. 494, 41 L. R. A. 432, 46 S. W. 566, which holds that a state statute providing for separate but equal accommodations for the white and colored races on railroads is a valid police regulation, and applies both to intra and inter state travel.

The court distinguishes *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, *infra*, and declares the question to be an open one under the decisions of the Supreme Court of the United States.

But state laws prohibiting any discrimination as to color, between passengers, are unconstitutional so far as they apply to interstate commerce, such as the carriage of passengers by a vessel making voyages between different states. *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

In *Central R. Co. v. Green*, 86 Pa. 427, 27 Am. Rep. 718, it was held that a state statute might impose a penalty on a carrier for making any distinction based on the color of passengers. No question of interstate commerce was decided in this case.

A railroad company which authorizes a railroad company in another state to sell a ticket to a negress entitling her to a first-class passage over the former's line thereby recognizes her as an interstate passenger and entitled to the rights of such a passenger. *Carrey v. Spencer*, 5 Inters. Com. Rep. 636, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886.

As to rights of colored passengers, see *Ex parte Plessy* (La.) 18 L. R. A. 639, and note, and on the general subject of constitutionality of privileges, immunities, and protection, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.



No counsel appeared for defendant in error.

[390] \*Mr. Justice **Brown** delivered the opinion of the court:

This case turns exclusively upon the question whether the separate coach law of Kentucky be an infringement upon the exclusive power of Congress to regulate interstate commerce. The law, in broad terms, requires all railroad companies operating roads within the state of Kentucky, whether upon lines owned or leased by them, as well as all foreign companies operating roads within the state, to furnish separate coaches or cars for the travel or transportation of white and colored passengers upon their respective lines of railroad, and to post in some conspicuous place upon each coach appropriate words in plain letters indicating the race for which it is set apart.

Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other states.

Similar questions have arisen several times in this court. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, an act of the general assembly \*of Louisiana prohibited common carriers of passengers within that state from making any rules or regulations discriminating on account of race or color. Plaintiff took passage upon a steamboat up the river from New Orleans to a landing place within the state, and, being refused accommodations on account of her color in the cabin especially set apart for white persons, brought an action under the provisions of this act. The vessel was engaged in trade between New Orleans and Vicksburg, Mississippi, and defendant insisted that the act was void as a regulation of commerce between these states. The state court held it to be constitutional. This court held "that, while the act purported only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the

boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

In *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348, an act of the legislature of Mississippi required, almost in the terms of the Kentucky act, that "all railroads carrying passengers in this state . . . shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations." The road was indicted for a violation of the statute in failing to provide separate accommodations for the two races. It will be observed that it was not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or for being prevented from riding on the train; but in that case, as in this, the prosecution was public. As the supreme court of Mississippi had held that the statute applied solely to commerce within the state (66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 6 So. 203), that construction was accepted as conclusive \*here; and being a matter respecting com-[392] merce wholly within the state, and not interfering with commerce between the states, there was obviously no violation of the commerce clause of the Federal Constitution. Said Mr. Justice Brewer, in delivering the opinion of this court: "So far as the 1st section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the powers given to Congress by the commerce clause."

In *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, the petitioner Plessy had engaged and paid for a first-class passage on the East Louisiana Railway from New Orleans to Covington, in the same state, took possession of a vacant seat in the coach where white passengers were accommodated, and was ejected therefrom under the separate coach law of Louisiana, which was practically in the same terms as the statute of Kentucky under consideration. Upon being subjected to a criminal charge, he applied for a writ of prohi-



bition upon the ground of the unconstitutionality of the act. The supreme court of Louisiana held the law to be constitutional, and denied the prohibition. On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, since the East Louisiana Railway was purely a local line, with both its termini within the state of Louisiana. Indeed, the act was not claimed to be unconstitutional as an interference with interstate commerce, but its invalidity was urged upon the ground that it abridged the privileges or immunities of citizens, deprived [393] the \*petitioner of his property without due process of law, and also denied him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the 14th Amendment.

As already stated, the court of appeals of Kentucky did not discuss the constitutionality of the act in question, but held itself concluded by its previous opinion in the *Lander Case*. That was an action instituted by Lander and his wife against the receiver of the Ohio Valley Railway, running from Evansville, Indiana, to Hopkinsville, Kentucky. Plaintiff's wife, who was joined with him in the suit, purchased a first-class ticket from Hopkinsville to Mayfield, both within the state of Kentucky; took her place in what was called the "ladies' coach," and was ejected therefrom by the conductor and assigned a seat in a smoking car, which was alleged to be small, badly ventilated, unclean, and fitted with greatly inferior accommodations. It was held by the court of appeals that the decisions of this court in *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348, and *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, were conclusive of the constitutionality of the act so far as plaintiffs were concerned; and that the mere fact that the railroad extended to Evansville, in the state of Indiana, could in nowise render the statute in question invalid as to the duty of the railroad to respect it. It was urged in that case, as it is in this, that the act undertook to regulate or control as to interstate passengers, and that that portion of the statute was invalid as being in conflict with the interstate commerce clause of the Constitution; and, further, that the act was inseparable, and therefore must all be held invalid. In disposing of this the court observed: "We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision hereinbefore referred to, . . . [in the Mississippi case], and also in conflict with the well-settled rules of construction." In winding up its opinion the court made the following observation: "If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within [394] the \*state, and therefore it should be held valid as to such passengers. It seems to 179 U. S.

us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the state."

This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of *all* white and colored passengers, while they are in the state, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the state lines. Indeed, it places the court of appeals of Kentucky in line with the supreme court of Mississippi in *Louisville, N. O. & T. R. Co. v. Mississippi*, 66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 6 So. 203, which had held the separate-coach law of that state valid as applied to domestic commerce. Granting that the last sentence from the opinion of the court of appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the act must stand, so far as it is applicable to passengers traveling between two points in the state.

Indeed, we are by no means satisfied that the court of appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to *all* passengers should be limited to such as the legislature were competent to deal with. The court of appeals has found such to be the intention of the general assembly in this case, or, at least, that if such were not its intention the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.

While we do not deny the force of the railroad's argument \*in this connection, we can [395] not say that the general assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and if we were in doubt on that point, we should unhesitatingly defer to the opinion of the court of appeals, which held that it would give it that construction if the case called for it. In view of the language above quoted from the *Lander Case*, it would be unbecoming for us to say that the court of appeals would not construe the law as applicable to domestic commerce alone, and if it did, the case would fall directly within the Mississippi case (133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348). We therefore feel compelled to give it that construction ourselves, and so construing it there can be no doubt as to its constitution-

ality. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

*The judgment of the Court of Appeals is therefore affirmed.*

Mr. Justice **Harlan** dissented.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

CHARLES B. SNELL.

(See S. C. Reporter's ed. 395-398.)

*Writ of error—judgment lacking in finality.*

A judgment of reversal, with costs, for error in overruling a motion for change of venue, on which the case is remanded with directions to grant the change of venue and for further proceedings according to law, is lacking in the finality necessary to sustain a writ of error.

[No. 110.]

*Argued November 15, 1900. Decided December 17, 1900.*

IN ERROR to the Supreme Court of the State of Ohio to review a decision reversing a judgment for error in overruling a motion for change of venue. *Dismissed.*

See same case below, 60 Ohio St. 256, 54 N. E. 270.

Statement by Mr. Justice **Brown**:

This was an action of tort instituted by Snell in the court of common pleas of Hamilton county, Ohio, against the Street Railway Company, to recover damages for personal injuries alleged to have been caused by its negligence.

On November 27, 1896, plaintiff Snell made a motion for a change of venue, and in support thereof filed his own affidavit as well as the affidavits of five other persons, in compliance with the following section of the Revised Statutes of Ohio:

[396] \*"Sec. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

This motion was overruled and an exception taken on January 28, 1897. A bill of exceptions was allowed and filed, showing what had occurred upon the motion so overruled.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 842, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

The case came on for trial before a jury, and resulted in a verdict in favor of the railway company. Motion for a new trial was made and overruled, and judgment entered for the defendant upon the verdict.

After this judgment upon the merits, proceedings in error were begun and prosecuted in the state circuit court, sitting in Hamilton county, to reverse the judgment by reason of the refusal of the court of common pleas to change the venue under the section of the statute above quoted. By leave of the circuit court, the railway company filed an amendment to its answer, wherein it alleged, among other things, that § 5033 was in conflict with the 14th Amendment to the Constitution of the United States. The judgment of the court of common pleas was affirmed by the circuit court, July 18, 1898, whereupon Snell began a proceeding in the supreme court of the state to reverse the judgment of the circuit court, the only error assigned being to the judgment of the circuit court, affirming the judgment of the court of common pleas denying a change of venue.

On May 9, 1899, the supreme court of Ohio rendered the following judgment: "On consideration whereof it is ordered and adjudged by this court that the judgment of the state circuit court be, and the same is hereby, reversed, with costs: and proceeding to render the judgment which the court should have rendered, it is considered and adjudged that the judgment of the court of common pleas be, and the same is hereby, reversed, \*with[397] costs, for error in overruling the motion of the plaintiff for a change of venue. It is further considered and adjudged that the plaintiff in error recover of defendant in error his costs in this court and in the circuit court expended, to be taxed, and that the case be remanded to the court of common pleas, with directions to grant the change of venue, and for further proceedings according to law." 60 Ohio St. 256, 54 N. E. 270.

Mr. J. W. Warrington argued the cause, and, with Mr. E. W. Kittredge, filed a brief for plaintiff in error.

Mr. Thomas L. Michie argued the cause, and, with Mr. John W. Wolfe, filed a brief for defendant in error.

\*Mr. Justice **Brown** delivered the opinion[397] of the court:

This writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court. It is true that the order appealed from finally adjudges that a change of venue should have been allowed; but the same comment may be made upon dozens of interlocutory orders made in the progress of a cause. Indeed, scarcely an order is imaginable which does not finally dispose of some particular point



arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case. Moreover, the action of the railway company in prosecuting this writ of error is somewhat inconsistent with its position in the circuit court, where in its answer it prayed that "since the order overruling the motion for a change of venue was interlocutory and not final, and since no other proceedings in error have been commenced herein, the present petition in error may be dismissed."

[398] "It is true that after the change of venue was denied, the case was tried upon the merits, and a verdict and judgment rendered for the defendant, of the benefit of which it was subsequently deprived; but it loses no right by acquiescing for the time being in the action of the state court, since, after judgment ultimately rendered, it may have a writ of error reaching back to the alleged error of the state court, if it involve a Federal question. The case is not unlike that of the refusal of a state court to permit the removal of a cause to the circuit court of the United States, or the action of the latter in remanding or refusing to remand. Such removal, although affirmed by the supreme court of the state, does not authorize a writ of error from this court until after final judgment, when, if the removal be found to have been erroneous, the subsequent proceedings in the state court go for naught. *Chicago & A. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Moore v. Robbins*, 18 Wall. 588, 21 L. ed. 758; *Illinois C. R. Co. v. Brown*, 156 U. S. 386, 39 L. ed. 461, 15 Sup. Ct. Rep. 656. Whether in this case defendant's judgment will be reinstated, as it was originally entered, is a question which does not properly arise at this stage of the proceedings. It is sufficient to say that the order appealed from lacks every element of finality, and the writ of error is therefore dismissed.

[399] \*JACK DAVIS, Appt.,  
v.

JAMES E. BURKE, Sheriff, etc.

(See S. C. Reporter's ed. 399-404.)

*Habeas corpus—interference with sentence of state court—self-executing constitutional provisions—due process of law—Federal question.*

NOTE.—On the jurisdiction of the United States courts on habeas corpus—see *Re Rehnitz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4; *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to habeas corpus to test constitutionality of sentence—see note to *Hovey v. Elliott* (N. Y.) 39 L. R. A. 449.

On self-executing constitutional provisions—see *Willis v. St. Paul Sanitation Co.* (Minn.) 16 L. R. A. 281, and note.

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1. Interference with the execution of the sentence of a state court by writ of habeas corpus from a Federal court, on the ground that the state law under which the prosecution was had upon an information is invalid, is properly refused where that question has not been raised in the state court, either by way of defense to the prosecution or by application for writ of habeas corpus.—especially when a decision against the validity of prosecutions by information might result in the liberation of many convicts.
2. The provision for prosecution on an information of the public prosecutor after a commitment by a magistrate, contained in Idaho Const. art. 1, § 8, is self-executing.
3. A constitutional provision which is complete in itself needs no further legislation to put it in force, but is self-executing.
4. A prosecution by information cannot be deemed insufficient to constitute due process of law, if it is authorized by the Constitution of the state.
5. The question whether a convict shall be executed, under statutory authority, by the warden of a penitentiary, or, under statutes in force at the time of his trial and conviction, by the sheriff, or whether he shall escape punishment altogether, does not involve any Federal question as to due process of law under U. S. Const. 14th Amend.

[No. 286.]

Argued December 3, 1900. Decided December 17, 1900.

APPEAL from the Circuit Court of the United States for the District of Idaho to review a decision denying a petition for writ of habeas corpus. *Affirmed.*

Statement by Mr. Justice Brown:

This was an appeal from an order denying a writ of habeas corpus to the appellant Davis, who was, on April 15, 1897, found guilty of murder in the district court of Cassia County, Idaho, and sentenced to be hanged June 4, 1897.

Motion for a new trial was denied, an appeal taken to the supreme court of Idaho, and on May 6, 1898, the judgment of the lower court was affirmed. 53 Pac. 678.

His execution having been postponed, an application for pardon was presented to the State Board of Pardons, and was denied January 23, 1899. Thereupon a petition for a writ of habeas corpus was presented to the United States District Judge for Idaho, which was denied January 30; and an appeal taken from this order was on October 16, 1899, dismissed by the circuit court of appeals (*Davis v. Burke*, 38 C. C. A. 299, 9; Fed. Rep. 501), upon the ground that, as the

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 654, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Uiman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

appeal involved a construction of the Federal Constitution, that court was without jurisdiction.

[400] \*Section 8021 of the Revised Statutes of Idaho provides that executions of defendants convicted of murder in the first degree shall take place at the county jail under the direction of the sheriff; but while this case was pending before the circuit court of appeals this section of the statute was amended (Laws 1899, p. 340), so as to provide for the execution of criminals at the state penitentiary under the direction of the warden. After the passage of this act, February 18, 1899, Davis was removed from the jail of Cassia county to the state penitentiary.

Upon being advised that this proceeding was erroneous, Burke, the sheriff of Cassia county, applied to the supreme court of Idaho for a writ of habeas corpus. That court decided that the act of February 18, 1899, above mentioned, regulating the time, place, and manner of inflicting a death penalty, was not applicable to past offenses, and that Davis should be executed in accordance with the law as it stood at the time of the commission of the offense, the trial, and original sentence. 59 Pac. 544. In accordance with that decision appellant was returned to the custody of the sheriff.

After the decision in the circuit court of appeals, and while awaiting a resentence by the state court, appellant presented this petition for a writ of habeas corpus to the circuit court of the United States for the district of Idaho, and upon the denial of such petition appealed to this court.

Mr. James H. Hawley argued the cause, and, with Messrs. J. W. Dorsey and Edgar Wilson, filed a brief for appellant:

Section 8 of article 1 of the Constitution of Idaho is not self-executing, but requires legislative action before it can become operative.

*State v. Ah Jim*, 9 Mont. 167, 23 Pac. 76.

Habeas corpus is the appropriate remedy, and the Federal court the proper forum, whereby and wherein to obtain relief.

*Re Ah Jow*, 29 Fed. Rep. 183.

Where jurisdiction is questioned a party cannot be estopped or prevented from taking the objection at any time or in any court, for it is an objection which lies at the foundation of the whole case.

*Coleman's Appeal*, 75 Pa. 441; *Doctor v. Hartman*, 74 Ind. 221; *Mathie v. McIntosh*, 40 Wis. 120; *Thompson v. The Julius D. Morton*, 2 Ohio St. 26, 59 Am. Dec. 658; 12 Am. & Eng. Enc. Law, pp. 306, 307.

Jurisdiction may be inquired into by habeas corpus, and the prisoner discharged if no jurisdiction appears, or if jurisdiction is negatived by the record.

*Ex parte Mirande*, 75 Cal. 363, 14 Pac. 888; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. 628.

Mr. Samuel H. Hays argued the cause, and, with Mr. W. E. Borah, filed a brief for appellee:

Habeas corpus to review the judgment of

the state court in a criminal case, on the ground that some right under the Constitution of the United States has been denied to the person convicted, will not be granted except in a few unusual cases, as the proper remedy is by writ of error.

*New York v. Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 50; *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323. To the same effect see *Re Duncan*, 139 U. S. 449, *sub nom. Duncan v. McCall*, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76.

This case presents no special or peculiar urgency such as would take it out of the general rule.

*Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734.

The objection that appellant can be executed only under the act of the legislature providing for executions at the state penitentiary, and not under the law as it stood at the time of his trial and conviction and original sentence, was decided adversely to his contention in the state supreme court, in a proceeding to which he was a party, and this point must therefore necessarily be decided against him here.

*McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959.

\*Mr. Justice Brown delivered the opinion [400] of the court:

The assignments of error, which are somewhat voluminous, are practically resolvable into two questions: first, whether the petitioner was legally prosecuted by information, and, second, whether the act of February 18, 1899, providing for executions at the state penitentiary under the direction of the warden, is, as to this defendant, *ex post facto*, and, as dependent upon this, whether he could be executed under § 8021 of the Revised Statutes as it formerly stood, after that section had been repealed by the act of February 18, 1899.

(1) The Constitution of Idaho contains the following clause: "Art. 1, sec. 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate." Appellant's answer to this is: (1) That the provision is not self-executing; (2) that a law passed March 13, 1891, known as the Information Act, is void, because it was not passed in the manner required in the Idaho Constitution, and that the journals of the legislature may be resorted to to determine this question.

In reply to his first contention, it is sufficient to say that this case has been twice before the supreme court of Idaho, and upon neither occasion was the point made that it could not be prosecuted by information. The first time it was carried there by appeal



from the judgment of the lower court, following a trial upon the merits, and was there affirmed. 53 Pac. 678. After conviction, and after the surrender of Davis by the sheriff to the warden of the penitentiary, in pursuance of the act of February 18, 1899, the sheriff made an original application to the supreme court for a writ of habeas corpus to obtain the custody of Davis, who had been surrendered to the warden of the penitentiary. This was granted. 59 Pac. 544. Upon the hearing of that case, counsel, who were admitted to appear on behalf of the prisoner as *amici curiæ*, insisted that the provisions of the Revised Statutes for the execution of prisoners having been repealed, and the provisions of the act of February 18, 1899, being *ex post facto*, there was no law under which Davis could be executed; but no question was made as to the validity of prosecutions by information.

[402] The rule is well settled in this court that, while there may be a power on the part of the Federal courts to issue a writ of habeas corpus where the petitioner insists that he has been deprived of his liberty without due process of law, that power will \*not ordinarily be exercised until after an appeal made to the state courts has been denied. *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; *Re Duncan*, 139 U. S. 549, *sub nom. Duncan v. McCall*, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Re Wood*, 140 U. S. 278, *sub nom. Wood v. Brush*, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76.

Certain exceptional cases have arisen in which the Federal courts have granted the writ in the first instance, as where a citizen or subject of a foreign state is in custody for an act done under the authority of his own government; or an officer of the United States has been arrested under state process for acts done under the authority of the Federal government, and there were circumstances of urgency which seemed to demand prompt action on the part of the Federal government to secure his release. *Wildenhuis's Case*, 120 U. S. 1, *sub nom. Mali v. Keeper of Common Jail*, 30 L. ed. 565, 7 Sup. Ct. Rep. 385; *Re Loney*, 134 U. S. 372, *sub nom. Thomas v. Loney*, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; *Re Neagle*, 135 U. S. 1, 34 L. ed. 1, 10 Sup. Ct. Rep. 658. It is recognized, however, that the power to arrest the due and orderly proceedings of the state courts, or to discharge a prisoner after conviction, before an application has been made to the supreme court of the state for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it. 179 U. S.

While the power to issue writs of habeas corpus under Rev. Stat. § 753, nominally extends to every case where a party "is in custody in violation of the Constitution, or of a law or treaty of the United States," it is not every such case where the interference of the Federal court is demanded, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The state courts are as much bound as the Federal courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there.

This case is peculiarly one for the application of the general \*rule. Not only was there [403] ample opportunity for making this defense upon the original hearing in the supreme court, or upon an independent application for a writ of habeas corpus; not only does the question involve the construction of the Constitution and laws of the state with which the supreme court of the state is entirely familiar, but a ruling by this court that prosecutions by information in the courts of Idaho are invalid might result in the liberation of a large number of persons under sentence upon convictions obtained by this method of procedure. A step so important ought not to be taken without full opportunity given to the state court to pass upon the question, and without clear conviction of its necessity.

(2) But we are also of opinion that for the purposes of this case the provision of the Idaho Constitution must be deemed self-executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential."

Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain prin-

ciple of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself. When a constitution declares that felonies may be prosecuted by information after a commitment by [404] a magistrate, \*we understand exactly what is meant, since informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the Constitution. It is true the legislature may see fit to prescribe in detail the method of procedure, and the law enacted by it may turn out to be defective by reason of irregularity in its passage. In such case a proceeding by information might be impeached in the state court for such irregularity, but it certainly would not be void so long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law.

(3) The question whether appellant shall be executed, under the act of the legislature, by the warden of the penitentiary, or, under the Revised Statutes, as the law stood at the time of his trial and conviction, by the sheriff, or whether he shall escape punishment altogether, was determined adversely to him by the supreme court of the state (59 Pac. 544), and involves no question of due process of law under the 14th Amendment. *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959.

*The order of the Circuit Court of the United States for the District of Idaho denying the writ of habeas corpus is therefore affirmed.*

[405] \*WILLIAM B. TYLER, *Plff. in Err.*,  
v.

JUDGES OF THE COURT OF REGISTRATION.

(See S. C. Reporter's ed. 405-414.)

*Error to state court—right to raise constitutional question—person unaffected by objection raised.*

The objection that persons may be deprived of their rights without due process of law under the Massachusetts Torrens act for land registration, because it provides for adjudicating the rights of certain classes of persons who are notified only by posting notices, registered letters, or publication, and for the registration of dealings with the land after the original registration, cannot be raised.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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so as to give jurisdiction on writ of error to the Supreme Court of the United States, by a person who is not affected by these provisions of the act because he has the requisite notice.

[No. 213.]

*Argued October 25, 1900. Decided December 17, 1900.*

IN ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts to review a decision sustaining the constitutionality of the Torrens act for land registration. *Dismissed.*

See same case below, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Statement by Mr. Justice Brown:

This was a petition by Tyler to the supreme judicial court of Massachusetts for a writ of prohibition to be directed to the judges of the court of registration to prohibit them from further proceeding under what is known as the Torrens act in the registration of a certain parcel of land described in the application, or in the determination of the boundary between such parcel of land and land of petitioner.

The petition alleged, in substance, that David E. Gould and George H. Jones, on December 22, 1898, applied to the court of land registration to have certain land in the county of Middlesex brought under the operation and provisions of the land registration act, and to have their title thereto registered and confirmed. The land referred to was shown on a plan filed with the application. The petitioner, who was the owner of an estate in fee simple in a parcel of land adjoining part of the land described in the application, insisted that the boundary line between his land and the part aforesaid was not correctly shown on the plan filed with the application, but encroached upon and included part of his land. The petition prayed for a writ of prohibition, and alleged that the land registration act \*under which the proceedings [406] were taken violated the provisions of the Constitution of the United States, first, in making a decree of confirmation conclusive upon persons having an interest in the land, though they may have had no notice of the proceedings for registration, and therefore would have the effect of depriving such persons of their property without due process of law, and otherwise than by the law of the land; second, that the act was also invalid in giving judicial powers to the recorder and assistant recorders therein mentioned, who were not judicial officers under the Constitution of the commonwealth, and also gave them power to deprive persons of their property without due process of law; third, that the operation of the act in other respects depended for the effect thereby intended upon the conclusiveness of the original decree of registration, and the exercise of nonjudicial powers by the recorder, etc.

Upon the petition and answer, which simply averred compliance with the terms of the act, together with the rules of the land court,

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etc., the case was reserved for a full bench upon the only question raised at the hearing, namely, the constitutionality of the act. The court decided the act to be constitutional, and dismissed the petition. 175 Mass. 71, 55 N. E. 812. Hence this writ of error.

**Mr. J. L. Thorndike** argued the cause and filed a brief for plaintiff in error:

If the state court had decided against the plaintiff in error on the ground that his objections to the validity of the act did not go to the whole act, but only affected it so far as it attempted to conclude the rights of persons without due process of law, the decision would have made it unnecessary to decide the Federal questions, and would not have involved any question that could have been brought before this court.

*Chapman v. Goodnow*, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

If a writ of error had been brought in such circumstances it would have had to be dismissed.

*Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

But as the state court did not take that view of the act, and rested its decree upon the decision of the Federal questions, they were properly brought to this court by writ of error.

The decree of the state court refusing the writ of prohibition was a final decree upon which a writ of error might be brought, by U. S. Rev. Stat. § 709, as in the similar case of an application for a mandamus.

*Furman v. Nichol*, 8 Wall. 56, 19 L. ed. 375; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

As the state court rested its decree upon its decision of a Federal question, it is submitted that it is not open to the defendants in error to contend in this court that the question was not material, and that a different construction might be given to the state statute from that on which the state court acted.

*McPherson v. Blacker*, 146 U. S. 23, 36 L. ed. 873, 13 Sup. Ct. Rep. 3. See also *Furman v. Nichol*, 8 Wall. 57, 19 L. ed. 376.

**Mr. Hosea M. Knowlton** argued the cause, and, with *Mr. Franklin T. Hammond*, filed a brief for defendants in error.

[406] \***Mr. Justice Brown** delivered the opinion of the court:

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the

benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

\*The very first general rule laid down by [407] Chitty, Pl. p. 1, is that "the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." An action on contract (p. 2) "must be brought in the name of the party in whom the legal interest in such contract was vested;" and an action of tort (p. 68) "in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed." As stated by another writer: "No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him, and, on the other hand, a person is not properly made a defendant to a suit upon a cause of action in which he has no interest, and as to which no relief is sought against him." In familiar illustration of this rule, the plaintiff in an action of ejectment must recover upon the strength of his own title, and not upon the weakness of the defendant's, who may even show title in a third person to defeat the action.

Actions instituted in this court by writ of error to a state court are no exceptions to this rule. In order that the validity of a state statute may be "drawn in question" under the 2d clause of § 709, Rev. Stat., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute. This principle has been announced in so many cases in this court that it may not be considered an open question.

In *Owings v. Norwood*, 5 Cranch, 344, 3 L. ed. 120, an action of ejectment, defendant set up an outstanding title in one Scarth, a British subject, who held a mortgage upon the premises. The decision of the court being adverse to Owings, he sued out a writ of error from this court, contending that Scarth's title was protected by the treaty with Great Britain. It was held that, as the defendant claimed no right under the treaty himself, and that the right of Scarth, if he had any, was not affected by the decision of the case, the court had no jurisdiction. "If," the court said, "he [the defendant] claims nothing under a treaty, his title cannot be [408] protected by the treaty. If Scarth or his heirs had claimed it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this court."

In *Henderson v. Tennessee*, 10 How. 311, 13 L. ed. 434, a similar case, namely, an action of ejectment, an outstanding title in a third person, was set up by the defendant, and alleged to have been derived under a treaty. The court held that an outstanding title in a third person might be set up, and

that the title set up in this case was claimed under a treaty, "but," said the court, "to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. . . . The heirs of Miller," who claimed under the treaty, "appear to have no interest in this suit, nor can their rights be affected by the decision." Like rulings were made under a similar state of facts in *Montgomery v. Hernandez*, 12 Wheat. 129, 6 L. ed. 575; *Hale v. Gaines*, 22 How. 144, 16 L. ed. 264; *Verden v. Coleman*, 1 Black, 472, 17 L. ed. 161, and *Long v. Converse*, 91 U. S. 105, 23 L. ed. 233.

In *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623, the prior authorities are cited, and the law treated as well settled that "in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only." See also *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439.

It is true that under the 3d clause of § 709, where a title, right, privilege, or immunity is claimed under Federal law, such title, etc., must be "specially set up or claimed," and that no such provision is made as to cases within the 2d clause, involving the constitutionality of state statutes or authorities, but it is none the less true that the authority of such statute must "be drawn in question" by someone who has been affected by the decision of a state court in favor of its validity, and that in this particular the three clauses of the section are practically identical.

As we had occasion to observe in *California v. San Pablo & T. R. Co.* 149 U. S. 308, 314, 37 L. ed. 747, 749, 13 Sup. Ct. Rep. 876, "the duty of this court, as of every judicial tribunal, is limited to determining rights of [409] \*persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard." See also *Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067; *Cleveland v. Chamberlain*, 1 Black, 419, 17 L. ed. 93; *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639.

In the case under consideration the plaintiff in error is the owner of a lot adjoining the one which is sought to be registered, and the only question in dispute between them relates to the location of the boundary line. In his petition he does not set forth that he made himself a party to the proceedings be-

fore the court of registration, and his name does not even appear in the list of those who are required to be notified, or elsewhere in the proceedings before the court.

In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law. In his brief his first objection to the validity of the act is that the registration, which deprives all persons, except the registered owner of interest in the land, is obtained as against residents and known persons only by posting notices in a conspicuous place on the land and by registered letters, and as against nonresidents and unknown persons by publication in a newspaper; and that the rights of the parties may be foreclosed without actual notice to them in either case, and without actual knowledge of the proceedings. His second objection to the validity of the act is that the registration of dealings with the land after the original registration would, in certain cases, have the effect of depriving the registered owners of their property without due process of law.

His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them \*and liti- [410] gate the only question, namely, of boundaries, before the court of registration. In other words, he is not affected by the provisions of the act of which he complains, since he has the requisite notice. Other persons, whether residents or nonresidents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their property without notice; but it is difficult to see how the petitioner would be affected by it. Indeed, if the act were subsequently declared to be unconstitutional, the proceedings against him would simply go for naught. He would have lost nothing, since the action of the court would simply be void, and his interest in the land would remain unaffected by its action.

It is true that his competency to institute these proceedings does not seem to have been questioned by the supreme court of Massachusetts. It may well have been thought that to avoid the necessity and expense of appearing before an unconstitutional court and defending his rights there, he had sufficient interest to attack the law, which lay at the foundation of its proposed action; but to give him a status in this court he is bound under his petition to show, either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the 14th Amendment; and as no such showing has been made, we cannot assume to decide the general question whether the commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property. If that court shall eventually uphold his contention with respect to the boundary, he will have no ground for complaint. If he be unsuccessful, he may, under the registration act, appeal to the superior and ultimately to the supreme court, whence, if it be made



to appear that a right has been denied him under the 14th Amendment, he may have his writ of error from this court.

Our conclusion is that the plaintiff in error has not the requisite interest to draw in question the constitutionality of this act, and that *the writ of error must be dismissed.*

[411] \*Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan**, Mr. Justice **Brewer** and Mr. Justice **Shiras**, dissenting:

In order to give this court jurisdiction to review the judgment of a state court on the ground that the validity of a statute of, or an authority exercised under, any state, was drawn in question for repugnancy to the Constitution or laws of the United States, and that its validity was sustained, it is enough that a definite issue as to the validity of the statute is distinctly deducible from the record; that the state court entertained the suit; and that its judgment rested on the conclusion that the statute was valid.

The inquiry is whether the validity of the statute or authority has been drawn in question "in a suit" in the state court and a "final judgment" has been rendered in favor of its validity. If so, we have jurisdiction to review that judgment. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Luxton v. North River Bridge Co.* 147 U. S. 337, 37 L. ed. 194, 13 Sup. Ct. Rep. 356; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

*Weston v. Charleston* was an application to the state court for a writ of prohibition to restrain the levy of a tax under a city ordinance on the ground that it violated the Constitution, and went to judgment in the highest court of South Carolina sustaining the validity of the ordinance.

This court held that the writ of error was properly issued, and Mr. Chief Justice Marshall said:

"The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?"

After answering this question in the affirmative the Chief Justice thus proceeded:

[412] "We think also that it was a final judgment, in the sense in which that term is used in the 25th section of the judicial act. If it were applicable to those judgments and decrees only in \*which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended.

"Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect  
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rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. *The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause.*"

*Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* was a petition to condemn land, and it had been held by the supreme court of West Virginia that the right to condemn was to be determined before the amount of compensation to be made had been ascertained. The judgment of the inferior court sustained the proceedings to condemn and appointed commissioners, and the state supreme court entertained an appeal from that judgment, and affirmed it.

A writ of error from this court was brought, and a motion to dismiss it denied. Mr. Justice Field said:

"The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the supreme court of a state holds a judgment of an inferior court of the state to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction."

In *Luxton v. North River Bridge Co.*, which was a proceeding to condemn in a circuit court of the United States, we held that an order appointing commissioners to assess damages was not a final judgment. The case of the *Wheeling & Belmont Bridge Company* was cited and distinguished by Mr. Justice Gray, who said:

"Jurisdiction of a writ of error to the supreme court of appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order had been held \*by the highest court of [413] the state to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could, therefore, hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the state upon a Federal question. 138 U. S. 287, 290, 34 L. ed. 967, 968, 11 Sup. Ct. Rep. 301. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners."

It is true that it appeared in these cases that the interests of plaintiffs in error were directly affected, and it is held that such is not the case here. But that ruling in effect

involves inquiry into the merits on a question of procedure, and it seems to me inadmissible for this court to deny, in a case like this, the competency of a party to invoke the jurisdiction of the state court, when that court has exercised it at his instance.

The supreme judicial court of Massachusetts held that prohibition was the appropriate remedy to avert the injury with which petitioner alleged he was threatened, and that petitioner was entitled to make the application for the writ; and thereupon passed upon the question of the validity of the statute, and rendered a final judgment sustaining its validity. The unconstitutionality of the act was the sole ground on which the application for prohibition rested, and the determination of that Federal question determined the cause.

We have then "a suit" and a "final judgment" sustaining the validity of a state statute drawn in question for repugnancy to the Constitution.

Every element requisite to the maintenance of our jurisdiction exists, and I submit that we cannot decline to exercise it because of any supposed error on the part of the state court in respect of entertaining the suit.

[§24.] \*To repeat: The state court ruled that the petition was sufficient to raise the Federal question; that petitioner was competent to raise it; and that he was entitled to preventive relief if his contention was well founded. And these rulings should be accepted on the preliminary inquiry into our jurisdiction.

The objections of plaintiff in error to the proceedings of the land court were not for want of jurisdiction over him personally, but for want of jurisdiction over the subject-matter. In other words, that there was a total want of power on the part of the persons assuming to act as a court to proceed at all. Whether that was so or not is the question which the state court decided, and discussion of that question is discussion on the merits.

Plaintiff in error alleged that the integrity of his boundary line was threatened by these proceedings. The fact that he had actual knowledge of them did not validate them if the act was void. And the answer to the question whether, if he were deprived of some part of his real estate, or of the cost of litigation, such deprivation would be deprivation without due process of law, determines the constitutionality of the statute, by which that result was effected.

In my opinion the writ of error was providently issued, and I am authorized to state that Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Shiras concur in that conclusion.

\*HUNTING ELEVATOR COMPANY, *Pc*-[415]  
petitioner,  
v.

C. H. BOSWORTH, Receiver of the Chicago, Peoria, & St. Louis Railway Company, *et al.*

(See S. C. Reporter's ed. 415-441.)

*Carriers—loss by fire—cars in yard of terminal association.*

A railroad company is liable, at least as a warehouseman, for goods transported by it and remaining in cars still subject to its orders in the yard of a terminal association under a contract with the terminal association for "terminal facilities" for "the handling of its trains . . . and the handling and care of its freight," without any provision that the terminal association will store cars, but only to furnish "storage room" for the cars necessary to the carrier's business, with a provision also that the railroad company shall repair its own cars damaged in making and breaking up trains, except those damaged outside of the yards set apart for its use, and that these shall be repaired by the party causing the damage, while the cars in the yards are not subject to be moved by the terminal association, by the orders of the consignee, or any other person until instructions to do so are given by the railroad company, and it, in its dealings with other carriers, assumes to have the possession and control of such cars.

[No. 12.]

*Argued October 24, 25, 1899. Decided December 17, 1900.*

**O**N WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision reversing decrees of a Circuit Court in an action against a railroad company for loss of property by fire. *Reversed.*

See same case below, 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. Rep. 72.

Statement by Mr. Justice **White**:

This case involves deciding whether the defendants in error are liable for the damage occasioned to certain property, resulting from a fire which occurred on October 28, 1894, in a railroad yard at East St. Louis, Illinois.

The Chicago, Peoria, & St. Louis Railway Company, at the date of the fire in question, was being operated by a receiver appointed on September 22, 1893, in foreclosure proceedings instituted in the circuit court of the United States for the southern district of Illinois.

NOTE.—On the question when the liability of a railway carrier of goods ceases to be that of a carrier—see *East Tennessee, V. & G. R. Co. v. Kelly* (Tenn.) 17 L. R. A. 691, and note.



On the assumption that the receiver was responsible for the damage occasioned by the fire above referred to, various persons and corporations who had suffered loss filed their interventions, asserting a liability on the part of the receiver for such damage. The interveners were nine in number, and all but

[416]\*two sought recovery for the loss occasioned by the damage or destruction of barley. The claims other than for barley were asserted by the Chicago, Milwaukee, & St. Paul Railway Company, and the Carr, Ryder, & Engler Company; the former corporation asking to be allowed for the value of its cars, in which were contained the destroyed or damaged barley, while the latter corporation demanded the value of certain doors, sashes, etc., consigned to Birmingham, Alabama. A list of all the interveners is given in the margin.†

The interventions which related to barley shipments alleged delivery of the cars of barley to an initial carrier, consigned to a named commission merchant in St. Louis, *via* East St. Louis; the delivery of the barley so shipped to the receiver of the Peoria Company to be "transported to its destination;" the carriage by that company as far as East St. Louis, and the damage by fire of the barley in the cars "while the same were still in transit and on the way to destination, and in the possession and under the control" of the receiver of the Peoria Company. In the answers filed by the receiver there was no denial of the allegations contained in the intervening petitions as to the shipment of the barley in question and the destination thereof. The answers, in effect, merely averred that after the receipt of the cars and contents by the receiver, they were delivered by him, in the due course of business, to the Terminal Railroad Association of St. Louis, and were damaged or destroyed while in the possession of that association and by its negligence.

It was alleged that the delivery to the Terminal Association had been made by virtue of a contract between the receiver and the Terminal Association, of date June 1, 1891, which contract was annexed as a part of the answer; and that by the custom in course of business existing between the receiver and the Terminal Association for four years prior to the deliveries in question, it resulted that the Terminal Association and not the \*receiver was bound for the damage which the fire had brought about. The receiver, moreover, filed a cross petition praying that the Terminal Association be

made a party defendant to the intervention proceedings, so that its liability to the interveners might be decreed. Upon this application the court issued a rule upon the association to show cause why it should not be made a party defendant as prayed. To this action, the Terminal Association appeared, solely for the purpose of objecting to the jurisdiction, and moved to discharge the rule for various reasons, all of which addressed themselves to the want of power to compel the appearance of the Terminal Association as a defendant to the interventions. The cross-petition, rule, and the motion just referred to were not thereafter pressed upon the attention of the court, and the Terminal Association never appeared as a party to the intervention proceedings.

When the issues on the interventions were thus made up, the court referred the claims of all the interveners to a master to take testimony and report. Under this reference the testimony as to all the interventions was taken together. During the course of the taking of the testimony before the master, it having developed that the propinquity of a warehouse filled with hay was the proximate cause of the fire, the interveners added to their petitions the following allegations, as "a further, separate, and distinct ground of recovery therein," *viz.*:

"That upon the arrival of the cars mentioned and described in said petition at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents, to be placed upon certain tracks in close proximity to a large wooden warehouse filled with baled and loose hay, and through which said warehouse locomotive engines were frequently passing and repassing during all hours, night and day; that said wooden warehouse was open at the sides and ends, and had railroad tracks passing through it, over which locomotive engines frequently passed, and said hay was generally exposed to fire escaping from said locomotives; that said warehouse and hay were easily ignitable, and on account of the inflammable condition of said hay, the large quantity thereof, and the dimensions of \*said wooden warehouse,[418] the same, if set on fire, would burn with great rapidity and produce a great conflagration, all of which the receiver well knew, yet notwithstanding all this he negligently and carelessly caused and permitted said cars and their contents to be placed upon said side track, near said warehouse, and to remain thereon for several days, when said hay and warehouse were in some manner set fire to, and the same burned so rapidly, and produced such a large conflagration, that said cars and their contents were damaged and destroyed, as stated in said several petitions,

†Names of the interveners: The Carr, Ryder, & Engler Company; The Chicago, Milwaukee, & St. Paul Railway Company; The S. H. Hyde Elevator Company; The W. W. Cargill Company; Jacob Rau; Gilchrist & Company, a partnership; The Hunting Elevator Company; McMichael & Son, a partnership; and Henry Rippe.

and the petitioners damaged in the manner and to the extent and amount, as therein stated."

Prior to the filing of the amended petitions of the interveners as above stated, the testimony before the master had shown that there was keen competition for the carriage of barley and other commodities from points in Iowa, Wisconsin, and Minnesota, between roads entering St. Louis from the west side of the river and those which carried freight from the territory named into St. Louis *via* bridge or ferry connections from East St. Louis. Indeed, it was shown that in order to get a proportion of the business the roads on the East St. Louis side of the river were obliged to furnish dealers with facilities equal to those which could be obtained from roads entering St. Louis on the west side. For this purpose a joint through rate to St. Louis for barley was made, and on the arrival of the barley at East St. Louis, unless the consignees had previously directed to the contrary, instead of being immediately transferred across the Mississippi river for delivery to the consignees in St. Louis, it was held in the cars at East St. Louis to enable the consignees to dispose of the same in carload lots; and when so disposed of the cars were either delivered in St. Louis or transferred for shipment elsewhere, as might be ordered by the consignees. To such an extent did this custom prevail that it was testified that East St. Louis had become the market place for barley consigned from the territory named to St. Louis.

On the hearing before the master, after the testimony on the subject just stated had been introduced, an offer of proof and stipulation respecting same was made, to which we shall now call attention. In presenting {419} a motion for a continuance of the \*hearing, on the ground that he had been unable to procure the attendance of Mr. Teichman and other commission merchants of St. Louis, counsel for the receiver said:

"We expect to prove by these witnesses that the St. Louis Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee, & St. Paul road, on which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis, to whom the particular consignments of barley are made, which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis free of car service, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all of the shippers; by that term, I mean the consignees and shippers except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm. And that

the solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi river, so as to give them the benefit of the transfer across the river from East St. Louis to St. Louis in competition with lines west of the Mississippi river."

In the record is next set out the following statements of counsel for the interveners:

Counsel for interveners: ". . . Now in reference to the testimony of people at St. Louis, in respect to the arrangement made by the Terminal Railroad Association, by which it would hold these cars of barley and so forth, rather than to postpone this hearing at this time I will consent that the witnesses, if here, would testify as Mr. Wilson has stated. So I do not think a continuance should be granted on that application. . . ."

"To expedite matters, it is stipulated that the witnesses Otto Teichman, Henry Grieve of the John Wall Commission Company, \*L. {420} Leinke, and Charles Orthwein, at St. Louis, if present, would testify substantially as has been stated by Mr. Wilson."

Leave having been granted the receiver to answer the amended petitions, he met the new averments respecting the warehouse contained in the amended petitions, by denying that, while in the possession of the receiver, the latter negligently caused or permitted the property in question to be placed in proximity to the warehouse referred to in the amended petitions, and further averred that after the delivery of the cars to the Terminal Association the receiver no longer controlled and directed the placing of the cars in the yards of the Terminal Association. It was also denied that the receiver had any knowledge of the dangerous character of the warehouse.

So, also, in the amended answer, doubtless to be able to avail himself of what was deemed to be a defense arising from the testimony as to the custom of detaining shipments of barley, the offer of proof and the stipulation above referred to, the receiver set up a new defense, stated in his answers as follows:

"This receiver, further answering, avers that all of the said intervening petitioners had knowledge, through their consignees, of the condition of affairs that existed in the yards of the said railroad association prior to and at the time said cars and contents were damaged and destroyed.

"This receiver, further answering, avers that the cars and contents mentioned in the said intervening petitions after being placed remained in close proximity to said wooden warehouse until the same were damaged and destroyed, with the full knowledge, approval, and consent of the said intervening petitioners, through their agents, their respective consignees; and in fact thus remained for the convenience of said consignees, and at their risk."

In the meanwhile, as by the proof which had been already introduced before the master, it was shown that the relations be-



tween the Terminal Association and the receiver, at the time of the fire, were not controlled by the contract of 1891, which the receiver had annexed to his answer, but were governed by a contract made on August 1, 1892, which had been produced on the hearing before the master, the receiver, in his [421] amended answer, admitted in effect the error of the averment of his original answer, and conceded that the controversy, in so far as controlled by the contract, depended upon the one made in 1892.

After the conclusion of the testimony the master, in a careful opinion reviewing the law and the facts, reported substantially in favor of the claims of all the interveners. The testimony which had been taken as to all the interventions was embodied in but one report, that upon the intervention of Jacob Rau, and was referred to in the reports filed upon the other claims.

After hearing on exceptions filed by the receiver to the reports of the master, the court overruled the exceptions, affirmed the reports, and decreed the liability of the receiver to the interveners. An appeal was taken to the circuit court of appeals for the seventh circuit, not only by the receiver, but, by leave of the court, the Chicago, Peoria, & St. Louis Railroad Company—which had become the owners of the Peoria Railway, as assignees of the purchaser at a foreclosure sale—also perfected an appeal. In the circuit court of appeals the decrees of the circuit court as to all but one of the interveners were reversed. The appellate court, however, was divided in opinion as to the reasons for its action in the cases which were reversed, such division of opinion being upon the deductions to be drawn from the evidence, one judge concluding that the circuit court erred upon the grounds stated in his opinion, while another member of the court, who concurred in the conclusion that the court below had erred, assigned different reasons. A third member of the court dissented because he thought the court below had deduced proper inferences from the proof in the cause. 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. Rep. 72. Thereupon a writ of certiorari was granted by this court.

Mr. **Burton Hanson** argued the cause, and, with Messrs. **George R. Peck** and **George P. Cary**, filed a brief for petitioner:

The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, or sending any waybill or shipping directions, does not establish the relation of common carrier between the initial and the connecting carrier.

*Texas & P. R. Co. v. Clayton*, 28 C. C. A. 142, 51 U. S. App. 676, 84 Fed. Rep. 305, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421; *Mount Vernon Co. v. Alabama G. S. R. Co.* 92 Ala. 296, 8 So. 687; *Kentucky Marine & F. Ins. Co. v. Western & A. R. Co.* 8 Baxt. 268; *Palmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137, 13 Atl. 818; *Ray, Freight Carriers*, 388.

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Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them.

*Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; *Texas & P. R. Co. v. Reich* (Tex. Civ. App.) 32 S. W. 818.

The receiver held the cars and their contents at the time of the fire as a carrier.

*Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Condon v. Marquette, H. & O. R. Co.* 55 Mich. 218, 21 N. W. 321; *Illinois C. R. Co. v. Mitchell*, 68 Ill. 471, 18 Am. Rep. 564; *Bennitt v. Missouri P. R. Co.* 46 Mo. App. 657; *Irish v. Milwaukee & St. P. R. Co.* 19 Minn. 379, Gil. 323, 18 Am. Rep. 340; *Mills v. Michigan C. R. Co.* 45 N. Y. 624, 6 Am. Rep. 152; *Wehmann v. Minneapolis, St. P. & S. S. M. R. Co.* 58 Minn. 22, 59 N. W. 546; *Conkey v. Milwaukee & St. P. R. Co.* 31 Wis. 624, 11 Am. Rep. 630.

If the receiver did not hold the cars and their contents as a carrier, then he held them as warehouseman, and is liable as such.

*Thomas v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 802, 63 Fed. Rep. 200, Affirmed in 19 C. C. A. 90, 24 U. S. App. 404, 71 Fed. Rep. 481; *St. Louis & S. F. R. Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227; *Tanner v. New York C. & H. R. R. Co.* 108 N. Y. 623, 15 N. E. 379; *Gregg v. Illinois C. R. Co.* 147 Ill. 555, 35 N. E. 343.

Mr. **Bluford Wilson** argued the cause, and, with Mr. **Philip Barton Warren**, filed a brief for respondents:

A common carrier is under no obligation to notify a consignee of the arrival of a shipment.

*Merchants' Despatch Transp. Co. v. Hallock*, 64 Ill. 284; *Gashweiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 122, 53 Am. Rep. 558; *Holtzclaw v. Duff*, 27 Mo. 395; *Cramer v. American Merchants Union Exp. Co.* 56 Mo. 528; *Rankin v. Pacific R. Co.* 55 Mo. 163; *Illinois C. R. Co. v. Carter*, 165 Ill. 570, 36 L. R. A. 527, 46 N. E. 374.

Goods held subject to orders are held as warehousemen.

*St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335; *Chicago & A. R. Co. v. Scott*, 42 Ill. 139; *Cairns v. Robins*, 8 Mees. & W. 258; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448; *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515; *O'Neill v. New York C. & H. R. R. Co.* 60 N. Y. 138; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Nichols v. Smith*, 115 Mass. 332; *Hutchinson, Carr. § 82; Angell, Carr. § 134* and note; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132.

Where the consignees are accustomed to use the warehouse of the carrier the transit ends when the goods arrive.

*Foster v. Frampton*, 6 Barn. & C. 107; *Scott v. Pettit*, 3 Bos. & P. 469; *Rowe v. Pickford*, 8 Taunt. 83; *Allan v. Gripper*, 2 Crompt. & J. 218.

Being sued as a carrier, recovery cannot be had as a warehouseman.

*St. Louis, I. M. & S. R. Co. v. Knight*, 122

U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297.

Issuing of waybill was not necessary to constitute delivery.

*Illinois C. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301.

[422] \*Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

A solution of the issues which arise on this record involves only an analysis of the facts for the purpose of ascertaining the true inferences to be drawn therefrom. In the statement of the case which we have just made we have given an outline of the origin of the controversy, and have referred to the facts only so far as essential to elucidate the pleadings. We propose now to review the facts upon which the controversy turns. The testimony to which we shall refer in doing so is contained in the record of the case of Jacob Rau, number 13 of this term, as in taking the appeals, following the course adopted by the master in making his report, the testimony as to all the interventions was brought up in that case only, and as found in that record has been treated in the argument as applicable to all the interventions.

The Terminal Railroad Association of St. Louis, which will be hereafter, for brevity, styled the Terminal Association, possessed in the city of East St. Louis extensive tracks, yards, and facilities for the purpose of successfully carrying on the railroad traffic which came to that point. It was connected with and operated lines of railroad running across two bridges, leading to St. Louis, Missouri, and had many transfer tracks in its railroad yards, which were connected, not only with its St. Louis tracks, but with the lines of various railroads which reached East St. Louis from different points. The Terminal Association, therefore, controlled the transfer of railroad business arriving at East St. Louis for St. Louis, and from St. Louis to East St. Louis, thence to other points, except to the extent that both of these classes of business were competed for by the Wiggins Ferry Company, a corporation owning and operating a transfer ferry between East St. Louis and St. Louis, which latter company also possessed terminal facilities in East St. Louis.

The Chicago, Peoria, & St. Louis Railway, [423] which we shall hereafter for brevity refer to as the Peoria Company, even when considering the acts of the receiver of that company, operated a line of railroad between Peoria, Illinois, and East St. Louis, in the same state. It commenced business at East St. Louis about January, 1891. The terminus of its main tracks to the latter place was at a point termed Bridge Junction, at a street known as Stockyards Avenue, which was either beyond the city limits, or, if within the city limits, was on the outskirts thereof. At the point where the track of the Peoria Company thus terminated, that road possessed no terminal facilities of any kind

for the handling of its freight business. It had no warehouses, no side tracks, no switch engines, and no conveniences for the switching or handling of its freight trains. The road therefore was in a position where it was practically impossible for it to handle freight destined for East St. Louis or for carriage beyond that point, and in order to enable it to discharge its duty as a common carrier as to any such business it was absolutely necessary for it to make some arrangement for that purpose. It is true that the Peoria Company had a small freight house on the river front, with one or more side tracks adjacent thereto, which were utilized for the loading and unloading of local freight. But neither this freight house nor the tracks in question were directly connected with the main tracks of the road. To make such connection it was essential, therefore, for the Peoria Company to use the tracks of some other railroad.

The Peoria Company thus being substantially without any terminal facilities whatever for freight business at East St. Louis, that company as early as June 1, 1891, entered into an agreement with the Terminal Association to supply such deficiency. In August, 1892, the agreement made in 1891 was modified, and governed the relations of the parties when the fire took place. A copy of this agreement is in the margin.†

†Memorandum of an agreement, made this first day of August, A. D. 1892, by and between the Terminal Railroad Association of St. Louis, party of the first part, and the Chicago, Peoria, & St. Louis Railway Company, party of the second part, witnesseth:

That whereas, the party of the first part undertakes to give the party of the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions:

First. It is agreed that the party of the first part shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch engines and yardmen to do the switching of the party of the second part, in the making up and breaking up of all freight trains that depart from and arrive at East St. Louis, and to furnish storage room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time: and the charge for the facilities and the work above named shall be at the rate of fifty cents (50) per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free.

Second. Cars made "bad order" by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors.

All cars made "bad order" outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

Third. For all loads to and from the National stock yards the party of the second part is to



[424] \*Under this agreement, the incoming freight trains arriving at the terminus of the main track of the Peoria road as above stated were handled substantially as follows:

[425] The Peoria train was stopped on a Y track. There the Peoria \*engine was detached and was placed on a stub track reserved for the purpose. A switch engine of the Terminal Association then took hold, broke up the train, and distributed the cars on the tracks set apart for the Peoria Company under the agreement.

The evidence shows that the place assigned for the use of the Peoria Company by the Terminal Association, in compliance with the contract, was a particular portion of the yard of the latter corporation, viz., eleven tracks, numbered from 40 to 50, and that these tracks were commonly used for such purpose. This latter fact was expressly admitted by the receiver in a stipulation made during the taking of testimony before the master on the interventions, in subdivision numbered 2 of which it was agreed that the cars and other property were damaged by the fire in question "while on the tracks of the Terminal Railroad Association of St. Louis, in its yard at East St. Louis, commonly used by the receiver herein under the agreement between said association and the Chicago, Peoria, & St. Louis Railroad Company, dated August 1, 1892." Though the stipulation referred to was amended in January, 1896, on motion of the receiver, by the elimination of certain admissions contained therein, which it was asserted had been discovered to be incorrect, no attempt was made to seek a correction of the stipulation so far as respected the use of the deposit tracks.

[426] Besides the freight trains coming into East St. Louis from the main track of the Peoria road, as above stated, there were brought to the aforesaid deposit tracks the empty as well as \*the loaded cars of the Peoria road, coming from the freight house above referred to, and also the loaded or empty cars destined for the Peoria Company from other points and coming into East St. Louis over any other road connecting with the Terminal Association. On the tracks to which all these cars were taken

substantially, therefore, all the freight business of the Peoria Company, whether it arose from dealings with the Terminal Association or with any other railroad corporation, was carried on, and there all the outgoing freight trains of the Peoria Company, whether inbound or outbound, whether destined to be carried to some ultimate point by the Terminal Association, or intended for delivery by that association if carried over other roads, remained upon the tracks set apart in the yard of the Peoria Company until all such purposes could be accomplished. In other words, under the agreement, all the ingoing and outgoing terminal freight business of the Peoria Company was in effect ultimately handled by the Terminal Association, and the yard in question, as far as set apart, was necessarily a yard for the transaction of every variety of the freight business of the Peoria Company.

The tracks thus set apart under the agreement—that is, tracks numbered from 40 to 50—were capable of holding two hundred cars, whilst under the contract the Peoria road was entitled to storage room for but one hundred and fifty cars. The evidence disclosed that the Terminal Association, whenever it found it convenient to do so, utilized the surplus space for the deposit of cars not belonging to the Peoria Company. The receiver of the Peoria road and his employees (such as the local agent at East St. Louis and his assistants, car inspectors, car repairers, etc.) had access to the deposit tracks. A car used as a work shop by the car repairers of the Peoria Company was placed near to said tracks. The consignee had also ready access to the cars placed on such tracks. Over a portion of the deposit tracks—that is, numbers 42 and 43—passed a structure known as the transfer warehouse, a building some 600 feet in length. On the night of the fire and some time prior thereto, this transfer warehouse was being used by a St. Louis corporation, under leave of \*the Terminal Association, for the storage of [427] loose and baled hay.

Such being the relations between the Peoria Company and the Terminal Association, we are brought to consider the par-

pay the party of the first part one (1) dollar per car in and out, inclusive of the charge for making up and breaking up of trains, but not the trackage charge at National stock yards.

Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on billing to it as to who should pay. In the absence of any instructions, the switching charges will follow the car.

Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned, as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the serv-

ice rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part.

This contract to be in force from and after the 1st day of August, 1892; and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties.

In witness whereof, the parties hereto have caused the same to be executed in duplicate this — day of —, A. D. 1892.

Terminal Railroad Association of St. Louis,  
By J. O. Van Winkler,  
General Superintendent.

Attest: ———, Secretary.

Chicago, Peoria, & St. Louis  
Railway Company,

By W. S. Hook,

President.

Attest: Marcus Hook, Secretary.





the work of handling cars were traveling backwards and forwards on the tracks in the vicinity of the warehouse. The dangerous character of the building, as used at the time of the fire, is well stated in the answer of the receiver, as "a veritable fire trap." No reasonable inference can be deduced from the proof other than that the fire was caused by the igniting of the hay from the sparks of a passing locomotive. That the perilous condition of the warehouse was known to the Terminal Association is beyond controversy, since it was shown that the warehouse was leased by that company to the corporation which had stored the hay therein, for the purpose of doing so. That knowledge of the hazardous use made of the building was also known to the Peoria Company is likewise true, as it is shown that the agent of the Peoria Company observed the situation <sup>[430]</sup> some time before the fire, and that such official called the attention of representatives of the Terminal Association to the insecurity arising therefrom.

The conflagration destroyed eighty-three cars and their contents. Of these, thirteen were admittedly chargeable to the Terminal Association, either because they had been so dealt with by the Terminal Association as to clearly make it responsible for them, or were cars of the Peoria Company, for which that company had delivered way bills to the Terminal Association for the further movement of such cars, whereby they admittedly passed into the control of the Terminal Company.

Of the remaining seventy cars belonging to the Peoria Company one was filled with outbound freight destined over that road; the others were cars which had come in over the track of the Peoria Company at various times, and had been placed in the yard under the circumstances already mentioned.

With the foregoing facts in mind, we pause in order to state the conflicting deductions which the parties claim should be drawn from them. We do this, because if what is asserted by each side be accurately defined, it will enable us in our further examination of the facts to restrict our inquiry alone to those matters which are necessarily pertinent.

The contentions of the Peoria Company, in every possible aspect, are embraced in three propositions, *viz.*:

1. That the barley in question was consigned to St. Louis, and therefore the obligation of that company was to carry to the terminus of its line and there deliver to the Terminal Association for the completion of the transit; and that having, prior to the fire, delivered to the Terminal Association at the end of the line of the Peoria road, the responsibility of the latter company to the owners of the merchandise had ceased.

2. That even if the shipment was to East St. Louis only, as the Peoria Company, when the merchandise arrived at the terminus of its road at that point, had delivered the cars to the Terminal Association, that association thereafter held them, not for the account of the Peoria Company, but for the owners, **179 U. S.**

and that this delivery by which the Terminal Association came into possession of the cars for account of the owners, was <sup>[431]</sup> sanctioned by the custom of trade as to barley shipments, and was moreover shown to have been expressly authorized by the offer of proof and the stipulation in connection therewith, which, as we have shown in the statement of the case, took place on the hearing before the master prior to the time when the amended answer of the Peoria Company to the amended petitions in intervention had been filed.

3. That as by the custom of trade as to barley, it was shown that such merchandise on the completion of the carriage to East St. Louis was there to be held for an uncertain period to wait the convenience of the owners until direction had been by them given for further shipment, it followed that after the arrival of freight at East St. Louis it was there retained by whomsoever it was held, not as a carrier, but for the benefit of the owners and to aid them in the transaction of their business, as their bailee; and that the Peoria Company was hence not responsible as a carrier under any view, and under the proof was not liable as a warehouseman. In effect, all the contentions of the intervener rest upon a denial of these propositions.

When the two first propositions above stated are duly weighed, it is seen that, although in some respects they contain different elements, in effect they both must rest upon an identical predicate of fact; that is, that the merchandise in question had arrived at East St. Louis and been there delivered to the Terminal Association. This becomes obvious when it is seen that the first proposition asserts a nonliability of the Peoria Company, because as a connecting carrier it had delivered the merchandise to the Terminal Association for further transportation, and that the second proposition rests upon the assertion that on the arrival of the merchandise at East St. Louis it had been delivered to the Terminal Association, which was, under the custom of trade and the offer of proof and stipulation above referred to, the agent or bailee of the owners. The different character in which it is charged that the merchandise was delivered to the Terminal Association, as stated in the two propositions, does not obscure the fact that both propositions essentially depend upon an assumption of fact common to both, that is, the delivery <sup>[432]</sup> of the merchandise to the Terminal Association on its arrival at East St. Louis.

In order to dispose of the two first propositions we come, then, to consider whether the cars containing the barley, on their arrival at East St. Louis, were delivered, in the legal import of that word, by the Peoria Company to the Terminal Association; and it is perhaps unnecessary to observe that the consideration of this premise of fact will serve completely to dispose of every argument based upon the custom of trade by which cars were held at East St. Louis, and the assumed agreement of the



Terminal Association with barley dealers as embraced in the offer and stipulation made in relation therewith. In its best aspect, the custom of trade was simply that the barley be held at East St. Louis by the company in possession of the same until the consignee gave an order for the completion of the transit. And in any view, the offer of proof and stipulation manifested but an agreement that as to consignments of barley which were solicited, the Terminal Association would conform to the course of dealing, and would, when the barley came under its control and possession, not exact a charge for car service. But neither the course of business nor the assumed agreement of the Terminal Association could possibly subject that association to a liability for merchandise before it came into its possession at a time when it was held for consignees and subject to their order, by another and different corporation.

This leads us to determine what was the attitude of the respective parties, under the contract, to the freight trains of the Peoria Company which were taken by the switch engines of the Terminal Association and placed on the deposit tracks, set apart for the former company. The legal relation must depend upon the contract, as it is obvious that the Terminal Association was under no obligation, as a common carrier, to accept in train loads freight arriving over the Peoria road, with cars consigned to different points and over different connections, and to subject itself, as a common carrier, to the hazard of sorting out the cars contained in such trains, and this also without delivery to it of way bills showing the further destination of such cars. It is also equally obvious that [433] under its duty as a common \*carrier the Terminal Association was under no obligation to allow the use of its yard for all the purposes of the Peoria Company, the handling of its incoming as well as its outgoing freight trains, whether of loaded or empty cars, and the furnishing of all the appliances necessary to do so; and especially to allow a given number of freight cars of the Peoria Company to occupy a designated portion of the yard of the Terminal Association for such time and under such circumstances as the Peoria Company might elect.

Before coming to consider the text of the contract, the circumstances surrounding the parties at the time it was made and the exigencies which caused it to be entered into are rightfully to be borne in mind as means of interpretation if ambiguity exists. We hence recall the facts to which we have previously referred. When the contract was executed, although the Terminal Association possessed extensive terminal facilities at East St. Louis, the Peoria Company had no means whatever for handling the freight business coming in or going out of East St. Louis over its main line. It had neither yards nor switches nor switch engines at East St. Louis, nor any of the appliances or instrumentalities essential to enable it, if it re-

ceived freight inward or outward bound, to discharge its duty as a common carrier. The purpose of the contract then was to bestow upon the Peoria road the facilities it absolutely required. As the tracks in the yard which the Peoria Company acquired, to carry on its business, were therefore the only terminal facilities which that company had, where its incoming and outgoing freight cars were received, and where all its freight trains were made up, to hold that the yard so far as set aside was not that of the Peoria Company, would be but to say that the Terminal Association and the Peoria Company had been merged into one corporation for the purposes of all the terminal business of the Peoria Company, or that the Terminal Association had become a guarantor to the shippers of freight over the Peoria road for all losses occasioned by the Peoria Company for which it was liable as a common carrier.

We come to a specific examination of the text of the contract.

The preamble which announces the intention of the parties \*in entering into the con-[434] tract clearly rebuts the construction that the terminal facilities which it was agreed should be afforded to the Peoria Company were to be enjoyed by that company without any responsibility whatever resting on it; in other words, that it was to have the facilities which were essential to discharge its duty as a carrier, but that the Terminal Association was to bear all the risk of such enjoyment. This results since the preamble recites that the Terminal Association undertakes "to give the party of the second part" (the Peoria Company) "terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions." Mark, the purpose is to give the Peoria Company "facilities," not to cause the Terminal Association to become responsible for the Peoria Company, whilst the latter was making use of the facilities given to it. The contract also expresses the purpose thus declared in the preamble—that is, that the facilities are to be furnished to the Peoria Company. The agreement is not that the Terminal Association will store cars for the Peoria Company, but that there is to be given to that company "storage room for a reasonable number of cars necessary to properly take care of and handle the business" (not of the Terminal Association, but) of the Peoria Company. The provision in the second paragraph is that "cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part" (the Peoria Company), "to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors." This makes the meaning yet clearer, since it results that during the making and breaking up of trains all the risk continued to be on the Peoria Company. And this is cogently enforced by the stipulation which immediately follows, that "all cars made 'bad order' outside of the yards set aside for the use of the party of the second part shall be re-



paired by the party causing the damage."

[435] That is to say, the contract whilst casting the risk on the Peoria Company during the making and breaking up of its trains, and whilst its cars remained in the yard set apart for the Peoria Company, applied a different rule outside of the yard, when by \*an order given to the Terminal Association to move the cars for further transit or delivery they actually came under its control. It is to be considered also that the compensation provided in favor of the Terminal Association by the contract is wholly incompatible with the construction that all the cars in the yard set apart for the Peoria Company were from the mere fact of their deposit there to be at the risk of the Terminal Association. Indeed, the fourth article expressly contemplated that the movement by the Terminal Association of the cars from the yard set apart for the Peoria Company should depend on the orders issued by the Peoria Company in the form of way bills, since it provides: "The party of the first part" (the Terminal Association) "to be governed in making its collections" (for cars moved) "by instruction shown on billing to it as to who should pay."

From this analysis of the contract, it results that the obligations which it imposed were entirely in accord with the conception naturally suggested by the general considerations to which we adverted before approaching the text. For it will be observed that the several provisions of the contract clearly subject the Peoria Company to all the risk resulting from those acts which that company was obliged to perform as a common carrier before it could effect delivery to a connecting carrier, and, on the other hand, imposed upon the Terminal Association the risk arising after the performance of such acts. That is, as by the contract the Peoria Company was furnished the facilities for the execution of its obligations as a common carrier, it was submitted to the risk incident to the performance by it of its own duties, and the Terminal Association was subjected to the risk which would likely devolve upon it by a delivery by the Peoria Company after the latter had performed its own duty as a common carrier.

The dealings and conduct of the parties in executing the contract dispel all question as to the proper interpretation to be given it. The proof beyond any doubt establishes that the way bills which we have described, and a sample of one of which we have reproduced, accompanied the freight cars from the initial point to the terminus of the Peoria main [436] tracks. When \*the Peoria train was taken charge of by the switch engine of the Terminal Association in order that it might be broken up and the cars composing the train be placed in the portion of the yard set apart for the Peoria, these way bills were retained by the latter company. While the Terminal Association kept a full record of the cars received on its Y tracks from the Peoria Company, and of the particular track on which each car was ultimately placed, presumably in order that it might readily locate a car when it received orders for further

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movement, as the way bills were retained by the Peoria the Terminal Company knew officially nothing of the final destination of the cars and as to where they were to be forwarded. It therefore was in a position where it could not move them until it received forwarding instructions or new way bills from the Peoria Company. The proof is that only on receipt of such new instructions or way bills would the Terminal Association card and switch out the cars from the deposit tracks of the Peoria Company, and ultimately deliver them to connections or destinations as ordered by the Peoria. It is established by the evidence, substantially without conflict, that the cars as placed on the tracks in the yard set apart, as above stated, continued to remain there, and were not subject to be moved by the Terminal Association by the orders of the consignee, or any other person, until instructions to do so were given by the Peoria Company. This fact was testified to by the receiver himself and his employees. Thus receiver Bosworth said that when a train of the Peoria Company was broken up by the Terminal Association, and the cars put upon the tracks commonly used for the business of the Peoria Company, the cars were not moved by the Terminal Association until instructions to do so were given by the receiver, and that they were subject to the order of the receiver to that extent, and the Terminal Association would not have recognized any instruction that the consignee would have made directly to it. The local agent at East St. Louis of the Peoria road also testified, respecting shipments of barley consigned to commission merchants whose address would be stated merely as "St. Louis," that "*there are a great many of the cars we have orders for before they arrive, giving us designated* [437] *\*points for delivery.*" Such cars, however, would be placed on the deposit tracks referred to, until the agent of the Terminal Association had received from the agent of the Peoria road a new way bill or manifest for the freight, indicating the precise destination; while cars of barley consigned as stated, for delivery in St. Louis, for which no orders for further movement were given by the consignees prior to the arrival of the cars, would be allowed to remain on the deposit tracks awaiting instructions to the Peoria Company from the consignee, such freight being, "as a rule, held for the accommodation of the consignee." In substance, this witness further said:

In the case of barley shipments, the time of detention on the deposit tracks would vary from two hours to the same number of months, depending upon whether instructions from the consignees had been received prior to the arrival of the cars, or upon the time, following the deposit of the cars, when the consignee would answer the notice sent to him and direct as to delivery.

Stapleton, the chief clerk of the local agent at East St. Louis of the Peoria road, testified on the subject as follows:

"The cars would come in and be placed on the tracks in the Terminal Association yard



wherever they saw fit; we would take the way bill and notify the consignee that we had a ear numbered so and so loaded with barley; 'Where do you want it?' That is about the substance of the notice; and at such time as he got ready he would send this notice back, indorsed on the back a great many times, Send this ear to Hines' Brewery, or Send it to Highland or some other point. Then we take and make out a way bill; take that to Mr. Felps and take his receipt.

"With reference to Teichman's barley, we would sometimes have orders in our office, in advance of the arrival of the ears, what disposition to make of them; others we wouldn't. Those we didn't, when they came we sent Mr. Teichman notice that the ears were there, what shall we do with them? Virtually that is the substance; and he would, at his pleasure, advise us to send the ear so and so, to Hines' brewery, say. We would \*make out a way bill for the ear, consign it that way, and deliver it to Mr. Felps of the Terminal Association.

"If a man would say 'Send this to Highland,' that would be instruction to the Vandalia, but the Terminal Association would handle it."

This testimony as to the relations existing between the parties and the necessity for instructions from the Peoria Company or new way bills before the Terminal Association was empowered to remove the cars standing in the designated yard is well illustrated by the proof, which shows that on October 28, 1894, the day of the fire, among the ears belonging to the Peoria Company, standing in said yard, there were twenty-four ears which had been received at various times, and that on that day for these twenty-four cars new way bills had been delivered by the Peoria Company to the Terminal Association, and the cars were moved by the latter corporation, and therefore escaped the fire.

In passing, we note how completely this proof refutes the assumption predicated upon the assumed custom of trade, and the offer of proof and stipulation, since it demonstrates that up to the time of the giving of instructions to the Terminal Association no relation between the Terminal Association and the consignees of the barley had arisen, and that the order of the consignees given to the Terminal Association as to the further movement of the barley would have been wholly without effect and worthless, without the giving of an order by the Peoria Company to the Terminal Association on the subject.

In the course of the dealings between the roads a blank form of order for the movement of the cars was prepared by the Terminal Association, was delivered to the Peoria

Company, and was used in the dealings for the purpose intended. One of these blanks was filled by an employee of the receiver during the course of the hearing before the master and was put in evidence. A copy will be found in the margin.†

It will be seen that the blank in question plainly manifests that prior to the giving of the order the ear referred to in the document had not been transferred to the Terminal Association, \*since it declares that the [439] transfer to that company arises from the order which the paper contains. Another very conclusive fact is likewise shown beyond dispute. By the course of business followed by the Peoria Company that road, where it received ears from other roads, to be further transported, made to the carrier from whom such ears were received what are denominated "junction reports," that is, statements showing when the ears in question were delivered by the Peoria Company to another carrier, and hence passed from its control. Now these reports thus made, in the course of the business, embraced ears which had been taken and placed in the yard after the Peoria Company had issued the new instructions or way bills to the Terminal Association. Thus for the purpose of its dealings with the carrier from whom the cars were received, the Peoria Company, by its whole course of action, constantly avouched that the ears were in its possession and under its control while in the yard up to the time the order to move was given by it to the Terminal Association, yet the claim now asserted is that the cars had passed from the possession and control of the Peoria Company from the mere fact that they had been placed in the yard and before the order to move was given.

A yet further fact of great significance remains to be noticed. The Peoria Company carried one or more insurance policies upon property in its possession. In an affidavit to proofs of loss furnished by the receiver to the insurance companies, verified by agent Calvert, in December, 1894, it was stated:

"During the night of October 28, 1894, a fire occurred on the track of the Terminal Railway Association Company at East St. Louis, state of Illinois (*said tracks being used by the Chicago, Peoria, & St. Louis Railway Company*), and burned the cars and wholly consumed the property freight in transit in said \*cars, as set forth in statements attached hereto, and forming a part of this proof of loss." [Italics ours.] [440]

The statement attached as part of the proofs of loss embraced the property, the value of which was subsequently demanded in the intervention proceedings. The proof of loss, while enumerating the claim of the Chicago, Milwaukee, & St. Paul Railway for thirty-eight of its cars, which had been de-

†Car No. 680. Terminal Railroad Association of St. Louis.

C. M. & St. P. Manifest of freight transferred.

From C. P. & St. L. R. R. To Eads R. R. Oct. 10, 1894.

Consignor.	Consignee & destination.	Description.	Weight.	Charges.
C. M. & St. P.	Teichman Com. Co.	Barley.	30,000.	\$51.00
Wykoff.	16th St. & Union depot.			
	St. Louis, Mo.			



stroyed, however, contained no reference to seventeen of the cars of that company which had been but partially damaged and were repaired by the receiver without any intimation to the Milwaukee Company that the receiver was not legally required to bear such expense, although, as between the Terminal Association and the receiver, the latter claimed that the former was ultimately liable for such damage.

Concluding that at the date of the fire the merchandise in question had not been delivered by the Peoria Company, and was in contemplation of law within its possession and control, the two first propositions are disposed of, and it remains only to consider the third, that is, even if the merchandise was in the possession of the Peoria Company at the time of the fire, by the custom of detaining the barley at East St. Louis for further orders, it was there held by the Peoria Company, not as a carrier, but as bailee, and under such relation the proof does not establish its liability. But the legal aspects of this proposition need not be considered, since it rests upon an assumption of fact which is unfounded, that the proof is insufficient to fix the responsibility of the Peoria Company, even although it merely held the merchandise as a bailee or warehouseman. We have seen that the amended interventions even under the hypothesis that the Peoria Company did not hold the goods at the time of the fire as a common carrier but as a warehouseman, plainly charged the liability of that company for the destruction of the property because of its negligence in and about the care of the goods. The facts which we have already stated as to the hazardous use of the warehouse and the actual knowledge of the Peoria Company of its condition, clearly sustains this latter ground, of the asserted liability of the Peoria Company. And even although the proof of actual knowledge by the Peoria Company, of the condition of the warehouse, be put out of view and weight be [441] \*given alone to the relation which that company bore to the tracks set apart for its use, and to its duty under the law to know the condition of the place where it stored the freight held by it, and the negligence which must be implied if no actual knowledge existed of the use made of the warehouse, from the presence of the officers and employees in that locality in the discharge of their duty, yet the liability of the Peoria Company in the capacity of warehouseman was clearly established by the proof.

Incidentally, it seems to be claimed in argument that the Hunting Elevator Company was not entitled to assert a right of recovery, because it was not the real party in interest. But we need not dwell upon this claim, as it depends upon the contention that the facts established a delivery of the merchandise to the consignees, a contention which has been fully disposed of by what has been previously said. And even if under the custom of trade by which the barley was retained by the Peoria Company at East St. Louis, it resulted that the Peoria Company became a bailee or warehouseman for the consignees,

under such hypothesis the right of the Hunting Elevator Company to recover in the intervention proceedings is manifest. The proof shows that after the destruction of the barley by the fire in question, upon the demand of the consignees, the Hunting Elevator Company, in order to comply with its contracts of sale, replaced the damaged or destroyed barley. Under this state of facts, therefore, the Hunting Elevator Company became in effect the assignees of the consignees in respect to any claim which the latter might have asserted. Of course, nothing which we have said in the foregoing opinion or anything which will be contained in the decree which we shall render will preclude any right which may exist or be asserted by the Peoria Company against the Terminal Association for the loss occasioned by the fire in question.

*The decree of the Circuit Court of Appeals is reversed, and the decree of the Circuit Court of the United States for the Southern District of Illinois is affirmed.*

Mr. Justice **Brewer** did not hear the argument, and took no part in the decision of this cause.

\*CHICAGO, MILWAUKEE, & ST. PAUL [442] RAILWAY COMPANY, *Petitioner*,  
v.

C. H. BOSWORTH, Receiver of the Chicago, Peoria, & St. Louis Railway Company, *et al.*

(See S. C. Reporter's ed. 442, 443.)

*Carriers—liability for loss of cars of a connecting carrier by fire—cars in yards of terminal company.*

A railroad company is liable to a connecting carrier for the loss of the latter's cars by fire while in the possession and control of the former company, but standing in the yard of a terminal company, awaiting orders from consignees for further movement, where the contract with the terminal company is not for the storage of the cars but merely for terminal facilities and storage room.

[No. 11.]

*Argued October 24, 25, 1899. Decided December 17, 1900.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision reversing that of the Circuit Court in favor of a railroad company in the action for the loss of property by fire. *Reversed.*

NOTE.—As to rights and liabilities of connecting carriers—see *Fox v. Boston & M. R. Co.* (Mass.) 1 L. R. A. 703, and note; *Crossan v. New York & N. E. R. Co.* (Mass.) 3 L. R. A. 766, and note; *Hill v. Denver & R. G. R. Co.* (Colo.) 4 L. R. A. 376, and note; *International & G. N. R. Co. v. Tisdale* (Tex.) 4 L. R. A. 545, and note; *Browning, K. & Co. v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415, and note. And see notes to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849; *Adams Exp. Co. v. Harris* (Ind.) 7 L. R. A. 214, and *Miller v. South Carolina R. Co.* (S. C.) 9 L. R. A. 833.

See same case below, 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. Rep. 72.

The facts are stated in the opinion.

Mr. **Burton Hanson** argued the cause, and, with Messrs. *George R. Peck* and *George P. Cary*, filed a brief for petitioner.

Mr. **Bluford Wilson** argued the cause, and, with Mr. *Philip Barton Warren*, filed a brief for respondents.

For contentions of counsel, see briefs as reported in *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, ante, 256, 21 Sup. Ct. Rep. 183.

[442] \*Mr. Justice **White** delivered the opinion of the court:

The decision of the controversy presented in this record is controlled by the principles announced in the opinion just delivered in *Hunting Elevator Co. v. Bosworth*, number 12 of this term (ante, 256). The claim of the railroad company was for the value of certain cars, admittedly owned by it, which had been received by the Peoria Company at various times on and prior to October 28, 1894, from a connecting carrier, upon shipments of barley from various points to commission merchants in St. Louis, the cars, except in one or two instances, being routed on the way bills to East St. Louis. The cars so taken by the Peoria Company were deposited on the tracks at East St. Louis set apart for the use of the Peoria Company under the circumstances disclosed in the opinion in the *Hunting Elevator Company Case*, and while awaiting orders from the consignees for further movement, were destroyed in the fire of October 28, 1894. The circuit court entered a decree in favor of the railroad company, but this decree was reversed by the circuit court of appeals.

[443] \*For the reasons stated in the opinion in the *Hunting Elevator Company case*, the decree of the Circuit Court of Appeals must be reversed, and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.

JACOB RAU, *Petitioner*,

v.

C. H. BOSWORTH, Receiver of the Chicago, Peoria, & St. Louis Railway Company, et al.

(See S. C. Reporter's ed. 443, 444.)

Carriers—cars in yards of terminal company—loss by fire.

This case is governed by the decision in the case of *Hunting Elevator Company v. Bosworth*, ante, 256.

[No. 13.]

Argued October 24, 25, 1899. Decided December 17, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision reversing that of the Circuit Court against a

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railroad company in an action for the loss of property by fire. *Reversed*.

See same case below, 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. Rep. 72.

The facts are stated in the opinion.

Mr. **Burton Hanson** argued the cause, and, with Messrs. *George R. Peck* and *George P. Cary*, filed a brief for petitioner.

Mr. **Bluford Wilson** argued the cause, and, with Mr. *Philip Barton Warren*, filed a brief for respondents.

For contentions of counsel, see briefs as reported in *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, ante, 256, 21 Sup. Ct. Rep. 183.

\*Mr. Justice **White** delivered the opinion [443] of the court:

This is another of the claims in intervention which originated from the fire in a railroad yard at East St. Louis on the night of October 28, 1894, referred to in the opinion just delivered in *Hunting Elevator Co. v. Bosworth*, number 12 of this term (ante, 256). The claim of Rau was for the value of two cars of barley shipped from Wykoff, Minnesota, consigned to the Orthwein Grain Company, St. Louis, to be sold for the account of the consignor. The cars were delivered by a connecting carrier to the Peoria Company, and were deposited on its tracks in a portion of the Terminal Association yards at East St. Louis on the \*afternoon of Oc-[444]tober 25, 1894. While so held, awaiting orders for further movement, the cars and contents were destroyed by the fire in question.

The circuit court of appeals reversed a decree which had been entered by the circuit court in favor of the claimant. Applying the principles declared in the opinion delivered in the *Hunting Elevator Company Case*, the decree of the Circuit Court of Appeals must be reversed, and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.

C. H. BOSWORTH, Receiver of the Chicago, Peoria, & St. Louis Railway Company, Petitioner,

v.

CARR, RYDER, & ENGLER COMPANY.

(See S. C. Reporter's ed. 444, 445.)

Carriers—cars in yard of terminal company—loss by fire.

This case is governed by the decision in the case of *Hunting Elevator Company v. Bosworth*, ante, 256.

[No. 14.]

Argued October 24, 25, 1899. Decided December 17, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirming that of the Circuit Court against a railroad company for goods lost by fire while in the yard of a terminal company. *Affirmed*.

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See same case below, 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. Rep. 72.

The facts are stated in the opinion.

Mr. Bluford Wilson argued the cause, and, with Mr. Philip Barton Warren, filed a brief for petitioner.

Mr. Burton Hanson argued the cause, and, with Messrs. George R. Peck and George P. Cary, filed a brief for respondent.

For contentions of counsel, see briefs as reported in *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, ante, 256, 21 Sup. Ct. Rep. 183.

[444] \*Mr. Justice White delivered the opinion of the court:

The claim presented on this record was for the value of a quantity of manufactured doors, sash, blinds, and moldings, shipped from Dubuque, Iowa, on October 20, 1894, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. The car containing

[445] \*the merchandise in question was received by the Peoria Company from the connecting carrier, and, at about three o'clock on the afternoon of October 28, 1894, was deposited in its portion of the yard of the Terminal Association at East St. Louis set apart for the use of the Peoria Company, under the agreement referred to in the opinion just delivered in *Hunting Elevator Co. v. Bosworth*, number 12 of this term, ante, 256. On the night of the date last mentioned the car and contents were destroyed by the same fire which consumed or damaged the property of the Hunting Elevator Company. Both of the courts below decreed the liability of the Peoria Company, the court of appeals declaring that "though in physical possession, under its agreement with the receiver, of the car in which the goods were being transported, the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way bill or other form of information on which it could proceed with the carriage." It necessarily results from the views expressed by us in the *Hunting Elevator Company Case* that the courts below did not err in the decrees rendered by them upon this claim.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly affirmed.

REYMANN BREWING COMPANY, Appt.,  
v.

HARRY BRISTER, Treasurer of Jefferson County, Ohio.

(See S. C. Reporter's ed. 445-456.)

*Intoxicating liquors—Dow law—discrimination against foreign corporations—police power.*

1. The exemption of sales of intoxicating

NOTE.—Validity of license tax imposed on foreign corporation as a condition of permission to do business within the state.

The exaction of a license fee to enable a foreign corporation engaged in general mining  
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liquors by the manufacturer at the manufactory in quantities of 1 gallon or more, which is made by 92 Ohio Laws, p. 34, known as the Dow law, being applicable to such sales made at any manufactory in the state, without regard to the residence, citizenship, or domicile of the person, copartnership, or corporation which owns the plant, does not constitute an illegal discrimination against a foreign corporation which has its manufactory in another state.

2. A foreign corporation is a trafficker in intoxicating liquors subject to tax under 92 Ohio Laws, p. 34, when it maintains a storehouse in the state where it sells and delivers beer and collects payment.

3. The Ohio Dow law entitled, "An Act Providing against the Evils Resulting from the Traffic in Intoxicating Liquors," and providing for a tax upon the business of selling such liquors except when the sales are made by the manufacturer at the manufactory and in quantities of 1 gallon or more, being construed by the supreme court of the state as aiming to control and regulate sales in quantities less than 1 gallon, in saloons or at places other than the place of manufacture, is within the scope of the police power.

[No. 76.]

Submitted November 7, 1900. Decided December 17, 1900.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio to review a decision dismissing a bill to restrain the collection of the Dow tax. Affirmed.

See same case below, 92 Fed. Rep. 28.

Statement by Mr. Justice Shiras:

\*On January 13, 1898, the Reymann Brew-[446] ing Company, a corporation of the state of West Virginia, with its principal office in the city of Wheeling, filed a bill of complaint in the circuit court of the United States for the southern district of the state of Ohio, against Harry Brister, treasurer of the county of Jefferson, state of Ohio, seeking to restrain and enjoin the said Brister from retaining the possession of certain personal property belonging to the brewing company, which he had seized in enforcement of certain laws of the state of Ohio, which provide for the collection of a tax known as the "Dow tax."

The cause was submitted upon the bill, a general demurrer thereto, and a statement of facts agreed upon by the parties. The statement of facts was as follows:

"The Reymann Brewing Company, the complainant, is a corporation resident in and a citizen of the state of West Virginia, and owns and operates a brewery at Wheeling, West Virginia, where it manufactures a beverage of malt and intoxicating liquor commonly known as 'beer.' It packs said beer in wooden barrels of various sizes and also in glass bottles, which bottles are packed in wooden boxes called 'cases,' twenty-four

and milling business to have an office in the state for the use of its officers, stockholders, agents, and employees is clearly within the competency of the legislature. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*,

quart bottles or thirty-six pint bottles being packed in each case.

"These barrels and cases are packed at the brewery of the Reymann Brewing Company, at Wheeling, in the state of West Virginia, there delivered to the common carrier, the railroad company, and shipped to Steubenville, in the county of Jefferson, in the state of Ohio, where they are received by Bert Meyers, who is employed by the Reymann Brewing Company in the capacity of soliciting agent, salesman, and driver, and who calls on retail dealers in intoxicating liquors at their places of business in and about said city of Steubenville, and as such agent then and there solicits orders for and sells any number of the above-described packages desired. He then loads on the wagon owned by the Reymann Brewing Company the barrels or cases \*above described, and delivers them to the purchasers in the original and unbroken packages in the same shape and condition as delivered to the common carrier at the brewery at Wheeling. Said agent also makes sales of said packages at, and delivers the same from, the place where stored at Steubenville. In no instance are any of the barrels or cases opened until after sold and delivered to the purchaser, and no change is made in any of the packages from the time they are packed at the brewery at Wheeling until delivered to the persons purchasing the same.

"Packages received by the said Bert Meyers at the railway station at Steubenville for which he has not received orders or which

he has not already sold are stored in a room on the ground floor of a cold storage house in said city of Steubenville, for which the Reymann Brewing Company pays a regular monthly rental, and of which room the said brewing company has the exclusive use and possession. The packages not delivered directly from the railway station to purchasers are delivered from the said storage house or room upon orders solicited, as aforesaid, and upon sales then and there at said storage room made. The price of the beer thus delivered is collected in some instances from time to time by a collector from the brewery at Wheeling, who calls on the purchasers and collects, and in other instances such collections are made by said agent, Bert Meyers, at the time of sale and delivery at said storage room.

"During the period for which the assessments hereinafter mentioned were made the said Reymann Brewing Company carried on its beer business in said city of Steubenville in the same manner as herein described.

"The horses, harness, and wagon described in the bill on which the defendant, Harry Brister, has levied, and which he has taken into his possession, are used by the Reymann Brewing Company, solely in the matter of delivering to purchasers the packages above described.

"Two barrels and cases of beer described in the bill were packed at the brewery at Wheeling and shipped in the manner above described to Steubenville, Ohio, placed in the storeroom above mentioned, and were to be

125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Having the absolute power of excluding a foreign corporation, a state may impose such conditions on permitting it to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent on the payment of a specific license tax, or a sum proportioned to the amount of its capital. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, *Affirming People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155; *People v. Equitable Trust Co.* 96 N. Y. 387.

An annual tax by way of license for the exercise of a corporate franchise may be imposed upon foreign corporations doing business in a state. *State, Tide-Water Pipe Line Co., Prosecutor, v. Berry*, 52 N. J. L. 308, 19 Atl. 665.

A state tax upon a corporate franchise or business of a foreign corporation, the amount of which is to be determined by the capital stock and dividends of the company, is not a tax on the capital stock or property of the company, but on its corporate franchise, and may be fixed at any sum that the legislature may choose. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, *Affirming People v. Home Ins. Co.* 92 N. Y. 328; *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155.

An annual tax of 2 per cent of the annual gross receipts of foreign building and loan associations is a tax on the franchise of doing business in the state, within the meaning of Ky. Const. § 174, providing that nothing therein contained shall be construed to prevent the general assembly from providing for taxation based on income, license, or franchise. *Southern*

*Bldg. & L. Asso. v. Norman*, 98 Ky. 294, 31 L. R. A. 41, 32 S. W. 952.

A tax on the amount of capital stock of a foreign corporation which maintains a sales agency and office in the state, and keeps a bank account there for convenience of local transactions, is sustainable under a statute authorizing such tax on a foreign corporation "doing business" within the state. *Southern Cotton Oil Co. v. Wemple*, 44 Fed. Rep. 24.

A tax on foreign companies "having an office or place of business within the commonwealth for the direction of its affairs or transfer of shares" is not unconstitutional, although it is based on a percentage of the par of the capital stock. *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717.

The right of the state of Pennsylvania to impose on the New York, Lake Erie, & Western Railroad Company, as a condition of doing business in the state, the duty of paying a state tax on corporate bonds held by resident holders, was sustained in *Com. v. New York, L. E. & W. R. Co.* 139 Pa. 457, 21 Atl. 528. But this case was reversed by the Supreme Court of the United States in *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952, on the ground that the state, having given to the railroad company upon a valuable consideration the right to extend its road into the state, could not withdraw the assent after the road had been built, as this would impair the obligation of a contract. There was another reason for the decision, that as to payment of interest made in New York, although on bonds held by residents of Pennsylvania, the latter state could not impose any burdens by way of taxation, because the property was out of the state.

A tax on the capital stock of a foreign corpo-



[448] there sold and delivered in the manner above described, when they were levied on and \*taken possession of by the defendant, Harry Brister. The defendant, Harry Brister, is treasurer of Jefferson county, in the state of Ohio, and as such treasurer did so levy upon and take into his possession and has advertised for sale the following personal property of the Reymann Brewing Company:

"Two horses (bay geldings), two horse covers, one set of double harness, one beer wagon, thirty-seven of said original and unbroken cases of beer containing quarts, four of said original and unbroken cases of beer containing pints, sixty-five original and unbroken barrels of beer, one-eighth size, one hundred and fourteen original and unbroken wooden barrels of beer of one-quarter size, twenty-nine original and unbroken wooden barrels of beer of one-half size—all of which he has done, as said treasurer of Jefferson county, Ohio, for the purpose of collecting from the said Reymann Brewing Company certain taxes or assessments and penalties, amounting to \$873.60, and charged against said company on the tax duplicate in the office of said treasurer under and by virtue of a law of the state of Ohio entitled 'An Act Providing against the Evils Resulting from the Traffic in Intoxicating Liquors,' passed May 14, 1886 (see 83 Ohio Laws, p. 157), as amended by acts March 21, 1887 (see 84 Ohio Laws, p. 224), March 26, 1888 (see 84 Ohio Laws, p. 117), and February 20, 1896 (see 92 Ohio Laws, p. 34), known as the 'Dow law;' which said levy and seizure

were duly made, and which amount (\$873.60) the said Reymann Brewing Company lawfully owes, if, under the circumstances in this statement set forth and the law herein referred to, said company or its business in said city of Steubenville, as herein described, should and may lawfully be assessed, as aforesaid.

"The defendant will, unless restrained by the court, insist on collecting future assessments of the complainant under said Dow law in the manner prescribed by said law; that is to say, by further seizures.

"It is agreed by both parties to the above-styled cause that the foregoing statement is a true statement of the facts, and that the said cause may be submitted to the court on said statement of facts agreed."

The Ohio statute referred to in the agreed statement of facts,\*known as the "Dow law," [449] and entitled "An Act Providing against the Evils Resulting from the Traffic in Intoxicating Liquors," provides:

"Sec. 1. That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation, or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or copartnership, the sum of three hundred and fifty dollars.

"Sec. 2. That said assessment, together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business

ration was held not to be a license tax, and to be valid only as to so much of its stock as was invested in the state. *Com. v. Standard Oil Co.* 101 Pa. 119.

A license tax imposed on an agent of a foreign express company, which seems to have been attacked in *Woodward v. Com.* 9 Ky. L. Rep. 670. 7 S. W. 613, on the ground that it discriminated against nonresidents, was there held valid on the ground that a corporation was not a citizen entitled to equal privileges and immunities. No question seems to have been raised in the case as to the effect of the license tax as an interference with interstate commerce.

A statute exempting from license tax manufacturing or mining companies carrying on business in the state is not an unconstitutional discrimination against those which carry on business outside the state. *State v. Underwood Cable Co.* (N. J. Eq.) 18 Atl. 581.

And the equal protection of the laws is not denied to a foreign corporation which manufactures goods in other states and sends them into the state for sale, by a tax on the amount of capital employed by it within the state, where the statute makes no discrimination between foreign and domestic corporations. *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

And the equal protection of the laws is not denied to foreign building and loan associations doing business within the state, by Ky. Stat. § 4228, requiring such associations to pay into the state treasury annually 2 per cent of their gross receipts. *Southern Bldg. & L. Asso. v. Norman*, 98 Ky. 294, 31 L. R. A. 41, 32 S. W. 952.

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The court said that the assertion of the principle that a state may favor its own corporations was not necessary to sustain the statute in question, as an examination of the Kentucky statutes would show no discrimination against the nonresident corporation.

A foreign corporation cannot object that a license tax imposed upon it is based upon the system adopted for domestic corporations, where the Constitution does not require foreign corporations to be licensed by a mode different from that provided for home corporations. *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463, 4 So. 504.

The payment of a percentage on the capital stock of the corporation at or before filing its articles of incorporation, under Minn. Gen. Laws 1889, chap. 225, is required of an Iowa railroad company on filing its articles, as required by Minn. Gen. Laws 1877, chap. 14, in order to extend and build its road into the state. *State ex rel. Clapp v. Sioux City & N. R. Co.* 43 Minn. 17, 44 N. W. 1032.

Restrictions on business of foreign insurance companies are not here considered. For a discussion of that question see *note* to *State ex rel. Richards v. Ackerman* (Ohio) 24 L. R. A. 298. Nor is the question as to whether the exclusion of foreign corporations is a burden on interstate commerce treated in this note. For a collection of cases on that subject, see *note* to *Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311. And on the general subject of the recognition or exclusion of foreign corporations, see *note* to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 289.

is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within the state, to wit, one half on or before the twentieth day of June, and one half on or before the twentieth day of December, of each year."

"Sec. 4. That if any person, corporation, or copartnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer shall thereupon forthwith make said amount due with all penalties thereon, and 4 per cent collection fees and costs, by distress and sale, as on execution, of any goods and chattels of such person, corporation, or copartnership; he shall call at once at the place of business of each person, corporation, or copartnership; and in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation, or copartnership, wherever found in said county, or on the bar, fixtures, or furniture, liquors, leasehold and other goods and chattels used in carrying on such business, which levy shall take precedence of any and all liens, mortgages, conveyances, or encumbrances hereafter taken or had on such goods and chattels, so used in carrying on such business; nor shall any claim of property by any third person to such goods and chattels, so used in carrying on such business, avail against such levy so made by the treasurer, and no property, of any kind, of any person, corporation, or copartnership liable to pay the amount, penalty, interest, and cost due under the provisions of this act, shall be exempt from said levy. The treasurer shall give notice of the time and sale of the personal property to be sold under this act, the same as in cases of the sale of personal property on execution; and all provisions of law applicable to sales of personal estate on execution shall be applicable to sales under this act, except as herein otherwise provided; and all moneys collected by him under this act shall be paid, after deducting his fees and costs, into the county treasury. In the event of the treasurer, under the levy provided for under this act, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

"Sec. 8. The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

Subsequently the defendant, with leave of court, withdrew the demurrer, and the cause coming on to be heard was, after agreement,

submitted to the court upon the bill and the agreed statement of facts. On February 25, 1899, a final judgment was entered dismissing the bill at the cost of the complainant. Thereupon an appeal was allowed to this court.

**Mr. J. Bernard Handlan** submitted the cause for appellant:

State legislatures cannot discriminate against citizens or products of other states.

*Hinson v. Lott*, 8 Wall. 150, 19 L. ed. 388; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 349.

It is the duty of the national government, so long as the state of Ohio accords to the manufacture and sale of intoxicating liquors the present treatment of the subject, to protect and secure to residents and citizens of other states equal rights with the residents and citizens of the state of Ohio.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Guy v. Baltimore*, 100 U. S. 443, 25 L. ed. 746; *Webber v. Virginia*, 103 U. S. 350, 26 L. ed. 567; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 495, 31 L. ed. 710, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 889, 1062.

That this statute was enacted in good faith can in nowise affect the ultimate decision; the necessary effect arising from its operation determines its validity.

*Minnesota v. Barber*, 136 U. S. 322, 34 L. ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The necessary effect of this tax assessed upon the business, compelling a nonresident to pay the tax and exusing the domestic manufacturer from so doing, is to prevent a nonresident from coming into competition with the domestic manufacturer, without reference to the purity or quality of the beer.

*Brimmer v. Rebman*, 138 U. S. 83, 34 L. ed. 864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Walling v. Michigan*, 116 U. S. 459, 29 L. ed. 695, 6 Sup. Ct. Rep. 454; *Scott v. Donald*, 165 U. S. 98, 41 L. ed. 644, 17 Sup. Ct. Rep. 265.

This law neither forbids the manufacture and sale of intoxicating liquor nor does it provide equal regulations for the inspection and sale of all domestic and imported liquors; consequently it fails as a police law, and does not come within the purview of the Wilson act of Congress of 1890.

*Scott v. Donald*, 165 U. S. 100, 41 L. ed. 645, 17 Sup. Ct. Rep. 265.

**Mr. Addison C. Lewis** submitted the cause for appellee:

The Dow law is a valid exercise of the police power of the state.

*Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672.

The Dow law is not invalid because it discriminates against the foreign brewer in that sales by the local brewer at the brewery, in quantities of a gallon or more, are specially exempt from the tax.

*Vance v. W. A. Vandercook Co.* 170 U. S. 179 U. S.



450, 42 L. ed. 1105, 18 Sup. Ct. Rep. 674; Black, *Intoxicating Liquors*, §§ 48, 69 *et seq.*; *Austin v. State*, 10 Mo. 591.

[450] \*Mr. Justice Shiras delivered the opinion of the court:

[451] \*By the 1st section of the statute of the state of Ohio, known as the "Dow law," it is provided "that upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors there shall be assessed yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation, or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or copartnership, the sum of three hundred and fifty dollars." 92 Ohio Laws, p. 34.

The Reymann Brewing Company, a corporation of the state of West Virginia, whose property has been seized to enforce payment of such an assessment, alleges that, as respects such foreign corporation, the statute is void, because it discriminates in favor of manufacturers and brewers of beer who have their plants located within the state of Ohio as against those who have their plants located in other states, and because it constitutes in its practical operation a regulation of commerce between the states.

So far as the terms of the statute are concerned, they do not disclose any intention to discriminate between foreign and domestic dealers in intoxicating liquors, as the tax in question is to be assessed upon every person, corporation, or copartnership engaged in the business of trafficking in such liquors. But it is contended that the effect of the legislation necessarily results in such a discrimination, because of the provisions of the 8th section of the statute, which is in the following words:

"The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

[452] The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax, \*and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell

at places other than the place of manufacture.

Under this provision, the manufacturers, whether within or without the state, may sell at the manufactory and ship to any part of the state of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the state of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the state legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another state it would be subjected to the tax if it sold intoxicating liquor at a place within the state of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax.

A similar contention was disposed of by this court in *New York v. Roberts*, 171 U. S. 658, *sub nom. People ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 323, 19 Sup. Ct. Rep. 658. In that case a corporation of the state of Michigan, and having its factory within that state, had a warehouse and store for the sale of its products in the city of New York. A statute of the state of New York enacted that "every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized, or formed under, by, or pursuant to law in this state, or in any other state or country and doing business in this state, except . . . manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this state, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually," and that "the amount of capital stock which shall be the basis for \*tax . . . in the case of every [453] corporation, joint-stock company, and association, liable to taxation thereunder shall be the amount of capital stock employed within this state."

It was claimed that the Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the state, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within the state, and that such a tax was an unjust discrimination against the corporation, whose place of manufacture was in the state of Michigan. But this court held otherwise, saying:

"If the object of the law in question was to impose a tax upon products of other states, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that obviously such is not the purpose of this legislation. . . . It will



be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state."

So, in the present case, the exemption is not confined to Ohio corporations or copartnerships, but extends as well to foreign corporations whose place of manufacture is within the state of Ohio; and so, likewise, the tax is imposed on Ohio corporations which manufacture goods in other states, and establish places for their sales within the state of Ohio, or which, manufacturing within the state, establish places within the state distinct from the manufactory, where their liquors are sold and delivered.

[454] In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales \*when made at places elsewhere, the legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder.

The supreme court of the state of Ohio, in construing the statute in question, has clearly pointed out the reasons that actuated the legislature in distinguishing between places where the liquors are manufactured and those where liquors are sold to be drunk on the premises. Thus in the case of *Adler v. Whitbeck*, 44 Ohio St. 574, 9 N. E. 672, that court said: "It was for the legislature to determine the form of the traffic that required to be regulated as a source of evil. It has in a measure drawn a line between a distillery and a brewery on the one hand and a saloon on the other. There is nothing unreal in the distinction. It is known by all men, and in one respect probably too well by many men. And unless absolute prohibition is resorted to no more practical distinction could be made."

It remains to consider whether the court below erred in finding, under the facts agreed upon, that the *Reymann Brewing Company* has established a place in the city of *Steubenville*, in the state of Ohio, where its beer was sold and delivered, and thus has become liable to the tax prescribed by the law.

It is sufficient to say that it is distinctly admitted that the brewing company not only ships its beer in barrels and cases, in filling orders received, and delivers it directly to the purchasers (which sales and deliveries are not by the statute subjected to any tax), but also maintains a storehouse in *Steubenville*, where it sells and delivers beer and collects payment. Such transactions constitute the brewing company a trafficker in intoxicating liquor having a place, other than

the place of manufacture, where the traffic is carried on within the meaning of the law. And, of course, it is obvious that such liquors, sold and delivered within the state of Ohio, are within the provisions of the statute of the United States, known as the *Wilson law*, which provides that intoxicating liquors transported into any state for sale or storage therein shall be subject to the operation and effect of the laws of such \*state, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquor had been produced in such state, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. 26 Stat. at L. 313, chap. 728.

As this statute subjects intoxicating liquors imported into a state to the operation and effect of the laws of such state only when enacted in the exercise of its police powers, it is contended that such is not the character of the *Dow law*; that, as it contains no prohibition upon the manufacture or sale of intoxicating liquors, and only purports to regulate the trafficking therein, it is not a police measure.

As we have heretofore stated, the supreme court of Ohio has construed the law to aim at controlling and regulating sales in quantities less than one gallon in saloons or at places other than the place of manufacture, and to be, therefore, within the scope of the police power. We think that this view of the meaning and intent of the statute is consistent with its language, and, even if not bound by the construction put upon the statute by the state court when applying the provisions of the *Wilson law*, we do not hesitate to adopt it.

A similar contention was disposed of by this court in the case of *Vance v. W. A. Vandercook Co.* 170 U. S. 447, 42 L. ed. 1104, 18 Sup. Ct. Rep. 674, and where it was said:

"From the fact that the state law permits the sale of liquor, subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the states absolutely forbade sales of liquor, and not to apply in case the states determined to restrict or regulate the same."

These views prevailed in the court below, where it was held that manufacturers of intoxicating liquors within and without the state may sell at the manufactory and ship to any part \*of the state of Ohio, and may solicit orders for their goods in any part of the state to be shipped from the manufactory; but that if they establish places within the state, distinct from the manufactory, where their goods are to be stored, for the purposes of sale and delivery, and such goods are there sold and delivered, then they be-



come traffickers within the meaning of the law, and are liable to pay the tax. 92 Fed. Rep. 28.

Accordingly, *the decree of the Circuit Court, dismissing the bill of complaint, is affirmed.*

Mr. Justice **Harlan** concurs in the result.

UNITED STATES, *Petitioner*,  
v.  
E. A. MORRISON & SON.

UNITED STATES, *Petitioner*,  
v.  
H. WOLFF & CO.

(See S. C. Reporter's ed. 456-463.)

*Duties—on glass beads colored in imitation of precious stones.*

Glass beads strung together and colored in imitation of precious stones are dutiable under ¶ 108 of the Act of Congress of 1890, as manufactures of glass not otherwise provided for, at 60 per cent ad valorem, and not under ¶ 454, as imitations of precious stones not set, at 10 per cent ad valorem, since the tariff laws have hitherto assessed strung beads at a rate higher than unstrung beads or imitations of precious stones, and the present statute, retaining the provision for unstrung beads at the same rate as imitations of precious stones, has failed to provide specifically for strung beads, without showing any purpose to change the former policy by which they were made to pay a higher rate than the unstrung beads, and it is a proper case for the application of the general rule by which articles to which two or more rates of duty are applicable shall pay the higher rate.

[Nos. 15 and 16.]

*Argued December 12, 1899. Decided December 17, 1900.*

ON WRITS OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review decisions reversing judgments of the Circuit Court as to duties on glass beads colored in imitation of precious stones. *Reversed.*

See same case below, 28 C. C. A. 456, 55 U. S. App. 406, 84 Fed. Rep. 444.

The facts are stated in the opinion.

Assistant Attorney General **Hoyt** argued the cause and filed a brief for petitioner.

Mr. **Albert Comstock** argued the cause and Messrs. **Comstock & Brown** filed a brief for respondents.

[457] \*Mr. Justice **McKenna** delivered the opinion of the court:

These cases are concerned with the classification of certain articles imported by the respondents under the tariff act of 1890. Those imported by E. A. Morrison & Son were variously colored in imitation of "cat's eyes" or "tiger's eyes," and were strung. 179 U. S.

Others were colored in resemblance to the garnet, aqua marine, moonstone, and topaz. Those imported by Wolff & Co. were in imitation of pearls, it is claimed, and were also strung. The contention is as to how they shall be classified or made dutiable—whether under paragraph 108 or under paragraph 454 of the act of 1890.

Paragraph 108 provides:

"Thin blown glass, blown with or without a mold, including glass chimneys and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum ad valorem."

Paragraph 454 provides:

"Precious stones of all kinds, cut but not set, ten per centum ad valorem; if set, and not specially provided for in this act, \*twenty-five per centum ad valorem. Imitations of precious stones composed of paste or glass not exceeding one inch in dimensions, not set, ten per centum ad valorem." [458]

The board of appraisers decided that the merchandise was dutiable under paragraph 108, at 60 per cent. The decision was affirmed by the circuit court. 77 Fed. Rep. 605. The circuit court was reversed by the circuit court of appeals on the appeal of the respondents. 28 C. C. A. 456, 55 U. S. App. 406, 84 Fed. Rep. 444. The cases are here on certiorari.

There was a dispute between counsel whether the articles represented by exhibit 3 were involved in the pending appeal. That dispute seems to be settled by the concession of counsel for United States that they are. At any rate, we do not consider the dispute important. We shall assume that all the articles are beads strung. The opinions of the circuit court and the circuit court of appeals dealt with beads strung and their classification, and the same questions involved are here for consideration. At the taking of the testimony counsel for respondents made as to exhibit 2 (so-called "cat's eyes") the following concession:

"The importer concedes that they were imported upon strings, and that the claim that they were entitled to entry as beads, loose, unthreaded, or unstrung, is not insisted on."

And in the court of appeals it was stipulated among things (the stipulation is a part of the record here) "that the merchandise herein involved was in fact beads, and was in fact threaded or strung at the time of its importation, and was thereby excluded from classification under paragraph 445, act of October 1, 1890, and that unless this court shall hold that it was dutiable under paragraph 454 of the said act, as imitations of precious stones, etc., it was properly classified by the collector of customs under paragraph 108 of the said act as manufactures of glass not specially provided for."

We have therefore only to consider whether the merchandise represented by all of the exhibits was or was not imitations of precious stones. In passing upon and determining these alternatives, we do not consider it necessary to detail the testimony of the witnesses. If we should regard it literally, and concede \*that, though conflicting, it prepon-

derates in favor of the view that the articles imported were known in trade as imitations of precious stones, we do not consider that that alone should determine our judgment. If the testimony shows the articles to be imitations of precious stones, it also shows them to be beads, and it is stipulated that they were "in fact beads," and were "in fact threaded or strung" at the time of their importation. If they are entitled to a double designation, how are they to be classified? The answer would be easy and ready under prior tariff acts.

From an early day up to and including the act of 1883 beads had separate classification, and were dutiable at a higher rate than precious stones or imitations of them. Precious stones set and unset; imitations of them set or unset, and compositions of glass or paste when not set, were separately mentioned, and bore a different rate of duty from beads, and were not confounded with beads by resemblances, indeed not always by identity of material.

As early as 1858 the Treasury Department decided that genuine pearls when imported strung on a thread to be used as beads for necklaces without further manufacture, were dutiable as beads. And later jet and coral necklaces were classed as beads and bead ornaments. Also glass balls and oval pieces of onyx, and pieces of glass or paste capable of being strung, were held to be beads against a claim of being imitations of precious stones.

A summary of the acts may be useful. In the act of 1832, under the description of "composition, wax or amber beads; all other beads, not otherwise enumerated," they were made dutiable at 15 per cent ad valorem. In the act of 1842 they were dutiable at 25 per cent. In that of 1846 the description was "beads of amber, composition or wax, and all other beads, 30 per cent ad valorem." The description and duty were the same in the act of 1861. In the statutes enacted between 1861 and the Revised Statutes, beads or imitations of precious stones are not specifically mentioned. In the Revised Statutes beads specifically reappear, and were classified "all beads and bead ornaments except amber: 50 [460] per cent \*ad valorem." In the act of 1883 the classification was "beads and bead ornaments of all kinds except amber, 50 per cent ad valorem."

The act of 1890, which is now under consideration, does not contain in all respects the specific classification of the prior acts. The only classification of beads by name is in paragraph 445, which provides "that glass beads, loose, unthreaded, or unstrung," shall be dutiable at 10 per cent ad valorem. The opposite condition—beads not loose, not threaded or strung—is not specifically mentioned.

It cannot be said they cease to exist with the passage of the act of 1890 or were unprovided for by it. They necessarily must be classified some other way than by name; but do they thereby lose their distinction, and, while they are "in fact beads threaded and strung at the time of importation," do they cease to be that for lower duties by being

made to resemble something else—to make the application to the pending case, to resemble some precious stone? That its purpose was to impose lower duties cannot be said of the act of 1890, nor can it be contended that such result was attained by any change of its provisions in regard to precious stones or their imitations.

In prior acts the rates on beads were higher than the rates on precious stones or imitations of them. Precious stones bore no higher rate than 10 per cent ad valorem. They, however, were not specifically mentioned in all acts. They were mentioned in the act of 1816, and were dutiable at 7½ per cent. They were mentioned in the act of 1842, and were dutiable at 10 per cent. Imitations were dutiable at the same rate. The description was on "gems, pearls, or precious stones 7 per centum ad valorem; on imitations thereof, and compositions of glass or paste . . . set or not set, 7½ per centum ad valorem." There was no specific enumeration in the act of 1861 of precious stones or imitations of them, nor of the latter in any act until the publication of the Revised Statutes, where they appear as follows: "Precious stones and jewelry—diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set, ten per centum ad valorem; \*when set in gold, silver, [461] or other metal, or on imitations thereof and all other jewelry—twenty-five per centum ad valorem."

In the act of 1883 precious stones not set bore a duty of 10 per cent. Imitations of precious stones were not specifically mentioned. They came under the provision for compositions of glass or paste, not set, and were dutiable at 10 per cent. If set (and precious stones if set), were classified as jewelry, and were subject to a duty of 25 per cent.

In the act of 1890 pearls are not grouped, as in some prior acts, with the diamond and ruby as precious stones. They have a separate classification, and are dutiable, if not set, at 10 per cent. Precious stones are more carefully distinguished than under the act of 1883. The provision for them is as follows:

454. Precious stones of all kinds, cut, but not set, 10 per centum ad valorem;

if set, and not especially provided for in this act, 25 per centum ad valorem.

Imitations of precious stones composed of paste or glass, not exceeding 1 inch in dimensions, not set, 10 per centum ad valorem.

If set, they seem to become jewelry under paragraph 452, and dutiable at 50 per centum ad valorem.

From this review it is evident that in prior tariff acts beads were classified separately from imitations of precious stones, and were regarded as distinct from them and dutiable at a much higher rate. Can it be said that the act of 1890 suddenly changed a purpose so constant throughout previous legislation, and did not express the change but left it to be inferred from indefinite and ambiguous provisions—provisions which had not had that



effect nor were intended to have that effect? We think not.

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If it be said they were only precluded from that effect by the specific provisions for beads and that such provisions are not in the act of 1890, the answer is twofold (1) that there is provision which applies to and embraces them. They are undoubtedly "glass and manufactures of glass," and the adequacy of that description, which is the description of paragraph 108, to include them, cannot be denied. An imitation of a precious stone may be a manufacture of glass, but the latter is not necessarily \*an imitation of a precious stone, or, more narrowly, an imitation of a precious stone within the meaning of a tariff statute. Every resemblance would not make such imitation, and the suggestion of the counsel for the United States is not without its weight, that the capability and purpose of setting must be considered. The condition seems to have been contemplated by the statute, and in the testimony for the importers there was an attempt to satisfy it. Witnesses testified that while the articles were beads, they could be set and sometimes were set. Undoubtedly they could be fixed in metal, and so arranged as to conceal their perforations, but that was not their purpose or use. Their purpose and use were for hat or dress trimmings, or to ornament embroideries. It may be that in construing a tariff act it is the essential nature of the article, not the purpose of the importer, which determines its classification; but if color may be regarded to bring the article to the resemblance of a precious stone its other conditions may be regarded to bring it to the character of a bead—a manufacture of glass, a mere hat or dress trimming, or an ornament for embroidery.

(2) If the act of 1890 did not as specifically provide for beads as prior acts, glass beads as such were in the legislative mind and their various conditions contemplated. It was impossible to have in contemplation glass beads, loose, unthreaded, and unstrung (445), and not have the exact opposite in contemplation—beads not loose, beads threaded and strung, and made provision for them. What provision? Were they to be dutiable at the same or at a higher rate than beads unthreaded or unstrung? If at the same rate—if *all* beads were to be dutiable at the same rate, why have qualified any of them? Were some to be dutiable at one rate and some at another rate? If made of plain glass, were they to be dutiable at 60 per centum under paragraph 108; if tinted or made to the color of some precious stone, were they to be dutiable at 10 per centum under paragraph 454? No reason is assigned for such discrimination, and we are not disposed to infer it. It is a more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded, and if there can be a choice of provisions that intention must determine. Indeed, admitting \*that either provision (paragraph 108 or paragraph 454) equally applied, the statute prescribed the rule to be that "if two or more rates of duty shall be applicable to any

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imported article, it shall pay duty at the highest of such rates." Section 5.

*The judgment of the Circuit Court of Appeals is reversed, and that of the Circuit Court is affirmed.*

Dissenting: Mr. Justice **Peckham**.

ROTHSCHILD & BROTHER, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 463-471.)

*Duties—on wrapper tobacco mixed with filler.*

Unstemmed leaf tobacco suitable for cigar wrappers, when mixed or packed with filler tobacco, though constituting less than 15 per cent of the whole, is separately dutiable at \$1.85 per pound as wrapper tobacco under paragraph 213 of the tariff act of July 24, 1897, and not as filler tobacco at 35 cents per pound.

[No. 59.]

*Argued October 31 and November 1, 1900.  
Decided December 17, 1900.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit raising the question as to the dutiability of wrapper tobacco mixed with filler tobacco and constituting less than 15 per cent of the package. Held *dutiable as wrapper tobacco*.

Statement by Mr. Justice **McKenna**:

This case is here on certificate of the Court of Appeals of the second circuit. The case went to that court by appeal from the circuit court for the southern district of New York, which reversed a decision of the board of general appraisers. 87 Fed. Rep. 798.

The statement of facts made by the circuit court of appeals is as follows:

"The appellant imported from San Domingo into the port of New York in September, 1897, certain bales of unstemmed leaf \*tobacco, the product of San Domingo, in which bales there was mixed or packed with filler tobacco less than 4 per centum of leaves suitable for wrappers. The collector of the port assessed duty upon the leaves of filler tobacco in each bale at the rate of 35 cents per pound, and upon the leaves suitable for wrapper at \$1.85 per pound, assuming to do so conformably with the provisions of the tariff act of July 24, 1897 (schedule F, 213, 214), imposing duty on wrapper and filler tobacco as follows: 'Par. 213. Wrapper tobacco and filler tobacco when mixed or packed with more than fifteen per centum of wrapper tobacco, and all leaf tobacco the product of two or more countries or dependencies, when mixed or packed together, it unstemmed, one dollar and eighty-five cents per pound; if stemmed, two dollars and fifty cents per pound; filler tobacco not specially

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provided for in this act, if unstemmed, thirty-five cents per pound; if stemmed, fifty cents per pound. Par. 214. The term wrapper tobacco as used in this act means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco."

The following questions are propounded:

"1. Is it the meaning of the tariff act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package?"

"2. Is it the meaning of said act to subject to the duty of \$1.85 per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety at the date of the enactment, were commercially known in this country as 'filler tobacco,' and bought and sold by that name, notwithstanding such leaves constitute less than 15 per centum of the contents?"

*Messrs. Edward R. Gunby and Henry J. Cookinham* argued the cause and filed a brief for appellants.

*Mr. John S. Wise* argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[465] \**Mr. Justice McKenna* delivered the opinion of the court:

In paragraph 214, the statute defines wrapper tobacco to be that quality of leaf tobacco which is suitable for cigar wrappers, and filler tobacco to be all other leaf tobacco. Paraphrasing the paragraph and paragraph 214, Judge Lacombe classified the tobacco, and assigned duty as follows:

"A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers and not otherwise provided for.

"A duty of \$1.85 per pound shall be paid on—

"(A) All leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco, which other tobacco is the product of any other country or dependency.

"(B) All leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than 15 per cent of tobacco which is suitable for cigar wrappers.

"(C) All leaf tobacco suitable for cigar wrappers."

To this classification the appellants oppose that of the board of appraisers, as follows:

"First. Wrapper tobacco.

"Second. Filler tobacco mixed or packed with more than 15 per cent of wrapper tobacco.

"Third. All other filler tobacco."

If the classification of Judge Lacombe is correct the questions certified should be answered in the affirmative; if the classifica-

tion of the board of appraisers is correct they should be answered in the negative.

The language and arrangement of paragraph 213 supports Judge Lacombe. Regarding the language of the paragraph alone, it requires some ingenuity to create ambiguity. Dealing with wrapper tobacco, the paragraph provides, "wrapper tobacco . . . \$1.85 per lb." That is all unstemmed wrapper tobacco. There is no limitation or exception whatever. Dealing with filler tobacco, the paragraph provides, "filler tobacco, \*when mixed or packed with more than 15 per cent of wrapper tobacco, if unstemmed, \$1.85 per lb.; if stemmed, \$2.50 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35 cts. per lb.; if stemmed, 50 cts. per lb." In other words, so mixed, and as it is stemmed or unstemmed, \$2.50 or \$1.85 per lb. Filler not so mixed, as it is stemmed or unstemmed, 50 cts. or 35 cts. per lb. But all wrapper tobacco is dutiable at least at \$1.85. There is no condition except being stemmed or unstemmed that excepts any part of it or affects the rate upon it. And all filler tobacco is dutiable, but not all at the same rate. There is a condition which affects the rate. That condition is to be mixed with wrapper tobacco. The statute deals with each kind of tobacco separately. It does not qualify wrapper; it does qualify filler—mix wrapper with filler to the extent of more than 15 per cent and the wrapper does not become dutiable as filler—but filler becomes dutiable as wrapper—the mixture becomes in legal effect wrapper, and is dutiable at the same rate.

The appellants contest this interpretation, and contend that wrapper so mixed with filler, by the very terms of the statute escapes duty or would escape duty, "except that it falls under the last clause of the statute, and is to be classified as filler tobacco, not specially provided for in this act." If this contention is justified, it would seem as if wrapper tobacco becomes filler even by name, and the provisions of the statute are reversed, and their care to make wrapper dutiable and prevent and penalize evasions of the duty become a means of either exempting 15 per cent of it from duty or making it dutiable only as filler.

Considerations outside of the statute are, however, urged as tests of its meaning, and two propositions are advanced which, it is claimed, Congress must be presumed to have known and to which it addressed its legislation.

These are (1) that in commerce and among dealers in leaf tobacco the bale is the unit; (2) there is in bales of wrapper a certain amount of filler, and in filler bales there may be a small per cent of wrapper, but in trade it is not recognized. It is therefore contended (and we quote counsel) "that the words 'wrapper tobacco' in this section (213) have reference to the commercial terms 'wrapper tobacco,' meaning thereby bales of tobacco known as wrapper, although in every bale there is a quantity of tobacco not suitable for wrapper." That is, not the tobacco as such, but the form of its importation de-



termines the duty. The bale is the unit, and the unit must always be regarded. The different kinds of tobacco cannot be separated; they mingle in the unit bale as (the illustration is) different percentages of blood mingle in an animal, and by holding in mind that the bale is the unit, it will be seen that wrapper tobacco (15 per cent or less) cannot be "segregated and assessable as such any more logically than could the 15 per cent of Holstein blood in an 85 per cent Ayreshire cow."

But the difficulty is not holding in mind the idea that the bale is the unit, but in accepting it. To accept it we should have to impose it upon the statute. It is certainly not there by expression, and it is not new. It was contended for under the act of 1883 and supported by about the same arguments upon which it is now attempted to be supported. It was rejected in *Falk v. Robertson*, 137 U. S. 225, 34 L. ed. 645, 11 Sup. Ct. Rep. 41, in which the leaf, and not the bale, was decided to be the unit, and the act of 1883 dealt with percentages as much as the act of 1897. The act of 1883 provided that "leaf tobacco of which 85 per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, \$1 per pound. All other tobacco in leaf, unmanufactured, and not stemmed, 35 cents per pound."

But it is claimed that *Falk v. Robertson* is distinguishable from the case at the bar in that the different kinds of tobacco were not mingled, but were carefully separated and distinguishable in quantity and quality. Upon principle we think the difference does not distinguish the case from that at bar. The contention is, besides, answered by *Erhardt v. Schroeder*, 155 U. S. 124, 39 L. ed. 94, 15 Sup. Ct. Rep. 45. To the claims of the parties—one that the bale was the unit—the other that the different kinds of tobacco were, the court, by Mr. Justice Shiras, said:

[468] "The proper answer to this question seems to depend upon the particular circumstances of a given case.

"If, then, a bale or other separate and concrete quantity of leaf tobacco, contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, or other separate collection, would be the unit contemplated in the percentage and weight tests of paragraph 246. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

It is conceded that in *Erhardt v. Schroeder* it was decided that the bale was not the unit, but it is claimed that the decision was based upon the fact that the "whole importation was wrapper, and it made no difference what the unit was—as the result would be the same if the wrapper tobacco in every bale was 85 per cent." We think not. Tobacco of different kinds in one bale was respective-

ly assessed at 75 cents and 35 cents a pound. The tobacco in the other bales was assessed at 75 cents a pound. The claim of the importers was that it all should have been assessed at 35 cents, and in passing on the diverse contentions of the parties it was decided that the statute did not make an inflexible unit. What the unit would be, it was said, would depend upon the "particular circumstances of a given case." And speaking of the bale as such unit the court used the language we have already quoted.

Succeeding the act of 1883 came the act of 1890. Paragraphs 242, 243, provided as follows:

"Leaf tobacco, suitable for cigar wrappers, if not stemmed, \$2 per lb., if stemmed, \$2.75 per lb.: Provided, That if any portion of any tobacco imported in any bale, box, or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box, or package, or bulk, shall be dutiable; if not stemmed, at \$2 per lb.; if stemmed, at \$2.75 per lb.

"All other tobacco in leaf unmanufactured and not stemmed, 35c. per lb.; if stemmed, 50c. per lb." [26 Stat. at L. 585, chap. 1244.]

This language is seemingly very explicit as to the duties on the different kinds of tobacco, and very unambiguous as to the effect [469] of mingling them in bale, bag, package, or bulk. And Circuit Judge Cox pronounced it so in *Stachelberg et al. v. United States*, 72 Fed. Rep. 50.

We are, however, referred to an opinion of the board of appraisers, in the matter of the protest of Emilio Pons & Co., which, it is claimed, was an administrative interpretation of such paragraph, which not only determined its meaning, but the meaning of the provisions of subsequent laws.

The importation passed upon was of Havana tobacco, and the conclusions of the board were very disputable even on the specific facts of that case. The board found there was well-defined difference between Havana wrapper and filler, and that in the best selected grades of each there was from 5 to 15 per cent of the other, and that filler bales having less than 15 per cent of wrapper were not recognized in trade as filler having any portion suitable for wrappers; over that percentage the bales were known as part wrapper, and also known as self-working bales. From these facts the board concluded that less than 15 per cent was not an appreciable quantity, and made the following special finding of facts:

"(1) That the tobacco is semi-Vuelta, uniform in quality, length, and color, and is of the kind known in trade as Havana filler tobacco, leaf, unstemmed.

"(2) That it contains from 10 to 15 per cent of leaves that can be used for wrappers for inferior cigars, but no portion thereof is of the quality known as wrapper tobacco.

"(3) That it is of a kind used exclusively by larger manufacturers of cigars as fillers for cigars.

"We hold that, within the meaning of the

statute, there is no portion of the tobacco covered by this protest suitable for wrappers for cigars.

"The protest is sustained."

Counsel for the appellants say that the reasoning and spirit of this decision was accepted by the Treasury Department, but that its percentage was rejected. And well it might have been. The act which expressed in clear and definite words that the effect of mixing "any portion" of wrapper tobacco with filler tobacco in an importation was to [470] make "the entire quantity" \*dutiabie as wrapper, was interpreted to admit at filler duty 15 per cent of wrapper, a fraction less than was necessary to make a working bale, a bale with enough wrapper to use up the filler. This was a very liberal application of the maxim which expresses the disregard of the law for small things. If Congress did not intend to penalize an accidental or inevitable mixing of some leaves of wrapper with filler, it certainly did not intend to defeat or weaken its legislation. Giving the bale as a unit, as contended for; giving a fraction less than 15 per cent of its contents, though wrapper to be admitted at filler duty, how much wrapper would be otherwise imported?

However, the decision was rendered; how far was it a factor in determining the provisions of the act of 1894 (the Wilson act) and that of 1897, the act under consideration, must be passed upon.

Of the Wilson act we need only quote the following:

"Wrapper tobacco, unstemmed, imported in any bale, box, package, or in bulk, \$1.50 per lb.; if stemmed, \$2.25 per lb.

"Filler tobacco, unstemmed, imported in any bale, box, package, or in bulk, 35c. per lb.; if stemmed, 50c. per lb. Provided, that the term wrapper tobacco, whenever used in this act, shall be taken to mean that quality of leaf tobacco known commercially as wrapper tobacco.

"Provided further: That the term filler tobacco, whenever used in this act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco.

"Provided further: That if any bale, box, package, or bulk of leaf tobacco, of uniform quality, contains exceeding 15 per cent thereof of leaves, suitable in color, fineness of texture, and size for wrappers for cigars, then the entire contents of such bale, box, package, or bulk shall be subject to the same duty as wrapper tobacco." [28 Stat. at L. 522, chap. 349, §§ 184, 185.]

As it will be observed, that act was more circumstantial than the act of 1890. It defines wrapper tobacco as meaning that "quality of leaf tobacco known commercially as wrapper." And filler to mean "all leaf tobacco unmanufactured, not commercially known as wrapper tobacco." It did not provide, as the act \*of 1890 provided, if any portion of any tobacco imported be wrapper the entire quantity should be dutiable as wrap- [471] 280

per. It fixed the wrapper which would have that effect at an amount exceeding 15 per cent of leaves in any bale, box, package, or bulk of leaf tobacco of *uniform quality* . . . *suitable in color, fineness of texture, and size*, for cigars.

If anything can be inferred from the qualifications which we have put in italics as connecting the act with the decision of the board of appraisers in the Pons case the inference must be dropped as to the act of 1897. All those qualifications are omitted except that the quantity of wrapper tobacco in the importation which will affect with wrapper duty the filler with which it is mixed is retained. But it is retained in such context, as we have already said, so as not to exempt any wrapper tobacco from duty as such, though it may charge filler tobacco with wrapper duty. It would make this opinion too long to analyze the Wilson act. We are inclined to think it should be interpreted as we have interpreted the act of 1897. But if we concede the construction of the appellants, it can only come from the qualifying words we have indicated. If their presence in the Wilson act determines the construction contended for, their absence from the act of 1897 determines against the construction of the latter act contended for, as it is also determined against by the character of the act. It precludes the view that any wrapper tobacco is to be admitted to importation under filler duty. And why should it be? There is nothing in the trade conditions urged upon our consideration which requires it. The mixing of the tobacco which may accidentally or necessarily attend the manner of picking and packing is provided for, and the indulgence of the statute so clearly expressed and defined should not be extended to exempt any portion of either tobacco from its full duty by assuming or accepting the arbitrary idea that the statute addressed itself to bales of tobacco, and not to the tobacco in the bales.

*We therefore answer the questions certified by the Circuit Court of Appeals in the affirmative.*

\*LOUIS LOEB, Plff. in Err., [472]  
v.

TRUSTEES OF COLUMBIA TOWNSHIP,  
Hamilton County, Ohio.

(See S. C. Reporter's ed. 472-494.)

*Error to circuit court—jurisdiction of constitutional question—reference to opinion of lower court—jurisdiction of circuit court—action by assignee of township bonds—validity of statute for local assessment—statute partly valid—contract protected against change of state decisions.*

1. The jurisdiction of the Supreme Court of

NOTE.—As to diverse citizenship as ground for Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* (C. C. W. D. Va.) 1 L. R. 179 U. S.



the United States to review a decision of a circuit court under the act of Congress of March 3, 1891, § 5, on the ground that the Constitution or law of the state is claimed to be in contravention of the Constitution of the United States, is not limited to a case in which the constitutional question is raised by the plaintiff, but extends to every case in which either party claims that the state law is in contravention of the Federal Constitution and that claim is either sustained or rejected, if the unsuccessful party seeks to have the decision reviewed by the Supreme Court.

2. The opinion of a circuit court of the United States, regularly filed, and which has been annexed to and transmitted with the record to the Supreme Court of the United States, in accordance with rule 8, may be examined on the question of the jurisdiction to review the case by reason of a constitutional question, in order to ascertain whether either party claimed in the lower court that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States.
3. A municipal corporation is within the words "any corporation," in the judiciary act of August 13, 1888, chap. 866 (25 Stat. at L. 433, 434, § 1), under which the assignee of a chose in action made by a corporation and payable to bearer may invoke the jurisdiction of a Federal court on the ground of diverse citizenship without regard to the citizenship of the original holder.
4. The unconstitutionality of the mode of assessment provided by § 3 of Ohio Act Gen. Asscm. April 27, 1893 (if conceded), would not defeat the other portions of the act, which provide for the making of a street improvement and the issuance of bonds by the town to pay therefor.

A. 108, and note, and *Myers v. Murray*, N. & Co. (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

*On statutes part valid and part invalid*—see notes to *Titusville Iron Works v. Keystone Oil Co.* (Pa.) 1 L. R. A. 363, and *Fayette County v. People's & Drivers' Bank* (Ohio) 10 L. R. A. 196.

*As to change of decision of state court as impairing obligation of contract*—see notes to *Los Angeles v. Los Angeles City Water Co.* 44 L. ed. U. S. 886, and *Allen v. Allen* (Cal.) 16 L. R. A. 646.

*Opinion of the court below as part of the record on appeal to the Supreme Court of the United States.*

The question whether an opinion of the court below is to be regarded as part of the record has been the subject of numerous and somewhat inconsistent decisions in the Supreme Court of the United States.

The early rule in that court was that the opinion was not a part of the record, and could not be considered on appeal or writ of error. *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571; *Fisher v. Cockereil*, 5 Pet. 248, 8 L. ed. 114; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733.

This rule was established while the judiciary act of 1789 was in force, which expressly restricted the court to an examination of matters "on the face of the record."

Even where a state statute required the judges to "file their opinions in writing among the papers of the cause," it was held that such

5. The Federal courts, in determining contract rights as affected by a state Constitution, will enforce the contract in accordance with the Constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made.

[No. 42.]

*Argued April 27, 1900. Decided December 10, 1900.*

**I**N ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a decision for defendant in an action on township bonds. *Reversed.*

See same case below, 91 Fed. Rep. 37.

The facts are stated in the opinion.

*Mr. C. Hammond Avery* argued the cause, and, with *Messrs. J. W. Warrington* and *H. D. Peck*, filed a brief for plaintiff in error:

When a case falls within any of the six specified classes of § 5 of the judiciary act of March 3, 1891, a writ of error or an appeal may be taken directly from the circuit court to this court, no matter whether other questions are involved upon which the case might have been decided, or not.

*Holder v. Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

The court below could not have reached its decision without holding, as in truth it did hold, that the statute set out in the pe-

opinions did not become a part of the record. *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571.

But in cases reviewed by writ of error to the supreme court of Louisiana, the opinion of the court was from the beginning regarded as a part of the record under a statute of that state and the practice under it, by which the opinion of the court was entered on the record. *Grand Gulf R. & Bkg. Co. v. Marshall*, 12 How. 163, 13 L. ed. 938; *Cousin v. Labatut*, 19 How. 202, 15 L. ed. 601; *New Orleans Waterworks Co. v. New Orleans Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 681.

The state statute and practice, however, did not operate to make the opinion of the court a part of the record of a case in a circuit court of the United States sitting in Louisiana. *Parks v. Turner*, 12 How. 39, 13 L. ed. 883.

But the old rule was departed from in *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429, in which it was held that under a change in the language of the judiciary act, by which the words expressly limiting the court to the face of the record were omitted, there was no reason why the court should not look to the opinion of a state court whose decision was brought up for review, if such opinion was properly authenticated, in order to determine whether any Federal question had been passed upon in the state court. This decision was followed in *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 290; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Adams County v. Burlington & M. R. Co.* 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Detroit City R. Co. v. Guthard*, 114 U. S. 133,

tition contravenes the 14th Amendment to the Constitution of the United States.

*Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

A contractual obligation of the township to pay its bonds through general taxation arises out of the authority to issue them, independently of the provision to levy a special assessment therefor.

*State v. Fayette County Comrs.* 37 Ohio St. 526.

Bonds issued under an ordinance which declares in express language that they shall be paid out of special assessments are nevertheless an independent and collectable debt, even though the special assessment fails in whole or in part.

*United States v. Fort Scott*, 99 U. S. 152, 25 L. ed. 348.

What is termed the policy of the government with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in the interpretation of the statutes.

*Hadden v. Collector*, 5 Wall. 107, *sub nom. Hadden v. Barney*, 18 L. ed. 518.

The statute is severable in the sense that the assessment provision may be eliminated, and the rest of the act enforced in accordance with the main purpose of the legislature.

*Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *Fayette County Treasurer v. People's & Drivers' Bank*, 47 Ohio St. 503, 10 L. R. A. 196, 25 N. E. 697; *Bowles v. State*, 37 Ohio St. 35.

A change of decision by the court of last resort of Ohio did not affect the validity of the bonds, for they were issued and purchased on the faith of the original rule.

29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Jacks v. Helena*, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Kreiger v. Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

And this change in the rule is recognized in *United States v. Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

In the case of *Adams County v. Burlington & M. R. Co.* 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77, *supra*, it appeared that the opinion of the state court was required by the laws of the state to be filed before judgment was rendered; and in *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811, *supra*, it was said that the Constitution of the state required the opinion of the state court to be in writing signed by the judges concurring therein, and filed by the clerk. So in *Kreiger v. Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752, *supra*, reference was made to the Kentucky statutes, which required

*Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 634, 6 Sup. Ct. Rep. 413; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. Rep. 296.

*Mr. Wallace Burch* argued the cause, and, with *Messrs. Simeon M. Johnson* and *Oliver G. Bailey*, filed a brief for defendants in error:

The opinion in the court below, when transmitted with the record in accordance with rule 8, § 2, is no part of the record.

*England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287.

A Federal question cannot be imported into the cause by the assignment of errors, where the record does not show that such question was raised in the court below.

*Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

Neither the argument of counsel nor the opinion of the court below can be looked to for the purpose of deciding whether this court has jurisdiction.

*Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317.

Under § 5 of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517), the Federal question in the case should be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction.

*Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Spies v. Illinois*, 123 U. S. 131, *sub nom. Re Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *F. G. Oxley Slave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

When in any case the Constitution or law of a state is claimed to be in contravention of the Constitution or law of the United States, such Federal question must be raised

written opinions to be delivered by the state court and to be recorded by the clerk. And the court laid down the rule in *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 457, 42 L. ed. 539, 8 Sup. Ct. Rep. 121, in these words: "Whenever a case comes from the highest court of a state for review, and by statute or settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment." And again in *Jacks v. Helena*, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39, *supra*, it was said that the opinion of the state court, under the laws of the state, formed part of the record.

But these facts cannot be deemed material under the rule laid down in the other decisions as stated above.

In the other cases cited beginning with *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429, *supra*, the proper authentication of the opinion of the state court, when it was transmitted with the record in compliance with the 8th rule of the Supreme Court of the United States, was all that was mentioned as necessary to permit it to be considered for the purpose of de-



and presented by the record, precisely as like questions are presented under § 709, U. S. Rev. Stat.,—that is, the Federal question must be specially set up or claimed at the proper time and in the proper way.

*Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247, and cases cited; *Desty*, Federal Procedure, 9th ed. § 223, p. 770.

And the rights so set up must have been denied, either expressly or by necessary implication.

*Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Desty*, Federal Procedure, 9th ed. § 223, p. 770; *Seudder v. Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518.

The question which arises in a case in which part of a statute is sought to be eliminated because unconstitutional is not whether the legislature could have enacted such a statute, but whether it would have done so had it foreseen that such part of the statute would be declared unconstitutional.

*Virginia Coupon Cases*, 114 U. S. 304, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 197, 5 Sup. Ct. Rep. 903; *Cooley*, Const. Lim. 211; *Com. v. Hitchings*, 5 Gray, 482; *Warren v. Charlestown*, 2 Gray, 84; *Angell's note to Cooley's Const. Lim.* p. 212; *State ex rel. Walsh v. Dousman*, 28 Wis. 541; *Slauson v. Racine*, 13 Wis. 398; *Tate v. Parkland*, 11 Ky. L. Rep. 838, 13 S. W. 443; *Parkland v. Gaines*, 88 Ky. 562, 11 S. W. 649; *Root v. Cincinnati Bd. of Edu.* 52 Ohio St. 589, 41 N. E. 135; *State ex rel. Huston v. Perry County Comrs.* 5 Ohio St. 497; *Ska-git County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458; *Jones v. Memphis*, 101 Tenn. 188, 47 S. W. 136.

The sections in question are connected in subject-matter, and were intended to operate together.

termining whether or not a Federal question was decided by the state court. In the language of Mr. Justice Harlan in the principal case: "We have done this without stopping to inquire whether there was any statute of the state requiring the opinion of the court to be filed in the case as part of the record."

But in seeking to determine the ground upon which the judgment of the state court proceeded, no effect can be given to an abstract portion of the opinion upon which no judgment was rendered. *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113.

The court said that, even if the opinions of the state court were part of the record, the United States Supreme Court could only look into them for the purpose of discovering the ground upon which the judgment of the state court actually proceeded.

And where the record shows upon its face that a Federal question was not necessarily involved and does not show that one was raised, the Supreme Court will not go outside of it to the opinion or elsewhere to ascertain whether one was in fact decided. *Moore v. Mississippi*, 21 179 U. S.

*Loeb v. Columbia Twp.* 91 Fed. Rep. 37; *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392.

A whole act must be declared invalid when it is apparent, from an inspection of it, that certain invalid portions formed the inducement or consideration for its passage.

*Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.

\*Mr. Justice Harlan delivered the opinion of the court: [473]

This action was brought in the court below by Loeb, a citizen of Indiana, against the trustees of Columbia township in Hamilton county, Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the township. After argument the demurrer was sustained, and, the plaintiff electing not to plead further, judgment was rendered for the defendant.

The suit is upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits.

The questions to be considered relate to the jurisdiction of this court, the validity under the Constitution of the United States of an act of the general assembly of Ohio in virtue of which the bonds in suit were issued, and the applicability in this case of certain decisions of the supreme court of the state rendered after such bonds were executed and delivered.

The pleadings and orders of court make the following case:

The petition alleged that on April 27th, 1893, the general assembly of Ohio passed an act by the 1st section of which the trustees of that township were authorized and required to widen and extend Williams avenue between certain points named, and to appropriate and enter upon and hold any real estate within the township necessary for such purpose;

That by the 2d section of the act the town-

Wall. 636, 22 L. ed. 653; *Citizens' Bank v. Louisiana Bd. of Liquidation*, 98 U. S. 140, *sub nom. Louisiana ex rel. Citizens' Bank v. Louisiana Bd. of Liquidation*, 25 L. ed. 114.

The Supreme Court cannot refer to the opinion of the court below for the purpose of eking out, controlling, or modifying the scope of the findings of that court. *Saltonville v. Birtwell*, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 169; *Stone v. United States*, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71.

The object and effect of the 8th rule of the Supreme Court of the United States must be deemed, in view of the decision in the principal case, to be the same whether the case reviewed comes from a state court or a circuit court of the United States, despite the apparent holding to the contrary in *England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287, which the later decision interprets as an adjudication that the opinion of the circuit court cannot, under the 8th rule, be referred to for the purpose of ascertaining the evidence or the facts found below upon which the judgment was based.



ship trustees were directed to "immediately make application to the probate court of the county as provided in § 2236 of the Revised Statutes of Ohio, and thereafter, as far as practicable, the proceedings shall conform to and be had under the provisions of §§ 2236 to 2261, inclusive, of the Revised Statutes of Ohio;" and,

[474] That by the 4th section it was provided that "for the purpose of raising money necessary to meet the expense of the improvement, the trustees of said township are hereby authorized and directed to issue the bonds of the township, payable in instalments or at intervals not exceeding in all the period of \*6 years, bearing interest at the rate of 6 per cent per annum, which bonds shall not be sold for less than their par value." 90 Ohio Local Laws, 251.

The petition did not set out the 3d section of the act. But as it was the duty of the circuit court to take notice of its provisions, and as it must be referred to in order to dispose of the questions arising on this record, it is here given in full:

"The trustees shall receive reasonable compensation for their services, which shall not exceed the sum of \$25 each, which, with all costs and expenses of constructing said improvement, together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon *each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned in § 1 hereof*, and shall be a lien from the date of the assessment upon the respective lots or parcels of lands assessed; said assessment shall be payable in five annual payments, and shall be paid to the township treasurer; and the option of paying his portion of such assessment in full within a period of twenty days from the date of the levy thereof shall be given to each of the property owners, but no notice to the property owners of such option shall be necessary. The township treasurer shall, on or before the 2d Monday of September, annually, certify all unpaid assessments to the county auditor, and the same shall be placed on the tax list, and shall be, with 10 per cent penalty to cover interest and cost of collection, collected by the county treasurer in the same manner as other taxes are collected, and when collected he shall pay the same to the township treasurer; and all moneys received by the township treasurer on such assessments shall be applied to the payment of the bonds issued under this act, and for no other purpose; and for the purpose of enforcing the collection of the assessments so certified to him the county treasurer shall have the same power and authority now allowed by law for the collection of state and county taxes." 90 Ohio Local Laws, 251.

[475] It further appears from the petition that the township trustees appropriated land for the avenue in the manner provided in the act; and that for the purpose of raising the money necessary to \*meet the expense of the appropriation the trustees, on or about September 29th, 1894, duly executed and issued, in proper form and in accordance with the terms and provisions of the act, twenty-five

bonds of Columbia township of \$500 each, five payable respectively in one, two, three, four, and five years each, and one for \$432 payable one year from date, all of the above date, and numbered consecutively from 1 to 26 inclusive, and all payable to the order of the bearer, at the office of the treasurer of the county, and bearing interest represented by coupons attached, at the rate of 6 per cent per annum, payable semi-annually, on the 29th days of March and September of each year; that on or about the September, 1894, the bonds were sold by the township to a bona fide purchaser and the highest bidder for \$13,325 and accrued interest; that on or about September 29th, 1895, the trustees paid bonds Nos. 1, 2, 3, 4, and 5, then due, each for \$500, and No. 26 for \$432, and the interest coupons payable on the date last named on the entire issue of the twenty-six bonds; and that on March 29th, 1896, the trustees paid the interest coupons, due on that day, on the twenty bonds remaining unpaid, including bonds numbered 6, 7, 8, 9, and 10.

The petition set out each of the bonds last named, and alleged that the plaintiff was the bona fide owner and holder for value of each of them, and had demanded payment of each in accordance with its terms, but that payment was refused.

The bonds dated September 29th, 1894, were signed by the trustees and attested by the seal of the township, and were alike in form. Each recited that it was "one of a series of twenty-five bonds of \$500 each, issued by virtue of an act of the general assembly of the state of Ohio, passed April 27th, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike, and one bond for \$432 for the payment of \$12,932, for widening and extending said avenue;" and that "by virtue of said act, the trustees of Columbia township hereby acknowledge said township indebted to the bearer in the sum of \$500, \*which sum they, [476] as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September, 1896, and also interest thereon at the rate of 6 per cent per annum, payable semi-annually, on the 29th days of March and September of each year, during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached."

A judgment was asked for the amount of bonds 6 to 10 inclusive, with the interest thereon.

The record contains in full the opinion rendered and filed by the court when disposing of the demurrer. 91 Fed. Rep. 37. In that opinion it is expressly stated that the following points were made in argument in support of the demurrer:

1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action, because the bonds



were payable to bearer, and were not made by a corporation.

2. That the act of the general assembly, under and by virtue of which the bonds were issued, was in violation of the Constitution of the state, and therefore the bonds were invalid.

3. That the act contravened the provisions of the Constitution of the United States, and therefore the bonds were invalid.

It appears from the opinion of the circuit court that the first and second of these points were ruled in favor of the plaintiff. But the third point was decided for the defendant the court being of opinion that according to the principles laid down in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, the law under which the bonds sued on were issued was repugnant to that clause of the 14th Amendment of the Constitution of the United States forbidding a state to deprive any person of property without due process of law. In disposing of the third point the court referred to the propositions made in its support as having been "claimed" by the township.

I. The first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the circuit court.

[477] \*By the 5th section of the circuit court of appeals act, appeals or writs of error may be prosecuted to this court from the circuit courts "in any case in which the Constitution or law of a state is *claimed* to be in contravention of the Constitution of the United States." 26 Stat. at L. 826, 827, 828, chap. 517.

The petition shows that the parties are citizens of different states. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court.

Is not this court, however, sufficiently informed by the record that the defendant township, under its general demurrer, "claimed" in the circuit court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the Constitution of the United States?

It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the *defendant* of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the 5th section is not justified by its words. Our right of review by the express words of the statute extends to "any case" of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. That section differs from § 709 of the Revised Statutes relating to the review by this court 179 U. S.

of the final judgment of the highest court of a state in this, that under the latter section we can review the final judgment of the state court upon writ of error sued out by the party who is denied a right, privilege, or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution \*of the United [478] States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state law is in contravention of the Constitution of the United States. If the circuit court had adjudged in this case that the township's claim of unconstitutionality was without merit, and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the circuit court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the state law upon which his action depended was, upon his adversary's claim, stricken down as void under the Constitution of the United States? Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of Congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff? The answer to these questions has already been indicated.

It is true that the plaintiff might have carried this case to the circuit court of appeals, and, a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court; for, as said in *Robinson v. Caldwell*, 165 U. S. 359, 362, 41 L. ed. 745, 746, 17 Sup. Ct. Rep. 343, "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals," although the latter \*court, before disposing of [479] a case which might have been brought here directly from the circuit court, may certify to this court questions or propositions as indicated in the 6th section of the above act. But the plaintiff was not bound to go to the circuit court of appeals, and thereby cut

himself off from the right to have this court declare whether the circuit court erred in holding that the state law upon which he relied for judgment was repugnant to the Constitution of the United States.

Cases in this court are cited which hold that where the plaintiff invokes the jurisdiction of the circuit court solely upon the ground of diverse citizenship, and where the claim of the invalidity of a state statute under the Constitution of the United States came from the defendant, or arose after the filing of the petition or during the progress of the suit, then the judgment of the circuit court of appeals is final within the meaning of the 6th section of the act of 1891 (26 Stat. at L. 826, 828, chap. 517), declaring that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." *Colorado C. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer v. Idler*, 159 U. S. 408, 414, 40 L. ed. 199, 201, 16 Sup. Ct. Rep. 34; *Ex parte Jones*, 164 U. S. 691, 693, 41 L. ed. 601, 602, 17 Sup. Ct. Rep. 222.

When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the 5th section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a state law was repugnant to the Constitution of the United States. In the present case the circuit court, upon the claim of one [480] of the parties, \*applied the Constitution to the case, and put the plaintiff out of court. *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969. Any other interpretation of the statute is inconsistent with the equal right of the plaintiff with the defendant to come here, if unsuccessful, in a case embraced by the 5th section. Here the plaintiff could not have raised in his petition any question of a Federal right. He sued on the bonds held by him, and sought only a judgment for money. His cause of action was not Federal in its nature. He therefore could not have invoked the jurisdiction of the circuit court upon any ground except that of diverse citizenship. He could not have added to or enforced jurisdiction by anticipating the defense and alleging in his petition that the defendant township would in its answer claim that the state statute in question was in contravention of the Constitution of the United States; for that would have been matter of defense, and the allega-

tion could, on motion, have been properly stricken from the petition. Nevertheless, the case is one in which there was a claim that a state law was repugnant to the Constitution of the United States.

The views expressed by us as to the scope of the act of 1891 are supported by *Holder v. Aultman, M. & Co.* 169 U. S. 81, 88, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269. That was an action in the circuit court of the United States for the eastern district of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a Federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: "The circuit court, in giving judgment for the plaintiff, held that the contract was made in the state of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that state under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 Fed. Rep. 467. This was therefore a 'case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3d, \*1891, chap. 517, § 5. 26 Stat. [481] at L. 828. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238, 40 L. ed. 406, 411, 16 Sup. Ct. Rep. 297; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223."

This brings us to the inquiry whether it can be assumed from the present record that a claim was made in the circuit court that the statute of the state under the authority of which the bonds in suit were issued was invalid under the Constitution of the United States. There can be but one answer to this question, if we may look to the opinion filed by the circuit court when it disposed of the demurrer. Although the demurrer was general in its nature, it referred to the petition and its allegations, and thus brought to the attention of the court the state enactment under which the bonds were issued; and it was certainly competent for the township to claim at the hearing of the demurrer that such enactment upon its face was repugnant to the Constitution of the United States, and therefore void. Turning to the opinion of the circuit court, made part of the transcript, we find it expressly stated therein, not only that such a claim was made by the township on the hearing of the demurrer, but that the judgment sustaining the demurrer and



dismissing the petition was placed upon the sole ground that the claim that the state law contravened the Constitution of the United States was well made.

Is the opinion of the circuit court of no value to us when considering this case? May we not look to it for the purpose of ascertaining whether it was claimed that the state law contravened the Constitution of the United States? It is said that we cannot, and that view is supposed to be sustained by *England v. Gebhardt* (1884) 112 U. S. 502, 505, 506, 28 L. ed. 811, 812, 5 Sup. Ct. Rep. 287, which was a writ of error to review a judgment of a circuit court remanding to the state court a case removed therefrom under § 5 of the act of March 3d, 1875, chap. [482] 137 (18 Stat. at L. 472). In the \*petition for removal in that case it was averred that the parties to the suit were citizens of different states, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was, of course, based upon facts brought to the attention of the court in the proper form. But the facts bearing upon the question of diverse citizenship did not appear in a bill of exceptions, nor in an agreed statement of facts, nor in a special finding in the nature of a special verdict, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court held that the affidavits formed no part of the record, saying: "The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant v. State Bank*, 12 How. 371, 384, 13 L. ed. 1028, 1033; *Fisher v. Cockerell*, 5 Pet. 248, 254, 8 L. ed. 114, 116. This must be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done." The opinion thus concluded: "Neither is the opinion of the court a part of the record. Our rule 8†, § 2, requires a copy of any opinion that is filed in a cause be annexed to and transmitted with the record, on a writ of error or an appeal to this court; but that of itself does not make it a part of the record below." That language is not to be taken too broadly or without reference to the particular case then before the court. What was said may undoubtedly be taken as an adjudication that the opinion of the court cannot, under our rule, be referred to for the purpose of [483] ascertaining the evidence or the facts \*found

†*Writ of Error, Return and Record*.—1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.  
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below upon which the judgment was based; but not as precluding this court from looking into the opinion of the trial court for any purpose whatever; as, for instance, for the purpose of ascertaining whether either party claimed, in proper form, that a state law upon which some of the issues depended was in contravention of the Constitution of the United States. The principal, if not the only, object of requiring the opinion to be annexed to and transmitted to this court was that we might be informed of the grounds upon which the court below proceeded. Unless the rule had at least that object why should it have been adopted?

In *United States v. Taylor*, 147 U. S. 695, 700, 37 L. ed. 335, 337, 13 Sup. Ct. Rep. 479, which came from a circuit court of the United States, this court said: "It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record (*Williams v. Norris*, 12 Wheat. 117, 119, 6 L. ed. 571; *Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317); but the inconvenience of this rule became so great that it was subsequently changed (*Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429), and, finally, the 8th rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript."

In *Sayward v. Denny*, 158 U. S. 180, 181, 39 L. ed. 941, 15 Sup. Ct. Rep. 777, in which the question was whether it sufficiently appeared from the record that the state court had denied any Federal right or immunity specially set up or claimed by the party who invoked our jurisdiction, the Chief Justice observed that certain propositions must be regarded as settled,—one of which was that the arguments of counsel formed no part of the record, "though the opinions of the state courts are now made such by rule,"—citing, among other cases, *United States v. Taylor*, above, referred to.

The rule of our court referred to does not apply alone to cases brought here from the highest court of a state. It applies, in terms, to all cases brought to this court by writ of error or appeal. What, therefore, was said in the above cases as to the object and effect of the rule applies to records from a circuit court of the United States.

Some light is thrown upon this question by the decisions in cases from the highest courts of the states. In *Murdock v. Memphis*, 20 Wall. 590, 633, 22 L. ed. 429, 443, it was said that in determining whether a Federal question was actually raised and decided in the state court "this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common-law phrase at the time that statute [act of 1789] was enacted. But the statutes of the states and new modes of proceedings in those courts have changed and confused the matter very much since that time." After observing that it was in reference to one of the necessities thus brought about that this



court had long since determined to consider as part of the record the opinions delivered in such cases by the supreme court of Louisiana, it was said: "And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question."

The subject was again considered in *Gross v. United States Mortg. Co.* 108 U. S. 477, 486, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940, which came from the supreme court of Illinois. After referring to what was said in *Murdock v. Memphis*, this court said: "We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title, or immunity under the Constitution or laws of the United States, and specially set up and claimed by the party bringing the writ." It is true that in that case the court stated that any difficulty upon the subject was removed by the statutes of Illinois regulating that subject; but the decision was not placed upon that ground.

It has long been the practice of this court in cases coming from a state court to refer to its opinion made part of the record, for the purpose of ascertaining whether any Federal right specially set up or claimed had been denied to the plaintiff in error, or whether the judgment rested upon any [485] ground of \*local law sufficient to dispose of the case without reference to any question of a Federal character. And we have done this without stopping to inquire whether there was any statute of the state requiring the opinion of the court to be filed in the case as part of the record.

For the reasons we have given it must be held that in a case brought here from a circuit court the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States. By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.

The result is that this court has jurisdiction to review the judgment of the circuit court, and to determine every question properly arising in the case. We may therefore determine whether the court below erred in sustaining the demurrer to the petition.

II. One of the questions arising upon the record is whether the defendant township is a corporation within the meaning of that

clause of the judiciary act of August 13th, 1888, chap. 866 (25 Stat. at L. 433, 434, § 1), which excludes from the cognizance of a circuit or district court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This question affects the jurisdiction of the circuit court to take cognizance of this case.

When the act of 1888 was passed it was the established law that a municipal corporation created under the laws of a state, with power to sue and be sued and to incur obligations, was to \*be deemed a citizen of [486] that state for purposes of suit by or against it in the courts of the United States. In *Cowles v. Mercer County*, 7 Wall. 118, 122, *sub nom. Mercer County Suprs. v. Cowles*, 19 L. ed. 86, 88, this court said: "It is enough for this case that we find the board of supervisors [of the county] to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. ed. 766, 767, 10 Sup. Ct. Rep. 363; *McCoy v. Washington County*, 3 Wall. Jr. 381, 384, Fed. Cas. No. 8,731; *Dillon, Removal of Causes*, § 105. We perceive nothing in that act indicating any purpose of Congress to exclude from the jurisdiction of the circuit courts of the United States suits by or against municipal corporations having authority by the laws creating them to sue or to incur liabilities in their corporate name. It must therefore be taken that the words "any corporation," in the act of 1888, include municipal as well as private corporations. And it is the settled law of Ohio that a township is suable on account of any liabilities incurred by it. *Harding v. New Haven Twp.* 3 Ohio, 227; *Concord Twp. v. Miller*, 5 Ohio, 184; *Wilson v. Trustees of No. 16*, 8 Ohio, 174. Now, by the statutes of Ohio, the defendant township was constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law, and was made capable of suing and being sued, pleading and being impleaded. 1 *Bates's Anno. Stat. Ohio*, § 1376. It was created for purposes of local administration, and is a corporation. *Fairfield Twp. Bd. of Edu. v. Ladd*, 26 Ohio St. 210, 213; *Lane v. State*, 39 Ohio St. 314. As, therefore, the bonds in suit were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a state different from that of which the township was a corporation, was entitled to sue upon them without reference to the citizenship of any prior holder. *Thompson v. Perrine*, 106 U. S. 589, 592, 593, 27 L. ed. 298, 300, 1 Sup. Ct. Rep. 179 U. S.



564, 568. This point was properly decided for the plaintiff.

III. Was the statute under which the bonds in suit were issued in violation of the [487] Constitution of the United States? \*The circuit court held that it was; and, the plaintiff having elected to stand upon his petition, the action was dismissed.

Looking at all the provisions of the statute that court held that the case was embraced by *Norwood v. Baker*, 172 U. S. 269, 279, 297, 43 L. ed. 443, 447, 454, 19 Sup. Ct. Rep. 187, and upon the authority of that case held that the bonds were issued in contravention of the 14th Amendment of the Constitution of the United States, prohibiting the taking of property without due process of law.

In *Norwood v. Baker* it was said that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," and that the assessment involved in that case, made against abutting property, to pay the cost and expense of opening a street in a village, was illegal and void because made "under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

We are of opinion that the circuit court erred in holding that the petition made a case that necessarily brought it within the decision in *Norwood v. Baker*, so far as the relief sought by the plaintiff was concerned.

We have seen that the 1st section of the act of 1893 authorized and required the improvement to be made, and directed the township to appropriate, enter upon, and hold any real estate necessary for such purpose; that the 2d section directed that proceedings for condemnation be immediately taken in the probate court under specified sections of the Revised Statutes of Ohio; that the 3d section prescribed how the assessment to meet the cost of improvement shall be made namely "upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned;" and that a separate section, the 4th, directed bonds to be issued "for the purpose of raising money necessary to meet the expense of the improvement."

[488] \*The 2d section of the act directed the trustees of the township to make immediate application to the probate court of the county, as provided in § 2236 of the Revised Statutes of Ohio, and declared that the proceedings thereafter, as far as practicable, should conform to the provisions of §§ 2236 to 2261, inclusive. Those sections do not relate to modes of assessment, but only to the steps to be taken by a municipal corporation when it appropriates private property for public [489] 179 U. S. U. S., Book 45.

purposes. From other sections of those statutes it appears that when the municipal corporation appropriates or otherwise acquires lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may decline to assess the cost and expenses of such appropriation, or acquisition, and of the improvement, upon the general tax list in which case the same "shall be assessed upon all the taxable real and personal property in the corporation." § 2263. But by § 2264 it is provided that in all cases where an improvement of any kind is made of an existing street, alley, or other public highway, and the council declines to assess the costs and expenses or any part thereof on the general tax list, the amount not so assessed shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvements, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance, "setting forth specifically the lots and lands to be assessed, may determine before the improvement is made,"—the assessments to be payable in one or more instalments, and at such times as the council might prescribe.

Now let it be supposed that the 3d section of the special act in question prescribed a rule by which all inquiry is precluded in respect of special benefits accruing to the adjoining property owners, and that an assessment under that section would be invalid under the decision in *Norwood v. Baker*, as taking private property for public use without just compensation,—\*upon which ques- [489] tion we express no opinion,—would it follow that the township would escape liability on the bonds? We think not. The 4th section of the act, authorizing and directing bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections 1 and 2, even if section 3 were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due, as well as the interest accruing thereon from time to time, are distinct and separable matters.

If the act under which the bonds were issued had not contained any provision whatever for an assessment to raise money to meet them, the township could not have repudiated its obligation to pay the bonds; for in the act would be found the command of the legislature to widen and extend Williams avenue, to immediately secure by proceedings in the probate court the land required for the proposed work, to issue bonds to raise the money necessary to meet the expenses of the improvement. We ought not to hold the statute invalid if it failed to provide some



legal mode of assessment to raise money to pay the bonds when they matured, with the interest accruing thereon. The statute, so far as the question of the power to issue bonds and put them on the market is concerned, may be carried into effect without reference to the 3d section. So that, if that section were held void under *Norwood v. Baker*, the remaining sections, being valid, can stand and their provisions be executed.

There is some ground for saying that the legislature would not have passed the act without the 3d section; and that was the view expressed by the learned judge who tried the case below. But we do not think that such is so manifestly the case as to justify the courts in refusing to execute the valid parts of the statute when that can be done in harmony with the intention of the legislature to have the improvement in question made by the township and its cost met by issuing bonds. We think the case comes within *Fayette County Treasurer v. People's & Drivers' Bank*, 47 Ohio St. 503, 523, 10 L. R. A. 196, 25 N. E. 697, in which the court said:

[490] "The question \*arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other."

The relief asked, and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the 3d section of the act of 1893 can be legally pursued; and, if not, whether the laws of the state do not authorize the adoption of some other mode by which the defendant can be compelled to meet the obligations it assumed under the authority of the legislature of the state. All that we now decide is that, even if the 3d section of the state statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a judgment against the township. Whether a judgment if rendered could be collected, without further legislation, depends upon considerations that need not now be examined.

IV. But it is contended that, independently of any question of Federal law, the stat-

ute of Ohio under which the bonds were issued was in violation of the Constitution of that state in that, when requiring the defendant township to widen and extend the avenue in question, the legislature exercised administrative, not legislative, powers. This contention is not supported by the decisions \*of the supreme court of Ohio made prior to [491] the issuing of these bonds. Those decisions were to the contrary.

In *State ex rel. Hibbs v. Franklin County Comrs.* 35 Ohio St. 458, 467, decided in 1880, the question was directly presented as to the validity under the Constitution of Ohio of a statute authorizing and directing a particular county to levy a special tax, not to exceed a given amount, for the purpose of building, grading, and gravelling or macadamizing a named public highway. On behalf of the county it was insisted that the legislature could not constitutionally compel it or the people to make an improvement of merely a local character, for the reason that the local authorities were made by the Constitution the sole judges of the necessity of such an improvement. The supreme court of the state said: "The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the Constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards, shall have power of local taxation as may be prescribed by law.' Art. 10, § 7. Manifestly this is no limitation on the power of the general assembly; and the inquiry therefore is as to the extent of such power. That it is only legislative is conceded, but that is undeniably a very broad power, and includes, generally the right to direct, *in invitum*, the construction and repair of public highways, and the levy of taxes to defray the necessary expenses thereof. That the power is liable to great abuse is denied by no one, but the responsibility, as well as the power, rests with the legislature."

But in *State ex rel. Broerman v. Hamilton County Comrs.* 54 Ohio St. 333, 43 N. E. 587, and *Hixson v. Burson*, 54 Ohio St. 470, 43 N. E. 1000, decided in 1896, the principle announced in *State ex rel. Hibbs v. Franklin County Comrs.* was declared to be unsound. In the first case the supreme court of Ohio held to be invalid an act of the legislature which, without the petition of anyone interested, authorized certain local improvements to be made with the consent of the county commissioners, but which was so framed as to require the commissioners to proceed in the way and to the extent mapped out by the legislature. The court \*said that [492] the act was "an assumption of powers over the affairs of a county not possessed by the general assembly,—it is administrative in character, and not legislative. . . . It is simply a usurpation of the powers heretofore always allowed to the proper administrative boards selected by the people of the localities concerned, in the exercise of the



right of local self-government." In the latter case the court expressly overruled the second syllabus in *State ex rel. Hibbs v. Franklin County Comrs.* (which under the statutes of Ohio is to be regarded as presenting the point adjudged), stating that "an act providing for the improvement of a designated county road is local in its nature, and not in conflict with art. 2, § 26, of the Constitution, which provides that 'all laws of a general nature shall have a uniform operation throughout the state.'"

What, under these circumstances, was the duty of the circuit court? That court, speaking by Judge Thompson, held that its duty was to enforce the provisions of the Constitution of Ohio as interpreted by the supreme court of that state at the time the bonds were issued, and not permit the contrary decisions, made after the bonds were issued, to have a retroactive effect. This was in accordance with the long-established doctrine of this court, to the effect that the question, arising in a suit in a Federal court, of the power of a municipal corporation to make negotiable securities, is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation. Our decisions to that effect are so numerous that any further discussion of the question is unnecessary, and we need only cite some of the adjudged cases. *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 432, 14 L. ed. 997, 1003; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Taylor v. Ypsilanti*, 105 U. S. 60, 71, 26 L. ed. 1008, 1012; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Green County v. Conness*, 109 U. S. 104, 105, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Anderson v. Santa Anna*, 116 U. S. 356, 361, 362, 29 L. ed. 633, 635, 6 Sup. Ct. Rep. 413; \**German Sav. Bank v. Franklin County*, 128 U. S. 526, 539, 32 L. ed. 519, 525, 9 Sup. Ct. Rep. 159; *Wade v. Travis County*, 174 U. S. 499, 510, 43 L. ed. 1060, 1065, 19 Sup. Ct. Rep. 715.

It should be here said that the doctrine of prior cases was not in any wise changed or impaired by the decision in *Central Land Co. v. Laidley*, 159 U. S. 103, 111, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80, in which it was held that, under the statute giving this court authority to review the judgment of the highest court of the state, we were without jurisdiction if the action of that court was impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but had followed its decisions of a contrary character rendered after his rights had accrued. This court held that a mere change of decision in the state court did not present a question of Federal right under that clause of the Constitution of the United States prohibiting a

state from passing any law impairing the obligation of contracts, that the question of such impairment did not arise unless the judgment complained of gave effect to some provision of the state Constitution, or some enactment claimed by the defeated party to impair the obligation of the particular contract in question. As, however, the circuit courts of the United States are courts of "an independent jurisdiction in the administration of state laws co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws" (*Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Folsom v. Township Ninety-six*, 159 U. S. 611, 624, 625, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174), they may, in suits within their jurisdiction, properly hold, as in numerous cases this court has held, that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the state at the time such rights accrued. The statutory provision that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply (U. S. Rev. Stat. § 721), has not been construed as absolutely requiring conformity, in such cases, to decisions of the \*state courts[494] rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character.

It results that the circuit court did not err in overruling the point raised under the demurrer at the hearing below, to the effect that the state enactment was invalid under the Constitution of the state.

The judgment is reversed, and the cause remanded with directions for further proceedings consistent with law and this opinion.

*Reversed.*

UNITED STATES, *Appt.*,  
v.

CHOCTAW NATION and Chickasaw Nation.

WICHITA and Affiliated Bands of Indians,  
*Appts.*,

v.  
CHOCTAW NATION, Chickasaw Nation,  
and United States.

CHOCTAW NATION and Chickasaw Nation,  
*Appts.*,

v.  
UNITED STATES and Wichita and Affiliated Bands of Indians.

(See S. C. Reporter's ed. 494-552.)

*Indian lands—effect of treaty—estoppel—jurisdiction of court of claims—intent of*

*Indians—implied trust—effect of appropriation act—requiring release of interest in other lands.*

1. An Indian tribe, by accepting without objection a congressional grant whose boundaries are identical with those mentioned in the treaty in pursuance of which the grant was made, and conform to the lines described in an earlier treaty so far as they are contained within the limits of the United States, is estopped to claim under the earlier treaty any lands not within such limits.
2. The obvious palpable meaning of the words of an Indian treaty may not be disregarded because of the dependent character of the Indians, or because, in the judgment of the court, the Indians may have been overreached.
3. No authority to determine the relative rights of the parties to an Indian treaty to the land therein conveyed, upon the ground of mere justice or fairness, was conferred upon the court of claims by the jurisdictional act of March 2, 1895 (28 Stat. at L. 876, 898, chap. 188), authorizing suit to be brought to determine the rights of the parties thereto, provided that nothing contained therein shall be deemed an admission by the United States that the Indian tribes have any claim to or interest in the lands or any part thereof.
4. An intention of the Choctaw and Chickasaw Nations to pass to the United States by the treaty of 1866 an absolute title to the "leased district," and to abrogate the existing lease, is apparent from the failure to accompany the cession of the lands with any declaration of trust in respect to them, while the money to be paid by the United States in consideration of the cession was to be invested and held in trust for certain specified objects.
5. The absolute cession to the United States, apparently made by the Choctaw and Chickasaw Nations in the treaty of 1866, of the "leased district" then held by the United States under a prior treaty for the permanent settlement of other Indians, will not be deemed to be attended with a trust for the settlement of Indians because of a statement by the United States' representatives in the preliminary negotiations that the new treaty to be made with the Indian tribes must provide that a portion of the lands hitherto owned and occupied by them must be set apart for the friendly tribes, and must exclude white settlers from the territory.
6. That the result of accepting the interpretation placed by the United States upon the treaty of 1866 with the Choctaw and Chickasaw Nations will be to render the general government less liberal towards them than towards other tribes constitutes no reason why the court should depart from the ordinary signification of the words used in the treaty.
7. A declaration in the act of Congress of March 3, 1891 (26 Stat. at L. 989, 1025, chap. 543), appropriating a sum to the Choctaw and Chickasaw Nations for their claims to lands situated within the "leased district," that the cession made by the treaty of 1866 was attended by a trust, is not sufficient to defeat as to other lands in such district the absolute, unconditional cession which the words of the treaty manifestly import, in view of the subsequent enactment reciting that the government was not committed to the payment of any further sum to those nations for any alleged interest in the remainder of the leased district, and of the proviso in the act authorizing the submission of their claim to the courts, that it should not be construed as an admission of the existence of such claim.
8. A release by the Wichita and Affiliated Bands of Indians, of all claims to any and all lands within the limits of the United States, except those allotted to them, cannot be made a condition of a decree for compensation on account of surplus lands under the treaty of 1891, under the act of Congress of March 2, 1895 (28 Stat. at L. 876, 895-897, chap. 188), which authorizes the court of claims to determine the claim of the Choctaw and Chickasaw Nations to an interest in such lands as are within the "leased district," and the claim of the Wichita Indians to be compensated in money for their possessory right in such land.

[Nos. 88, 89, 90.]

*Argued March 7, 8, 9, 1900. Decided December 10, 1900.*

**A**PPPEAL from a decree of the Court of Claims determining rights of Indians in lands and proceeds thereof. *Reversed.*

See same case below, 34 Ct. Cl. 17.

The facts are stated in the opinion.

**Messrs. George T. Barnes and J. M. Wilson** argued the cause and filed briefs for the Choctaw Nation.

**Mr. Robert L. Owen** also filed a brief on behalf of the Choctaw Nation.

**Mr. Halbert E. Paine** argued the cause and filed a brief for the Chickasaw Nation.

**Messrs. Philip Walker and Andrew A. Lipscomb** argued the cause, and, with **Messrs. Josiah M. Vale and William C. Shelley**, filed a brief for the Wichita and Affiliated Bands of Indians.

**Mr. C. C. Binney** and **Attorney General Griggs** argued the cause and filed a brief for the United States.

Contentions of counsel sufficiently appear in the opinion.

\***Mr. Justice Harlan** delivered the opinion—[496] ion of the court:

On the 4th day of June, 1891, an agreement was entered into between commissioners on behalf of the United States and the Wichita and Affiliated Bands of Indians, in the Indian territory, whereby those Indians did "cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever," to the United States "all their claim, title, and interest of every kind and character" to the land embraced in the following boundary: "Commencing at a point in the middle of the main channel of the Washita [Wichita] river where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40' west longitude, thence on said line of 98° 40' due north to the middle of the channel of the main Canadian river, thence down the middle [of the channel] of said main Canadian river to where it crosses the 98th meridian, thence due south to the place of beginning." 28 Stat. at L. 876, 895, chap. 188.



In consideration of that cession, it was agreed on behalf of the United States that out of the territory ceded there should be allotted to each member of the Wichita and Affiliated Bands of Indians in the Indian territory, native and adopted, 160 acres of land in the manner and form described in the agreement. It was provided that upon the allotments being made the titles should be held in trust for the allottees for a period of twenty-five years, in the manner and to the extent provided for in the act of Congress of February 8, 1887 (24 Stat. at L. 388, 389, chap. 119); and at the expiration of that period the titles should be conveyed in fee simple to the allottees, or their heirs, free from all encumbrances. 28 Stat. at L. 876, 895, 896, chap. 188.

[497] This agreement recited that in addition to the allotments provided \*for, and the other benefits to be received, the Wichita and Affiliated Bands of Indians claimed and insisted "that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments." And it was stipulated in the agreement that "the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands it shall be subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty at that price per acre, if any, that may be allowed by Congress." Art. 5.

It was further stipulated in the agreement that "there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement." 28 Stat. at L. 876, 896, chap. 188.

This agreement of 1891 was ratified by the act of Congress known as the Indian Appropriation Act of March 2d, 1895. 28 Stat. at L. 876, 894, 897, chap. 188.

By that act it was, among other things, provided:

"The compensation to be allowed in full for all Indian claims to these lands which may be sustained by said court in the scrip hereinafter provided for shall not exceed one dollar and twenty-five cents per acre for so much of said land as will not be required for allotment to the Indians as provided in the foregoing agreement, subject to such reduction as may be found necessary under article 5 of said agreement: *Provided*, That no part of said sum shall be paid except as hereinafter provided."

"That whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in ad-

dition to the \*land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: . . . *Provided*, That said lands shall be opened to settlement within one year after said allotments are made to the Indians.

"That sections 16 and 36, 13 and 33, of the lands hereby acquired, in each township, shall not be subject to entry, but shall be reserved sections 16 and 36 for the use of the common schools, and sections 13 and 33 for university, agricultural college, normal schools and public buildings of the territory and future state of Oklahoma; and in case either of said sections or parts thereof is lost to said territory by reason of allotment under this act or otherwise the governor thereof is hereby authorized to locate other lands, not occupied, in quantity equal to the loss: *Provided*, That the United States shall pay the Indians for said reserved sections the same price as is paid for the lands not reserved.

"That as fast as the lands opened for settlement under this act are sold, the money received from such sales shall be deposited in the Treasury subject to the judgment of the court in the suit herein provided for, less such amount, not to exceed fifteen thousand dollars, as the Secretary of the Interior may find due Luther H. Pike, deceased, late delegate of said Indians, in accordance with his agreement with said Indians, to be retained in the Treasury to the credit and subject to the drafts of the legal representative of said Luther H. Pike: *Provided*, That no part of said money shall be paid to said Indians until the question of title to the same is fully settled.

"That as the Choctaw and Chickasaw Nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement [the agreement above referred to], which claim is controverted by the United States, jurisdiction be and is hereby conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said court of claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall be fully considered and determined, and \*to try and determine all [499] questions that may arise on behalf of either party in the hearing of said claim; and the Attorney General is hereby directed to appear in behalf of the government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: . . . And provided further, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof. That said action shall be presented by a single petition making the

United States and the Wichita and Affiliated Bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land. . . And provided, That it shall be the duty of the Attorney General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and Affiliated Bands through the agents, delegates, attorneys, or other representatives of said bands, that said bands are made defendants in said suit, of the purpose of said suit, that they are required to make answer to said petition, and that Congress has, in accordance with article 5 of said agreement, adopted this method of determining their compensation, if any."

It was also provided that the court of claims "shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights, and equities of the parties litigant, and issue rules on any department of the government therefor if necessary." 28 Stat. at L. 876, 897, 898, chap. 188.

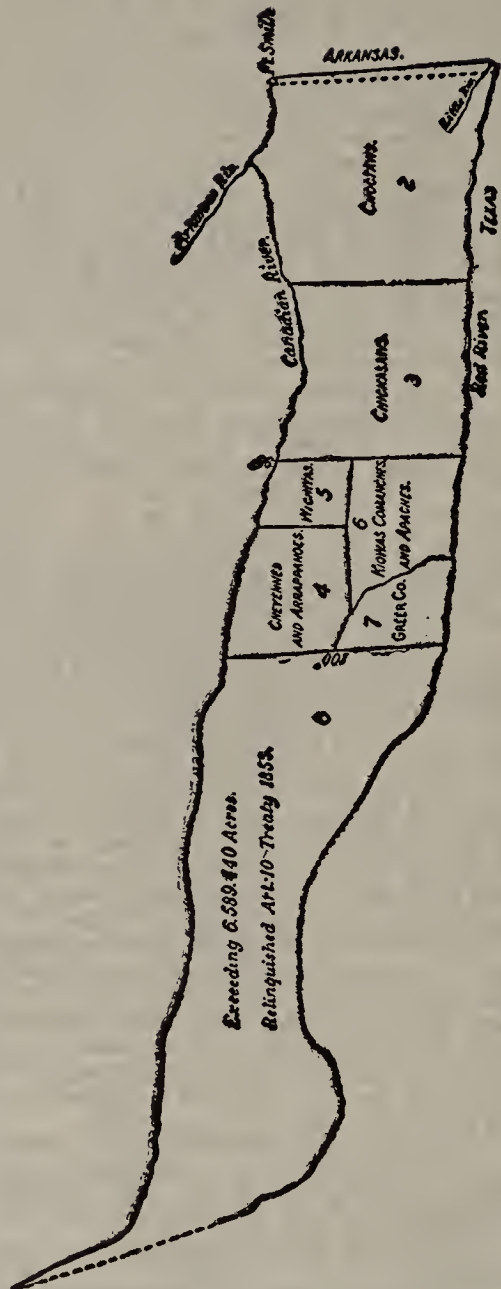
Pursuant to the above act the present suit was brought in the court of claims by the Choctaw and Chickasaw Indians against the United States and the Wichita and Affiliated Bands of Indians.

A diagram which was incorporated into the opinion of the court of claims is here reproduced to show the land ceded by the Wichita and Affiliated Bands of Indians. It is sufficiently accurate for the purposes of the present discussion.

[501] \*Tract 5, marked "Wichitas," is the particular land now in dispute, containing, it is stated, 743,257.19 acres; and, with tract 4, marked "Cheyennes and Arrappahoes," tract 6, marked "Kiowas, Comanches, and Apaches," and tract 7, marked "Greer Co.," constituted what has been known as the "Leased District," containing, it is supposed, 7,713,239 acres. That District, it will be observed from the diagram, did not extend west of the 100th degree of west longitude.

It may be here remarked that according to the census report for 1890 the Choctaws then numbered between 14,000 and 15,000 people, of whom about 10,000 were Indians and about 4,500 were of African descent; the Chickasaws about 7,000, of whom about 3,400 were Indians and 3,700 were of African descent; and the Wichitas and Affiliated Bands, known as Caddoes, Wacoos, Towacanies, Keechies, Delawares, and Ionies, about 1,100 people, of whom not exceeding 175 were Wichitas and about one half Caddoes.

The decree of the court of claims recited that by the treaties between the United States and the Choctaw Nation or tribe of Indians, and between the United States and the Choctaw and Chickasaw Nations or tribes of Indians, the lands in dispute and other lands were acquired by the United States "in trust for the settlement of Indians thereon, and in trust and for the benefit of said claimant Indians when the aforesaid trust shall cease;" that "the Wichita and



Affiliated Bands of Indians were by the United States located within the boundaries of the lands hereinbefore described;" that they "now number not more than 1,060 persons;" and that the location of the Wichitas and Affiliated Bands within said boundaries was "for the purpose of affording them permanent settlement therein."

It was then adjudged—Mr. Justice Peelle dissenting—that the lands in dispute had been acquired and were held by the United States in trust for the purpose of settling Indians thereon, and that whenever that purpose was abandoned as to the whole or any part thereof then all the lands not so devoted to Indian settlement should be held in trust by the United States for the Choctaw and Chickasaw Indians exclusively.



[502] \*It was also adjudged and decreed that the members of the Wichita and Affiliated Bands, not exceeding 1,060 were equitably entitled to 160 acres of land each out of the lands in dispute, and that the same should be set apart to them by the United States, due regard being had to any improvements made thereon by them respectively for their permanent settlement.

It was further adjudged that the Choctaw and Chickasaw Nations were in law and equity entitled to, and were the owners of, such of the lands ceded to the United States by the Wichita and Affiliated Bands as remained, after satisfying the provisions for the Wichitas and Affiliated Bands, and that in the event of the sale thereof by the United States the Indian plaintiffs should be entitled to, and receive, the proceeds of such sale.

From this decree the United States, the Wichita and Affiliated Bands, and the Choctaw and Chickasaw Nations severally appealed. 34 Ct. Cl. 17.

The fundamental question to be determined on these appeals arises out of the treaty concluded April 28, 1866, between the United States and the Choctaw and Chickasaw Nations (14 Stat. at L. 769) relating to the lands constituting what has been known as the Leased District, north of Red river and between the 100th and 98th degrees of west longitude—the lands marked on the above map as tracts 4, 5, 6, and 7. By that treaty the Choctaws and the Chickasaws, in consideration of the sum of \$300,000, ceded to the United States the territory known as the Leased District.

The government insists that this cession was absolute and unaccompanied by any trust upon the termination or abandonment of which the Indians would be entitled either to the territory ceded or to the proceeds of its sale.

The Choctaw and Chickasaw Nations deny such to be the effect of the treaty of 1866, and insist that the United States took the lands *in trust* to be used only for the settlement of Indians, and that on the abandonment of such trust the lands reverted, or should be adjudged to have reverted, to the Choctaws and Chickasaws.

[503] The Wichita and Affiliated Bands of Indians contend that \*they are entitled to compensation in money for all the lands left in the territory in dispute after making the allotments provided for in the agreement of 1891, and that it should have been so adjudged.

The Choctaws also contend that they once owned, by transfer from the United States, a vast body of lands west of the Leased District, for which they have never received anything, and that the treaty of 1866 must be interpreted in the light of that fact. What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive. But as the proposition just stated was the subject of much consideration in the court of claims, and as it is earnestly pressed upon our attention, we will first inquire whether the Choctaws ever owned any lands west of

the Leased District, that is, west of the 100th degree of west longitude, and then bring into view the circumstances leading up to the treaty of 1866 which, it is argued, throw light on its interpretation. This being done, we will examine the provisions of that treaty so far as they bear upon the title to the particular lands in dispute.

I. By a treaty concluded August 24, 1818, an Indian tribe called the Quapaws, in consideration of certain promises and stipulations, did "cede and relinquish" to the United States all the lands within the following boundaries: "Beginning at the mouth of the Arkansaw river; thence extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to *its source*; thence south to Big Red river, and down the middle of that river to the Big Raft; thence, a direct line, so as to strike the Mississippi river, thirty leagues in a straight line, below the mouth of the Arkansaw; together with all their claims to land east of the Mississippi and north of the Arkansaw river, included within the colored lines 1, 2, and 3 on the above map,† with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw river, opposite the present post of Arkansaw, and running thence, a due southwest course, to the \*Washita [Wichita] river; thence, up[504] that River, to the Saline Fork; and up the Saline Fork to a point from whence a due north course would strike the Arkansaw river at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any state or nation, without the approbation of the United States first had and obtained." 7 Stat. at L. 176, art. 2.

Observe in this boundary the words "extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to *its source*." One of the questions much discussed is whether the Quapaws owned and really intended to cede lands situated as far west as the source of the Canadian Fork or river—that point being far west of the 100th degree of west longitude. Did the United States understand that it acquired by the Quapaw treaty of 1818 lands as far west at that time as the *source* of the Canadian Fork or river, which (as is now known, but was not known in 1818) rises in the northeastern part of New Mexico, 36° north latitude by 105° west longitude, while the Red river rises in the Staked Plains and arid table lands near the eastern border of New Mexico, about latitude 35° north and longitude 103° 10' west? This question cannot well be determined without referring to other documents pertinent to the present inquiry.

†A map which accompanied the treaty of 1818.

By a treaty signed within a few months after the date of the treaty with the Quapaws, that is, on February 22, 1819, the United States and Spain agreed:

"Art. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red river; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from [505] Washington; \*then crossing the said Red river, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South sea. . . . The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions to the territories described by the said line; that is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims, and pretensions to the territories lying west and south of the above-described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of the said line; and, for himself, his heirs and successors, renounces all claim to the said territories forever." 8 Stat. at L. 252, 254, 256.

We here remark that the words in this treaty "then following the course of the Rio Roxo [Red river] westward, to the degree of longitude 100 west from London and 23 from Washington, then crossing the said Red river, and running thence, by a line due north, to the river Arkansas," indicate that in the judgment of the United States at the time the treaty with Spain was signed the lands west of the 100th degree of west longitude and south of the 42d parallel of latitude constituted or should constitute part of the possessions of that country.

The treaty with Spain, although signed in 1819, was not finally ratified until February 19, 1821. But between the signing of that treaty and its ratification, namely, on the 18th day of October, 1820, a treaty was concluded between the United States and the Choctaw Nation, whereby the latter ceded to the United States certain lands east of the Mississippi river. The main object of that treaty with the Choctaws was to exchange some of the lands then occupied by them for [506] "a country \*beyond [west of] the Mississippi, where all, who live by hunting and will not work, may be collected and settled together."

The second article of that treaty was in these words: "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby cede to said nation a tract of country west of the Mississippi river situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red river; thence down Red river, three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning." 7 Stat. at L. 210, 211.

Those who supervised the drawing of the treaty of 1820 evidently did not closely scrutinize the provisions of the treaty with Spain signed the year previous; for the line "up the same [Canadian Fork] to its source, thence due south to the Red river" was in conflict with the Spanish treaty of 1819 which fixed the dividing line, running north and south, between the United States and Spain on the 100th degree of west longitude. This is clear from the use of the words in the Choctaw treaty of 1820, "up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red river." Or, perhaps, those who drew the treaty of 1820 assumed without inquiry that the source of the Canadian river was not farther west than the 100th degree of west longitude, which the treaty of 1819 designated as the dividing line between the United States and Spain. As the westernmost point of the Canadian river or Fork is 105° west, and the westernmost point of Red river is about 103° 10' west longitude, a line running up the Canadian Fork "to its source, thence due south to Red river," was an impossible line; for necessarily a line directly south from the actual source of the Canadian river would never strike Red river; while a line drawn from the actual source of the Canadian river to the westernmost point of Red river would cross \*the Canadian river several times, strik- [507] ing Red river about longitude 103° 10' west.

The difficulties arising from the conflicting description of boundaries as given in the Quapaw, Spanish, and Choctaw treaties, above referred to, seem to have been recognized when the United States and the Choctaws, in execution, or in further recognition, of the treaty of 1820, made another treaty on the 27th of September, 1830. 7 Stat. at L. 333, 334.

By the latter treaty it was provided:

"Art. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it; beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south



to Red river, and down Red river to the west boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

"Art. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi river; and they agree to remove beyond the Mississippi river early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

"Art. 4. The government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all [508] the persons and \*property that may be within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any territory or state; but the United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties, and laws of the United States; and except such as may and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing, by their own laws, any white man who shall come into their nation and infringe any of their national regulations." 7 Stat. at L. 333, 334.

It cannot be doubted that the purpose of article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by article 2 of the treaty of 1820, and no others. It was as if the parties declared that the words in the treaty of 1820, "thence up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red river," should be held to mean the same as the words in the treaty of 1830, "thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits, thence due south to Red river." The treaty of 1830 plainly imports the understanding of the parties at that time that whatever might be the wording of the treaty of 1820, the United States had not thereby intended to grant, and the Choctaws had not

thereby expected to receive, any lands at or near the source of the Canadian Fork unless that point was within the limits of the United States—that both parties had in view at that time only lands within the limits of the United States.

As the treaty of 1820 provided that the Choctaws should have lands as far west as the source of the Canadian river, it is suggested that the United States could not legally modify that provision by the subsequent ratification in 1821 of \*the treaty with [509] Spain signed in 1819. But it was entirely competent for the parties, without any new or valuable consideration intervening, to rectify a mistake in the description of boundaries, and to agree as in effect they did by the treaty of 1830, that the words "to the Canadian Fork, and up the same to its source," in the treaty of 1820, were to be interpreted as meaning "to the source of the Canadian Fork, if in the limits of the United States, or to those limits"—thus relieving the United States from any obligation to make a special grant to the Choctaws of lands which by the treaty with Spain, ratified in 1821, had been recognized as part of Spanish territory. After the treaty of 1830 the line "thence due south to the Red river" was to be taken as running from a point on the dividing line between the United States and Spain, the 100th degree of west longitude as established by the treaty of 1819-1821, thence due south to that river.

In confirmation of the view we have taken of the treaty of 1830, we may refer to the agreement made January 17, 1837, by which the Choctaws assented to the formation by the Chickasaws of a district "within the limits of *their country*." 11 Stat. at L. 573. In the description of the boundaries of that district, which adjoins the district of the Choctaws on the west, it appears that one of the lines ran to a point 10 or 12 miles above the mouth of the south fork of the Canadian river, "thence west along the main Canadian river to its source, if in the limits of the United States, or to those limits; and thence due south to Red river, and down Red river to the beginning." Here was a repetition of the words of the treaty of 1830 and a distinct recognition of the fact that the Choctaw country was not to be regarded as embracing any lands not then, in 1837, within the limits of the United States. It cannot be contended that any lands west of the 100th degree of west longitude were within such limits as then established.

It is an important fact in this connection that prior to the treaty of 1830 the United States of America and the United Mexican States, by the treaty between them of January 12, 1828, recognized the boundaries of the respective countries to be as fixed by the treaty of 1819-1821. 8 Stat. at L. 372, 374. And \*this position was maintained; for by a [510] treaty concluded in 1838 between the United States and the Republic of Texas, the latter recognized as binding upon it the treaty made in 1828 with the United Mexican States. Treaties and Conventions (1776-1887), p. 1079. And in the settlement made



in 1850 between the United States and the state of Texas the latter agreed that its boundary on the north should commence at the point at which the *meridian of 100 degrees west* from Greenwich is intersected by the parallel of 36° 30' north latitude, and run from that point west to the meridian 103 degrees west from Greenwich, then due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico. 9 Stat. at L. 446, chap. 49; *United States v. Texas*, 162 U. S. 1, 39, 40 L. ed. 867, 880, 16 Sup. Ct. Rep. 725.

It is said that the United States made a gift to Texas of the lands west of the 100th degree of west longitude, but that it could not give away lands previously ceded by the treaty of 1820 to the Choctaws. We have already shown that the United States and the Choctaws substantially stipulated in the treaty of 1830 that the lands to be transferred to the Choctaws in consideration of the transfer by the Choctaws of lands east of the Mississippi river were only such as were within the limits of the United States. But we add, as a fact of significance, that in 1842 the special grant provided for by the treaty of 1830 to be made to the Choctaws described one of the lines of the lands granted to those Indians as "running thence to the source of the Canadian Fork, *if in the limits of the United States, or to those limits*, thence due south to the Red river." This grant was accepted by the Choctaws, and we find no evidence in the record tending to show that they at that time or at any time prior thereto claimed that the United States was under any obligation to transfer to them, or to compensate them for any lands west of the 100th degree of west longitude which the United States had recognized to be within the limits of Spain. There is no suggestion even in the petition in this case that the treaty of 1830 did not properly express the intention of the parties as to the lands to be transferred to the Choctaws.

II. Proceeding in our examination of the [511] facts supposed to \*throw light upon the meaning of the treaty of 1866, we find that in 1854, for the first time, the Choctaws, acting under some influence not explained by the record, insisted that their country extended west of the 100th degree of west longitude. In a letter dated July 11, 1854, and addressed to the Commissioner of Indian Affairs by Choctaw delegates, it was said: ". . . We shall therefore have to demand the immediate removal of the several bands of Texas and other Indians, who have settled within our limits; and if this demand be not complied with, we will remove them ourselves, using force if necessary. The government must look to the consequences, whatever they may be. Our country extends west to the headwaters of the Canadian, about the 103d degree of west longitude, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which cannot be disputed. In the compromise with Texas in 1850 that portion of our country west of the 100th degree of west

longitude was assigned to that state, in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and if this is not done our people will take possession of it, and leave the government to settle with Texas and the Indians upon it for such damages as they claim."

Under date of April 9, 1855, the United States agent for the Choctaws, acting under instructions from the Commissioner of Indian Affairs, asked the Choctaw delegates, then in Washington, for a conference—submitting to them certain interrogatories to be answered in writing—"for the purpose of ascertaining what arrangements, if any, can be made with them, having in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the government of the United States, and the permanent settlement of the Wichita and other bands of Indians in the Choctaw country."

The Choctaw delegates, in reply, said, among other things: "Respecting the Wichita and other bands of Indians, who have intruded themselves within the limits of our country, we have to remark they are, as you know, a nuisance, and we had far rather be rid of them altogether. In our communication to the acting Commissioner of Indian Affairs of the 11th of July \*last, we demanded [512] their removal, as we had a right to do; but we are not aware that any order has been given on the subject. We have had it in contemplation to renew this demand, and if not complied with to remove them by force if necessary. We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the government; and if it be an object of importance to it to have these Indians accommodated with a home within the boundaries of our country, though such an arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it on fair and reasonable terms, if it can be made a part of a just and equitable adjustment of all the matters involved in the existing controversy between the Choctaws and the government; otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people to the measure."

The Chickasaw delegates, with whom a conference was also sought, said, under date of April 14, 1855: "In regard to the third point, they have only to say that, in conjunction with the Choctaws, they are willing to enter into an arrangement with the United States government for the permanent settlement of the Wichita and other bands of Indians in the Choctaw country, upon terms just, fair, and safe for both the Choctaws and Chickasaws."

Under date of April 21, 1855, the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer, as the terms on which they will settle with the Chickasaws, and provide for the



Wichitas and other Indians within the limits of the Choctaw country, the Department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States."

(513) On the 24th of April, 1855, the Choctaw delegates wrote to the Indian agent: "2. We will agree to provide, in the same convention or supplemental treaty that the government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Wichita and other bands of Indians, for a fair and just consideration, the amount to depend, of course, upon the extent of country required for the purpose. The Commissioner of Indian Affairs, in his letter, requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east of the 99th degree; but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of \$400,000."

Two days later, April 26, 1855, the Commissioner of Indian Affairs thus wrote to the Indian agent: ". . . You will also ascertain upon what terms the Choctaws will arrange with the United States, for the use of their country west of 98° west longitude, for the Wichitas and such other bands of Indians as the government may desire to settle permanently west of that degree of longitude, also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office with the least delay possible."

On the day last named the Indian agent sent a letter to the Commissioner, inclosing "a proposition for the lease of the Choctaw possessions west of the 99th degree of west longitude to the government, for the permanent settlement of the Wichita and other bands of Indians within the Choctaw country."

Under date of April 27, 1855, the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "As I have heretofore said, I have every disposition to act towards these Indians in a spirit of the utmost liberality consistent with the just rights and interests of the United States; and, all things considered, am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy of your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that, notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded by the Department as without any foundation in law or equity, it might prevent further trouble, \*in regard to it, to insert an article in the supplemental treaty or convention, now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same."

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Under date of May 2, 1855, the Indian agent wrote to the Choctaw delegates: "In view of the probability that an arrangement will be effected between the Choctaw and Chickasaw tribes, restricting the western boundary of the 'Chickasaw district' to the 98° of west longitude, west from Greenwich, I desire to ascertain whether you will agree, the Chickasaws assenting, to lease the country between 98° and 100° west longitude and between Red and Canadian rivers to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw Nation; and if so, upon what terms, it being understood that the Choctaws shall relinquish and quitclaim, in favor of the United States, whatever interest they may have in the country lying west of the 100° of west longitude."

On the 3d of May, 1855, the Choctaw delegates wrote to the Indian agent: "In our communication to you of the 9th ultimo, we referred to the prejudices and opposition of our people to the location of the Indians referred to within the limits of our country, and our repugnance to such an arrangement; but we stated that we had every disposition to comply with the policy and wishes of the government on the subject; and that, if the measure were one of importance to it, we would take the responsibility and consent to it, on fair and reasonable terms. In our subsequent communication of the 24th instant, we stated our unwillingness to lease for that purpose, any portion of our country east of the 99° of west longitude, but that we would agree to lease that west of that degree, for the sum of \$400,000. On further consideration of the subject, however, since the receipt of your letter, we have concluded, in the same spirit of accommodation, to agree to comply with the wishes of the government by leasing to it the further portion of our country between the 98° and 100° of west longitude. The question of the total relinquishment of any portion of our territorial rights is one of even greater delicacy and difficulty. We have fully acquainted you with the grounds of our claim to title to the headwaters of the Canadian river, extending as far west as at least to the 103° of west longitude. We believe our title to be perfectly valid and good; but as it is questioned, if not disputed, by the government, west of the 100° of west longitude, and we are anxious to put at rest all questions of controversy with it, we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms. The extent of country involved is large; we know it to be valuable, and we believe the acquisition of our title to it to be important to the government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, we would consent to take \$800,000—one half thereof for the lease of the country between the 98° and 100° west longitude, and the other half for the relinquishment of our right west of the latter degree. The above proposition has reference to the arrangement as a whole. Were it to be



confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than \$600,000 therefor."

On May 4, 1855, the Indian agent wrote to the Choctaw delegates: "If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude (the Chickasaws assenting), and couple with it a relinquishment of all claims west of 100° west longitude, the government will agree to pay them \$600,000."

Under date of June 7, 1855, the Commissioner of Indian Affairs wrote to the Acting Secretary of the Interior: ". . . After consultation with the Secretary of the Interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of \$600,000 for the lease of the country between the two degrees, *and the relinquishment west of the 100°*, the government would give that sum. The delegation assented to this proposition, and agreed to take the sum of \$600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to [516] the terms of the lease, and the question was settled, as I supposed; but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the government must be left free to locate such Indians as it may desire within the ceded country. . . . The delegations propose, as a compromise, *that the Choctaws quitclaim to the country west of 100°, and that they and the Chickasaws will lease the country between 99° and 100° for the permanent settlement of any Indians whom the government may desire to locate therein, for the sum of \$600,000.*"

Under date of June 14, 1855, the Choctaw delegates thus addressed the Commissioner of Indian Affairs: "The lease we had consented to agree to was a limited one, *viz.*, for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country, the government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless, and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrange-

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ment would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover, the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more; so that practically the government would have acquired from us some thirteen and a half \*millions of acres of land, for the certainly [517] insufficient sum of \$600,000."

We have made this extended reference to the correspondence between the Indians and the officers of the United States for the purpose, not only of showing that the Choctaws had no claim, legal or equitable, to territory west of the 100th degree of west longitude, but of indicating the situation and relations of the parties when the treaty of 1855, to be presently referred to, was concluded.

The facts, above stated, so far as they relate to lands west of the 100th degree of west longitude, may be thus summarized:

1. By the treaty of 1818 two of the boundary lines of the tract of country ceded by the Quapaws to the United States were described as extending "up the Arkansas to the Canadian Fork, and up the Canadian Fork to its source; thence south to Big Red river."

2. By the treaty signed in 1819, the dividing line between the United States and Spain, running north from Red river, was established on the 100th degree of west longitude.

3. In 1820, before the treaty of 1819 was ratified, the United States made a treaty with the Choctaw Nation, ceding certain territory, two of the lines of which were described by the treaty of 1820 as extending "up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red river." But those were impossible lines, because the source of the Canadian river or fork was at the 105th degree of west longitude, while the source of Red river was at the 103d degree of west longitude, and a line running due south from the source of the Canadian river would not strike Red river.

4. When the treaty of 1830 was made with the Choctaws the fact was recognized that the United States had apparently ceded to the Choctaws lands west of the 100th degree of west longitude, which by the previous treaty with Spain signed in 1819 and ratified in 1821 had been recognized as within Spanish territory. But that the United States might not appear to cede or agree to cede lands outside of its limit, the treaty of 1830 corrected or qualified the description in the treaty of 1820 of the line running up the Canadian Fork to its source by using *the* [518] words "if in the limits of the United States, or to those limits; thence due south to Red river." This change in the wording of the treaty of 1820 was recognized by the agreement between the Choctaws and Chickasaws of 1837, and was confirmed by the Choctaws



when they accepted the special grant executed in 1842.

5. It does not appear that the Choctaws made any claim between 1830 and 1854 to have derived by cession from the United States any title to lands west of the dividing line between the United States and Spain, that is, west of the 100th degree of west longitude, or that the Choctaws complained during that period that any lands ceded to them by the treaty of 1820 were wrongfully or illegally recognized by the treaty of 1819 as belonging to Spain.

6. In 1854-'5 the Choctaws, for the first time, asserted title to lands west of the 100th degree of west longitude, as far west at least as the 103d degree. This claim was disputed by the United States, and pronounced by the Secretary of the Interior to be wholly without any foundation in law or equity, although that officer deemed it wise that the new treaty then (1855) contemplated to be made should embrace a relinquishment by the Choctaws to the United States of any interest they might have in lands west of the 100th degree of west longitude.

7. The Choctaws expressed their willingness to make a treaty leasing to the United States certain territory in their country east of the 100th degree of west longitude, and relinquishing any and all claim to lands west of that degree.

III. Such was the situation when the parties entered upon negotiations resulting in another treaty. We allude to the treaty of June 22, 1855, upon some of the provisions of which much stress has been placed by the parties.

The preamble to that treaty recites:

"Whereas the political connection, heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire that the Choctaw [519] Indians shall relinquish \*all claim to any territory west of the 100th degree of west longitude, and also to make provision for the permanent settlement, within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States, that portion of their common territory which is west of the 98th degree of west longitude [that is, the territory between the 98th and 100th degrees of west longitude]; and whereas the Choctaws contend that by a just and fair construction of the treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States, under said treaty, and have proposed that the question of their right to the same, together with the whole subject-matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for  
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final adjudication and adjustment; and whereas it is necessary, for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument. Now, therefore," etc.

The boundaries of "the Choctaw and Chickasaw country," as established by article 1 of this treaty, were as follows: "Beginning at a point on the Arkansas river, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian, to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning;" and pursuant to the act of Congress approved May 28, 1830, 4 Stat. at L. 411, chap. 148, the United States forever secured and guaranteed the lands embraced within those limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe should have an equal and undivided interest in the whole, subject, however, to the condition that no part thereof \*should ever be sold with- [520] out the consent of both tribes; and that the land should revert to the United States if the Indians and their heirs became extinct or abandoned the same.

It will be observed that "the Choctaw and Chickasaw country," as thus established, embraced no lands west of the 100th degree of west longitude.

Article 2 of the treaty established the boundary of the Chickasaw district—the district marked on the diagram heretofore made part of this opinion as tract 3.

By Article 3 it was provided that "the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall at all times have the right of safe conduct and free passage through the Chickasaw district." This territory is designated on the diagram as tract 2.

Article 4 provided that the government and laws then in operation, and not inconsistent with the treaty, should remain in full force within the limits of the Chickasaw district, until the Chickasaws should adopt a constitution.

Article 5 secured to the members of either tribe the right freely to settle within the jurisdiction of the other, and have all the rights, privileges, and immunities of citizens thereof, except that no member of either tribe should participate in the funds belonging to the other tribe.

Article 6 provided for the surrender of fugitives from justice of either tribe.

Article 7 secured to each tribe the unrestricted right of self-government, and, with certain exceptions not necessary to be here



stated, full jurisdiction over persons and property within their respective limits.

Article 8 provided that, in consideration of the foregoing stipulations, and immediately upon the ratification of the treaty, there should be paid to the Choctaws, in such manner as their national council should direct, out of the national fund of the Chickasaws held in trust by the United States, the sum of \$150,000.

[521] Articles 9 and 10 are the important parts of the treaty of 1855 so far as the present litigation is concerned. We therefore give them here in full:

"Art. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the 100th degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river, and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

"Art. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct." 11 Stat. at L. 611, 612, 613.

The treaty of 1855 contains other articles, but they do not affect the determination of the present issues, and therefore we need not advert to them.

The lands described in this treaty as having been leased to the United States constituted what is called the "Leased District," no part of which, as we have seen, was west of the 100th degree of west longitude.

[522] There can be no doubt as to the meaning and scope of the treaty of 1855. In order simply to avoid future dispute, the United States desired the relinquishment by the Choctaw Nation of all claim to any territory west of the 100th degree of west longitude, and, in addition, it obtained a lease of the territory between the 98th and 100th degrees of west longitude for the permanent settlement of the Wichita and certain other tribes or bands of Indians, the right being reserved to the Choctaws and Chickasaws to settle on

the leased territory as theretofore. The consideration for the "relinquishment and lease" was \$800,000. It is immaterial to inquire as to the value placed by the Indians or by the United States upon the relinquishment and lease respectively. The Indians accepted for both the aggregate amount named. It is idle therefore to contend that the Indians had any claim upon the United States, after the treaty of 1855, for lands west of the 100th degree of west longitude. The treaty closed that dispute forever, if it had not been closed by previous treaties and by the special grant of 1842 made pursuant to article 2 of the treaty of 1830, and which, as we have said, estopped the Indians from claiming any lands not within the limits of the United States. As to the lands the control of which was acquired by the lease embodied in the treaty of 1855, it may be assumed that the United States did not then desire to obtain the fee, but took the lands for specifically defined objects, upon the accomplishment of which the Indians could insist as a condition of the lease.

After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree of west longitude, and as to the lands between that and the 98th degree of west longitude the United States held them under a permanent lease given in 1855, which practically divested the Choctaws of all interest in the territory constituting the Leased District, except that they could settle in it if they so desired.

IV. Subsequently to the making of the treaty of 1855, and until the Civil War intervened, the relations between the United States and these Indians were, so far as the record discloses, entirely harmonious. But their relations changed when that war opened and the Choctaws and Chickasaws co-operated with the confederate forces, making war upon Indians adhering to the United States. As early as February 7, 1861, the general council of the Choctaw Nation passed resolutions declaring that "in the event of a [523] permanent dissolution of the Union the natural affections, education, institutions and interests of its people indissolubly bound them to the confederate states (Reb. Rec. Series I, Vol. 1, p. 682); and on the 25th of May, 1861, the legislature of the Chickasaws passed resolutions declaring that in the war then opening the confederate states were their natural allies, and called upon the neighboring Indian nations to co-operate with them in the defense of the territory they inhabited "from northern invasion by the Lincoln hordes and Kansas robbers." Reb. Rec. Series I, Vol. 3, p. 585.

The Civil War having ended, a council was held in September, 1865, at Fort Smith, Arkansas, which was attended by D. N. Cooley, Commissioner of Indian Affairs, and others named by the President. There were also in attendance representatives of the Choctaws, Chickasaws, Creeks, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas, and Comanches. What was said at that meeting by the com-



missioners on behalf of the United States is supposed to have some bearing upon the present issues. An address was made by Chairman Cooley to the Indian delegates, the substance of which was printed in a newspaper, and was as follows:

"Brothers: After considering your speeches made yesterday the commissioners have decided to make the following reply and statement of the policy of the government. Brothers: We are instructed by the President to negotiate a treaty or treaties with any or all of the nations, tribes, or bands of Indians in the Indian territory, Kansas, or of the plains west of the Indian territory and Kansas. The following-named nations and tribes have by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, forfeited all right to annuities, lands, and protection by the United States. The different nations and tribes having made treaties with the rebel government are as follows, *viz*: The Creek Nation, July 10, 1861; Choctaws and Chickasaws, July 12, 1861; Seminoles, August 1, 1861; Shawnees, Delawares, Wichitas, and affiliated tribes, residing in leased territory, August 12, 1861; the Comanches of the Prairie, August 12, 1861; the Great Osages, October 2, 1861; the Senecas, Senecas and Shawnees \* (Neosho agency), October 4, 1861; the Quapaws, October 4, 1861; the Cherokees, October 7, 1861. By these nations having entered into treaties with the so-called confederate states, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation for protection by the United States.

"Under the terms of the treaties with the United States and the law of Congress of July 5, 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands. The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations. The President is anxious to renew the relations which existed at the breaking out of the rebellion. We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian territory and others above named living west and north of the Indian territory. Such treaties must contain substantially the following stipulations: 1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States. 2. Those settled in the Indian territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the territory, and with the United States. 3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for. 4. A stipulation in the treaties that slavery or in-

voluntary servitude shall never exist in the tribe or nation except in punishment of crime. 5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government. 6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes in the Indian territory be formed into one consolidated government. \*after the plan proposed by the [525] Senate of the United States in a bill for organizing the Indian territory. 7. No white person except officers, agents, and employees of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory unless formally incorporated with some tribe according to the usages of the band.

"Brothers: You have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted. As we said yesterday, we say again, that in any event those who have always been loyal, although their nations may have gone over to the enemy, will be liberally provided for and dealt with."

The committee on the part of the Choctaws and Chickasaws, in reply to the proposition submitted by the commissioners of the United States as the basis of new treaties, said:

"We are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and as a basis of this new treaty accept articles 1st and 7th. In reference to the requirements of the 2d article, we desire to say that we wish as far as possible to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guarantee all our influence in favor of peace in all its bearings with our red brethren, and will not object to any of our citizens volunteering in any war in which the United States may become involved, for the aiding of the United States. We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles. On certain terms, on which we can doubtless agree with you, we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article. We are willing to submit the territorial bill referred to in the 6th article for the consideration of our respective general councils, and for this purpose request a copy of that bill for the principal chief of the Choctaw Nation and for the governor of the Chickasaw \*Nation. [526] We accept article 7, and are willing to have the provisions thereof incorporated into the treaty. We are also willing to incorporate a provision that no individual shall be proscribed, or any act of forfeiture or confiscation passed against those who remain friend-



ly to the United States, and that they shall enjoy equal privileges with other members of the nation."

Among the documents in the record is a draft of a treaty between the United States and the Choctaw and Chickasaw tribes which, it was stated, was submitted by the United States commissioners at the council held at Fort Smith. It is said in the opinion of the court of claims—and we think correctly—that this treaty was never agreed upon or executed. It need not therefore be set out here.

The reports, official and unofficial, of what was said and done before and at the Fort Smith council, show that the persons in attendance there were aware of the exact situation. They separated with the expectation or understanding that the matters then under consideration were to be further discussed and a conclusion reached in Washington in the spring of 1866, at which place delegates from the Indian tribes would attend.

In 1866 the negotiations between the United States and the Choctaw and Chickasaw Nations were resumed at Washington. The result was the treaty concluded April 28, 1866. 14 Stat. at L. 769. The respective rights of the Choctaws and Chickasaws and of the United States, as involved in the present case, depend upon the construction of that treaty.

It is to be taken as beyond dispute that when the parties entered upon the negotiations resulting in that treaty, neither overlooked the fact that the Choctaws, by the treaty of 1855, had forever quitclaimed any claim they had to territory west of the 100th degree of west longitude. Nor could either have forgotten that the United States had, by the same treaty, acquired the control of the Leased District, without limit as to time, for the permanent settlement of certain Indians, excluding other Indians. Bearing these facts in mind, let us see what was effected by the treaty of 1866.

By article 1, permanent peace and friendship were established between the United States and those nations—the Choctaws and

[527]\* Chickasaws binding themselves respectively to use their influence and to make every exertion to induce Indians of the plains to maintain peaceful relations with each other, with other Indians, and with the United States.

By article 2, the Choctaws and Chickasaws covenanted and agreed that neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties had been duly convicted in accordance with laws applicable to all members of the particular nation, should ever exist in those nations.

Article 3—the important part of that treaty—was in these words: "The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° of west longitude, known as the Leased District, provided that the said sum shall be invested and held by the United States, at an interest not less than 5 per cent, in trust for the said nations, until the

legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, 40 acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of \$300,000 shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three fourths to the former and one fourth to the latter—less such sum, at the rate of \$100 *per capita*, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. \*And should the said laws, [528] rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of \$300,000 shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of \$300,000 or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The Choctaws and Chickasaws further agreed in the same treaty (art. 4) that "all negroes not otherwise disqualified or disabled shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said



nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid the 40 acres aforesaid shall stand in place of the land cultivated as last aforesaid."

By articles 30 and 43 it was provided:

[529] "Art. 30. The Choctaw and Chickasaw Nations will receive into their respective districts east of the 98th degree of west longitude, in the proportion of one fourth in the Chickasaw and three fourths in the Choctaw Nations, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made as aforesaid by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selection as therein provided, in the event of the making of the laws, rules, and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupancy of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws."

[530] "Art. 43. The United States promise and agree that no white person, except officers, agents, and employees of the government, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and

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naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations."

By article 46 it was provided: "Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the Leased District, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively."

"Art. 51. It is further agreed that all treaties and parts of treaties inconsistent herewith be, and the same are hereby, declared null and void." 14 Stat. at L. 769-781.

It is unnecessary to refer to any other provisions of the treaty \*of April 28, 1866; for [531] none of them throw any light on the present inquiry.

The lands in dispute—being tract 5 and marked Wichitas on the above map—constitute a part of the Leased District which was ceded to the United States by the third section of the treaty of 1866. That is admitted. Did that treaty make an absolute, unconditional cession to the United States of these lands, free of any trust, express or implied? Or, stating the question in another form, is it consistent with that treaty to hold, as the court below did, that the lands were ceded to the United States in trust that the lands themselves, or, if they were appropriated or taken by the United States, their value, should be paid to the Indians whenever they ceased to be used exclusively for the settlement of Indians thereon?

There was much discussion at the bar as to the principles that should govern the court when determining the scope and effect of a



treaty between the United States and Indian tribes. All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.

To what extent, if at all, have these rules been enlarged or modified when the instrument to be interpreted is a treaty between the United States and Indian tribes? In *The Kansas Indians*, 5 Wall. 737, 760, *sub nom. Blue Jacket v. Johnson County Comrs.* 18 L. ed. 667, *Wan-sop-eh v. Miami County Comrs.* 18 L. ed. 674, it was said that enlarged rules of construction have been adopted in reference to Indian treaties, citing as the words of Chief Justice Marshall in *Worcester v. Georgia*, 6 Pet. 515, 563, 582, 8 L. ed. 483, 502, 508 (but which were in fact the words of Mr. Justice McLean in his concurring opinion in that case) the following: “The language used in treaties with the Indians [532] should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.” Mr. Justice McLean further said: “How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.” In *United States v. Kagama*, 118 U. S. 375, 383, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109, the Indian tribes in this country are spoken of as wards of the nation, communities dependent for their food and their political rights, as well as for protection, on the United States. And in *Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75, it was said that the relation between the United States and the Indian tribes was that of superior and inferior, and that the rules to be applied in the case then before the court were those that govern public treaties, which, even in case of controversies between nations equally independent, were not to be interpreted as rigidly as documents between private persons governed by a system of technical law, “but in the light of the larger reason and the superior justice that constitute the spirit of the law of nations.” In *Jones v. Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

But in no case has it been adjudged that

the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the court of claims or this court with authority to determine \*whether the United [533] States had, in its treaty with the Indians, violated the principles of fair dealing. What was said in *The Amiable Isabella*, 6 Wheat. 1, 71, 72, 5 L. ed. 191, 208, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: “In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. . . . In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals.”

So, in *Beecher v. Wetherby*, 95 U. S. 517, 525, 24 L. ed. 440, 441, which involved the question whether the fee to certain lands was in the United States, with the right of occupancy only in certain Indians, this court said: “It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter \*open to [534]



discussion in a controversy between third parties neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government."

The same principle was announced in *United States v. Old Settlers*, 148 U. S. 427, 468, 37 L. ed. 509, 524, 13 Sup. Ct. Rep. 650. That suit was brought under an act of Congress authorizing the court of claims to pass upon a claim preferred by an Indian tribe, the intention of Congress, as stated in the act, being "to allow the said court of claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined." In that case it was sought to have the claimants relieved of certain provisions of a treaty, because of fraud and duress alleged to have been practised by the United States. But this court said: "There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested and the act does not in the least degree justify any such inference."

In the jurisdictional act of March 2, 1895, 28 Stat. at L. 876, 898, chap. 188, Congress authorized suit to be brought in the court of claims, so that the rights, legal and equitable, of the United States and of the Choctaw and Chickasaw Nations, and the Wichita and Affiliated Bands of Indians in the premises "shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party"—taking care, however, to add that nothing in the act "shall be accepted or construed as a confession that the United States admit that [535]\*the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof." It is thus clear that the court of claims was without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties. Those rules, it is true, permit the relations between Indians and the United States to be taken into consideration. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any 179 U. S.

trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts, not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the government to determine.

It is said in the present case that the interpretation of the treaty in accordance with the views of the United States would put the government in the attitude of having acquired lands from the Indians at a price far below their real value. Even if this were true it would not authorize the court in determining the legal rights of the parties to proceed otherwise than according to the established principles of interpretation, and out of a supposed wrong to one party evolve a construction not consistent with the clear import of the words of the treaty. If the treaty of 1866, according to its tenor and obvious import, did injustice to the Choctaws and Chickasaws, the remedy is with the political department of the government. As there is no ground to contend in this case that that treaty, if interpreted according to the views of the government, was one beyond the power of the parties to make, it is clear that even if the United States did not deal generously with the Choctaws and Chickasaws \*in respect of the lands in dispute—and [536] we do not mean to say that there is any ground whatever for so contending—the wrong done must be repaired by Congress, and cannot be remedied by the courts without usurping authority that does not belong to them.

Looking now at the treaty of 1866, we are unable to concur in the interpretation placed upon it by the court of claims. In our opinion its words plainly and obviously import a cession to the United States of the territory constituting the Leased District unaccompanied by any condition in the nature of a trust, express or implied, except that the money to be paid by the United States in consideration of the cession was to be invested and held by the United States "in trust" for certain specified objects. The declaration of a trust touching the money, and the failure to accompany the cession of the lands with any declaration of a trust in respect to them, manifestly shows that there was an intention to pass to the United States an absolute title to the lands, and to abrogate the existing lease. The words in article 3 of the treaty, "the Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° of west longitude known as the Leased District," and the words in article 46, "of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the Leased District," so clearly exclude the idea of trust in reference to



the lands, that a different meaning cannot be attached to them without doing violence to the words used by the parties. It cannot be doubted, as we have heretofore said, that during the negotiations resulting in the treaty of 1866 the parties well knew that the territory constituting the Leased District was held by the United States, not absolutely or in fee, but under lease, for the permanent settlement thereon of the Wichita and certain other tribes or bands of Indians. The treaty of 1855 shows that upon its face. Now there is nothing whatever in the treaty of 1866 that evinces a purpose to preserve the relations of lessor and lessee in respect to the lands constituting the Leased District. On the contrary, the relations of the parties having been disturbed or destroyed

[537] by the Civil War, there was \*a manifest purpose, not to renew and continue the relations of lessor and lessee, but to have the territory in question ceded absolutely to the United States.

It is said that the treaty of 1866, if interpreted in the light of what occurred at the Fort Smith council held in September, 1865, shows that the parties expected and intended that the lands ceded should be accompanied with a trust in reference to the use of the Leased District for the settlement of Indians. We cannot assent to this view. The persons at that council who represented the United States stated that the new Indian treaties to be made must contain certain stipulations. But no one of those stipulations had specific reference to the lands constituting the Leased District. It is true that of the stipulations mentioned by Commissioner Cooley at the Fort Smith Council, the fifth declared that "a portion of the lands hitherto owned and occupied by you [the Indians] must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government;" and that by the seventh it was provided that "no white person, except officers, agents, or employees of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory unless formally adopted into some tribe according to the usages of the band." But those stipulations had no reference to the Leased District then held by the United States under the treaty of 1855 for the permanent settlement of Indians. The reference in the fifth and seventh proposed stipulations related, so far as the Choctaws and Chickasaws were concerned, to lands "owned and occupied by them," that is, to the territory, respectively, of the Choctaws and Chickasaws east of the 98th degree of west longitude, which was controlled by them and in which their laws and usages prevailed. Those nations did not then occupy the Leased District, but did own and occupy lands east of that district, and in that territory their laws and usages controlled.

The treaty of 1866 contains no word or clause qualifying or limiting the absolute cession made by article 3 of the territory constituting the Leased District. If the parties

to it intended \*that the lands constituting [533] that district should continue to be held and used by the United States as they were then held and used under the treaty of 1855—that is, under lease—the treaty of 1866 would not have declared, without qualification, that the Choctaws and Chickasaws "hereby cede" to the United States the territory known as the Leased District, and omitted all words that would, under the most liberal interpretation, either import a continuation of the lease then existing or any trust connected with the territory ceded. It is a fact not without significance that one of the persons attesting the treaty of 1866 as a witness was an eminent lawyer who was of counsel for the Choctaws and Chickasaws during the negotiations at Washington resulting in that treaty. In the view we take of the matter, we cannot suppose that he advised the Indians that the treaty made any other than an unconditional cession of the territory known as the Leased District.

If the Indians intended, so far as they were concerned, to pass an absolute unencumbered title to the United States, it would, we think, have been impossible to employ language more appropriate to that object than is to be found in the treaty of 1866. Our convictions upon this point are so decided that we feel constrained to say that if some of the parties had not been Indians it would never have occurred to anyone that the cession of territory made by that treaty was attended by conditions in the nature of a trust. While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them "in the light of the larger reason and the superior justice that constitute the spirit of the law of nations" (*Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75), the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy. We may repeat, that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the government having full power over the subject.

\*It is said that the interpretation placed [539] by us upon the Choctaw-Chickasaw treaty of 1866 is inconsistent with that placed by the United States upon the treaties made in the same year with the Seminoles and the Creeks—all of which treaties contemplated a new policy for the Indian country and for the Indians. Let us see what are the facts in relation to those treaties.

The preamble of the treaty with the Seminoles (which was concluded March 21, 1866, and proclaimed August 16, 1866, 14 Stat. at L. 755), recited: "Whereas existing treaties between the United States and the Seminole Nation are insufficient to meet their mutual necessities; and whereas the



Seminole Nation made a treaty with the so-called confederate states, August 1, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States; and whereas a treaty of peace and amity was entered into between the United States and the Seminole and other tribes at Fort Smith, September 10, 1865, whereby the Seminoles revoked, canceled and repudiated the said treaty with the so-called confederate states; and whereas the United States, through its commissioners, in said treaty of peace, promised to enter into treaty with the Seminole Nation to arrange and settle all questions relating to and growing out of said treaty with the so-called confederate states; and whereas the United States, in view of said treaty of the Seminole Nation with the enemies of the government of the United States, and the consequent liabilities of said Seminole Nation, and in view of its urgent necessities for more lands in the Indian territory, requires a cession by said Seminole Nation of a part of its present reservation, and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provisions of article first, treaty \*of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7th, 1856. In consideration of said grant and cession of their lands, estimated at 2,169,080 acres, the United States agree to pay said Seminole Nation the sum of \$325,362, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians."

The treaty concluded with the Creeks June 14, 1866, and proclaimed August 11, 1866, 14 Stat. at L. 785, contained a preamble similar to the one in the treaty with the Seminoles, and which, in addition, stated that "the United States *require* of the Creeks a portion of their land whereon to settle other Indians." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek Lands being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said

Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres the United States agree to pay the sum of thirty cents per acre, amounting to \$975,168, in the manner hereinafter provided."

By the Indian appropriation act of March 2, 1889, chap. 412, 25 Stat. at L. 980, 1004, the sum of \$1,912,942.02 was appropriated "to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article 3" of the above treaty with the Seminoles. And by an act approved March 1, 1889, chap. 317, 25 Stat. at L. 757, 759, Congress appropriated \$2,280,857.10 to pay the Creek Nation for the lands ceded by the treaty of 1866 with them—the agreement with those Indians which was the basis of the above act reciting, among other things, that \*the United States desired that "all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof."

Now, it is argued that if the interpretation placed by the United States upon the treaty of 1866 with the Choctaws and Chickasaws is accepted the result will be that the general government has been more liberal towards the Seminoles and Creeks than it has been with the Choctaws and Chickasaws. But that cannot constitute a reason why the court should depart from the ordinary signification of the words used in the treaty with the Choctaws and Chickasaws. If Congress chose to adopt one course towards the Seminoles and Creeks and a different course towards the Choctaws and Chickasaws, it is not for the judiciary to defeat the will of the legislative branch of the government by giving to an Indian treaty a meaning not justified by its words.

Apart from this last view we find clauses in the treaties with the Seminoles and Creeks which are not in the treaty with the Choctaws and Chickasaws, and which throw light upon the refusal of the United States to make an appropriation to the latter tribes on account of the particular lands here in question. In the treaties of 1866 with the Seminoles and Creeks, respectively, by which they ceded certain lands to the United States, it is expressly stated that the cession was made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." No such words are found in the treaty of cession concluded with the Choctaws and Chickasaws. When the United States concluded the treaty of 1866 with the Choctaws and Chickasaws it did not need a cession of the lands here in question in order simply to locate Indians and freedmen on them. It already had, by the treaty of 1855, a perpetual lease of those lands for the settlement of Indians. What it needed, perhaps what it required—at any rate, what it obtained—was an unqualified cession of the territory, unaccompanied by any declaration as to the use intended to be made of it, or by any words qualifying the absoluteness of the title passed to the United States. It took an absolute cession, without any declaration as



to the uses to which the territory ceded was to be devoted.

[542] \*It may be that other considerations than those referred to caused the use of the words in the treaties with the Seminoles and Creeks that are not to be found in the treaty with the Choctaws and Chickasaws. But in our judgment the words of the treaty of 1866 with the Choctaws and Chickasaws so clearly import a cession of title without limitation as to the uses to which the ceded territory was to be devoted, that the claim of those Indians can derive no support from the transactions between the United States and the Seminoles and Creeks.

But the Choctaws and Chickasaws lay great stress on the following paragraph in § 15 of the Indian appropriation act of March 3, 1891, 26 Stat. at L. 989, 1025, chap. 543: "And the sum of \$2,991,450 be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian river, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain 2,393,160 acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and conveyances \*to the United States of all the right, title, interest, and claim of said respective nations of Indians in and to said land (not including Greer county, which is now in dispute), in manner and form satisfactory to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw Nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

It is argued that the words in the above paragraph, "said lands have been ceded in trust" by article 3 of the treaty between the

United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866," must be taken as an admission by the United States in 1891 that the cession made by the treaty of 1866 was not intended to be absolute and unconditional, but in trust to be used for the settlement of Indians, upon the abandonment of which object by the United States the ceded lands reverted to the Indians.

There would be force in this contention if it appeared that the legislative and executive branches of the government had adhered to the declaration in the act of March 3, 1891. But such is not the fact. For at the next session of Congress, President Harrison, by special message, dated February 18, 1892, called attention to the above paragraph, and among other things said: "If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours a disapproval of the general Indian appropriation bill of which it was a part would have resulted in consequences so far-reaching and disastrous that I felt it my duty to approve the bill. But as a duty was devolved upon me by the section quoted, viz.: the acceptance and approval of the conveyances provided for, I have felt bound to look into the whole matter, and in view of the facts which I shall presently mention, to postpone any executive action until these facts could be submitted to Congress."

After referring to some matters that have no connection with the inquiry as to the meaning of the treaty of 1866 with the \*Choctaw and Chickasaws, the President proceeded: "After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of § 15 of the Indian appropriation bill, already set out, 'ceded in trust by article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866,' etc. It is agreed that the treaty contained no express limitation upon the uses to which the United States might put the territory known as the Leased District. The lands were ceded by terms sufficiently comprehensive to have passed the full title of the Indians. The limitation upon the use to which the government might put them is sought to be found in a provision of the treaty by which the United States undertook to exclude white settlers, and in the expressions found in the treaties made at the same time with the Creeks and other tribes of the purpose of the United States to use the lands ceded by those tribes for the settlement of friendly Indians. The stipulation as to the exclusion of white settlers might well have reference solely to the national lands retained by the Choctaw and Chickasaw tribes, and the reason for the nonincorporation in the treaty with them of a statement of the purpose of the government in connection with the use of the lands is well accounted for by the fact that as to these lands the government had already, un-



der the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the lands of the other tribes referred to. The United States paid to the Choctaws and Chickasaws \$300,000, and the failure to insert the words that are called words of limitation in this treaty points, I think, clearly to the conclusion that the commissioners on the part of the government, and the Indians themselves, must have understood that this government was acquiring something more than a mere right to settle friendly Indians, which is already possessed, and something more than the mere release of the right which the Choctaws and Chickasaws had under the treaty of 1855 to select locations on these lands if they chose. Undoubtedly it was the policy of this government for the time to hold these and the adjacent lands as [545] Indian country, and many of \*the expressions in the proclamations of my predecessors and in the reports of the Indian Bureau and of the Secretary of the Interior mean this and nothing more. This is quite different from a conditional title which limits the grant to a particular use, and works a reinvestment of full title in the Indian grantors when that use ceases. But those who hold most strictly that a use for Indian purposes, where it is expressed, is a limitation of title, seem to agree that the United States might pass a fee absolute to other Indian tribes in the lands ceded for their occupancy. Certainly it was not intended that in settling friendly Indians upon these lands the government was to be restrained in its policy of allotment and individual ownership. If, for an adequate consideration by treaty, the United States placed upon these lands other Indian tribes, it was competent to give them patents in fee for a certain and agreed reservation. This being so, when the policy of allotment is put into force the compensation for the unused lands should certainly go to the occupying tribe, which, in the case supposed, had paid a full consideration for the whole reservation. It will hardly be contended that in such case this government should pay twice for the lands. . . . It is right also, I think, that Congress in dealing with this matter should have the whole question before it; for the declaration of Indian title contained in this item of appropriation extends to a very large body of land, and will involve very large future appropriations. The Choctaw and Chickasaw Leased District, embracing the lands in the Indian Territory between the 98th and 100th degrees of west longitude and extending north and south from the main Canadian river to the Red river, including Greer county, contains, according to the public surveys, 7,713,239 acres, or, excluding Greer county, 6,201,663 acres. This Leased District is occupied as follows: Greer county, by white citizens of Texas, 1,511,576 acres. The United States is now prosecuting a case in the courts to obtain a judicial declaration that this county is part of the Indian country. If a decision should be rendered in its favor, the claim of the Choctaws and Chickasaws to be paid for these lands at the rate named in this appropriation would at once be presented. . . . Under the treaty of 1855 the Choctaws and Chickasaws quit-claimed \*any supposed interest of theirs in [546] the land west of the 100th degree. The boundary between the Louisiana purchase and the Spanish possessions by our treaty of 1819 with Spain was, as to these lands, fixed upon the 100th degree of west longitude. Our treaty with the Choctaws and Chickasaws made in 1820, extended their grant to the limit of our possessions. It follows, of course, that these lands were included within the boundaries of the state of Texas, when that state was admitted into the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the state of Texas, and not of the United States. The lands became public lands of that state. For the release of this claim, and for the lease of the lands west of the 98th degree, the government of the United States paid the sum of \$800,000. In the calculations which have been made to arrive at the basis of the appropriations under discussion, no part of this sum is treated as having been paid for the lease. I do not think that this is just to the United States. It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. The sum of \$300,000, paid under the treaty of 1866, is deducted, as I understand, in arriving at the sum appropriated. It seems to me that a considerable proportion of the sum of \$800,000 previously paid should have been deducted in the same manner. I have felt it my duty to bring these matters to the attention of Congress for such action as may be thought advisable."

The President's message having been referred by the Senate to its Committee on Indian Affairs, that Committee made a report accompanied by the following resolution: "*Resolved*, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw Nations for their interest in the Cheyenne and Arapahoe reservation in the Indian territory, submitted with this resolution, it is the opinion of the Senate that there is no sufficient reason for interference in the due execution \*of the law [547] referred to." Congr. Rec. 52 Cong. 1st Sess. Vol. 23, pt. 5, p. 4093. The resolution was adopted, and one of similar import was adopted by the House of Representatives.

But on the 15th day of December, 1892, the House of Representatives passed the following resolution: "*Resolved* by the Senate and House of Representatives, That the Secretary of the Treasury be, and he is hereby, directed to retain and cover back into the Treasury \$48,800 of the appropriation made by Congress to pay the Choctaw and Chickasaw tribes of Indians for their interest in



lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of said Cheyennes and Arapahoes to be by that amount more than is due the said Choctaws and Chickasaws upon the purchase and settlement for their said interest." The Senate amended that resolution by adding thereto this proviso: "Provided, however, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, nor of this resolution shall be held in any way to commit the government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the 'Leased District.'" In this amendment the House concurred, and on January 18, 1893, the resolution as amended was approved by the President. Congr. Rec. 52d Cong. 2d Sess. vol. 24, pt. 1, pp. 173, 379, 868; 27 Stat. at L. 753.

Then followed the act of 1895, 28 Stat. at L. 876, 898, chap. 188, under which the present suit was instituted, and which related to the lands in the Leased District covered by the agreement of June 4, 1891, with the Wichita and Affiliated Bands of Indians—the lands in dispute. That act contained the proviso that nothing in it "shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof."

[548] It thus appears that while the majority of the members of the two Houses of Congress, at one time, were apparently of the opinion that the cession made by the treaty of 1866 with \*the Choctaws and Chickasaws was encumbered with a trust that the lands be used only for purposes connected with the settlement of Indians, the head of the Executive Department of the government in 1892 was of opinion that no such trust existed or was intended. Evidently, the legislative branch of the government, when it came to deal with the lands occupied by the Wichita and Affiliated Bands of Indians, under the treaty of 1855, declined to apply the rule adopted in the act of 1891 in reference to the lands in the Leased District occupied by the Cheyennes and Arapahoes, and intended by the act of 1895 to leave the whole question as to the legal and equitable rights of the United States and of the Choctaw and Chickasaw Nations in the lands now in dispute to be determined by the courts. In other words, the rights of the parties are to be determined by the rules established for the interpretation of such instruments as the treaty of 1866, giving due weight to every fact proper to be considered in ascertaining the intention of the parties. In this view, we cannot hold that the above declaration in the act of March 3, 1891, 26 Stat. at L. 989, 1025, chap. 543, that the cession made by the treaty of

1866 was attended by a trust, is sufficient to defeat such interpretation of the treaty as is required by its words when reasonably interpreted or interpreted in the sense in which they were naturally understood by the Indians when they assented to the treaty.

V. We come to the material questions arising upon the appeal of the Wichita and Affiliated Bands of Indians.

We have seen in the statement of the case that by the agreement of June 4, 1891, between the United States and the Wichita and Affiliated Bands of Indians (ratified by the act of Congress of March 2, 1895, 28 Stat. at L. 876, 895, 896, 897, chap. 188) the latter ceded to the United States, without any reservation whatever, all their claim and title in and to the lands embraced in tract 5 on the above diagram, known as the Wichita Reservation. That agreement shows that in addition to the allotment of lands therein provided for, the Wichita and Affiliated Bands insisted that further compensation, in money, should be made to them by the United States for their possessory right in and to the above lands in excess of that required for the allotments. \*And [549] it was agreed that the question "as to what sum of money, if any, shall be paid to said Indians for such surplus lands" should be submitted to Congress, its decision thereon "to be final and binding upon said Indians;" provided, if any sum of money was allowed by Congress for surplus lands, it should be subject to a reduction of each allotment of land that was taken in excess of the 1,000 at that price per acre, if any, that might be allowed by Congress. It was further stipulated in the agreement of 1891 "that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement"—the tract numbered 5 and marked "Wichitas."

The relief asked by the Wichita and Affiliated Bands was that the petition of the Choctaws and Chickasaws be dismissed; and that it be decreed that they were entitled to the proceeds of the sale of all the lands involved in this case, to be paid to them from time to time after being deposited in the Treasury as required by the act of 1895.

The court of claims having decided that the Choctaws and Chickasaws were entitled to such of the lands of the Wichita Reservation as remained after making the allotments required by the act of 1895, the only relief given by the decree to the Wichita and Affiliated Bands was to adjudge that the members of those tribes were each entitled to 160 acres of land out of the lands in dispute, to be set apart for them by the United States, having due regard to any improvements made thereon by them respectively, for their permanent settlement. Of this decree the United States does not complain, but the Choctaws and Chickasaws do complain of it so far as it assigned 160 acres of land to each member of the Wichita and Affiliated Bands.



Under the views we have expressed, the Choctaws and Chickasaws have had no interest in the particular lands in dispute since the absolute cession made by them to the United States in the treaty of 1866. They have therefore no concern in the questions that have arisen between the United States and the Wichita and Affiliated Bands [550] of Indians as to the disposition \*of those lands. And as the United States does not complain of the decree in favor of the latter Indians, awarding to each 160 acres of land, the only question that remains to be considered arises on the appeal of the Wichita and Affiliated Bands, namely, whether the court below erred in not decreeing those Indians to be entitled to the proceeds of the sale of such of the lands in question as may be left after making the allotments in severalty required by the act of Congress.

The question last stated does not require any extended discussion; indeed, we are relieved of the necessity of discussing it, for the United States at the present hearing concedes that the removal of the Wichita and Affiliated Bands from their former habitations and their permanent settlement upon the Wichita Reservation invested them with a full right of occupancy of the lands in dispute and with all the incidents of such right, and that each member of those tribes is now entitled to receive 160 acres in severalty, and "also the proceeds of the balance of the land whenever such sales are made as authorized by the jurisdictional act." "If this were all," say the representatives of the government, "that the Wichita and Affiliated Bands claimed, the United States would in-dorse the appeal of these Indians instead of opposing it." The government itself suggests—and we recognize its right under all the circumstances of this case to ask—that the decree as to the Wichita and Affiliated Bands be reversed and set aside and the cause remanded with directions that, in addition to the dismissal of the petition of the Choctaw and Chickasaw Nations, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of those tribes, they have the benefit of the proceeds of the sale of such lands in the Wichita Reservation as are not needed for the purposes indicated in the act of Congress.

To what compensation are the Wichita and Affiliated Bands entitled on account of the lands not needed for the allotments required by the act of Congress? Upon this question this court does not feel bound to express any opinion. The agreement of 1891 between the United States and the Indians shows that the question of the amount of money, if any, to be paid to the Indians on account of the surplus lands was [551] in dispute, and was \*left to the determination of Congress, whose action, it was agreed, should be final and binding on the Indians; and then by the act of Congress that question was referred to the court of claims, with a right of appeal to this court. But Congress did not indicate any rule for the guidance of the court of claims in fixing the amount due the Indians. It only 179 U. S.

declared that the compensation allowed in the present suit should not exceed \$1.25 per each acre of land not required for the allotments in severalty. This implied that in the judgment of Congress a less amount might suffice to meet the legal and equitable rights of the Indians and the ends of justice. For the purpose of fixing that compensation, should the surplus lands be valued as of the date the Indians were located on the Reservation, or of the date the agreement of 1891 was ratified by Congress, or of the date when this suit was brought, or of the date when the allotments are all made? Upon these points the act of Congress is silent. The decree in the present suit should declare that the Wichita and Affiliated Bands are entitled to compensation in money for such of the lands as are not needed to meet the requirements of the act of March 2, 1895, 28 Stat. at L. 894, 897, chap. 188, leaving the amount to be fixed upon such evidence as may be adduced by the parties, but not, in any event, exceeding the limit prescribed by Congress.

The United States insists that it should be made a condition of any decree recognizing the right to compensation on account of the surplus lands, that the Wichita and Affiliated Bands should execute a release to the United States of all right, title, interest, and claim of every nature whatsoever in and to any lands within the limits of the United States except those allotted to them. This view cannot be adopted, because the pleadings do not inform the court of the existence of any claims of that kind; indeed, the pleadings could not properly embrace any claim to lands, or to the proceeds of any lands, except those within the Wichita Reservation. The court below could not make any decree in reference to claims that have not been referred to it by Congress. It is manifest that while article 6 of the agreement of 1891 between the United States and the Wichita and \*Affiliated Bands of Indians reserved the [552] right of the latter to prefer against the United States any and every claim they believed they had the right to make, the only suit authorized by the jurisdictional act of 1895 was one that would determine the claim of the Choctaws and Chickasaws of an interest in the particular lands here in dispute, and the claim of the Wichita and Affiliated Bands to be compensated in money for their possessory right in such lands. No suit was authorized by that act that would embrace any and every claim that the Wichita and Affiliated Bands might elect to prefer against the United States.

For the reasons given the decree must be reversed with directions to dismiss the petition of the Choctaw and Chickasaw Nations, and to make a decree in behalf of the Wichita and Affiliated Bands of Indians fixing the amount of compensation to be made to them on account of such lands in the Wichita Reservation as are not needed in order to meet the requirements of the act of Congress of March 2, 1895, chap. 188, and for such further proceedings as may be consistent with law and with this opinion.

*It is so ordered.*



ROBERT W. WORKMAN, *Petitioner*,  
v.  
MAYOR, ALDERMEN, AND COMMON-  
ALTY OF THE CITY OF NEW YORK,  
and James A. Gallagher.

(See S. C. Reporter's ed. 552-591.)

*Admiralty—action against city for injury  
to vessel by collision—negligence of per-  
sons in charge of fire-boat.*

1. The maritime law, and not the local law, governs in determining the liability of a city for injury to another vessel by a fire-boat owned by the city and in the custody and management of its fire department, which is negligently handled while hastening to assist in putting out a fire raging in a building at the head of a dock.

NOTE.—*Municipal liability for acts of firemen.*

A municipal corporation is not liable for the negligence of its firemen engaged in the line of their duty. *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Lilly v. Scranton*, 18 Pa. Co. Ct. 433; *McKenna v. St. Louis*, 6 Mo. App. 320.

The city of New York is not liable for the acts or omissions of the metropolitan fire department, created and organized by N. Y. Laws 1865, chap. 249, or of its commissioners or agents, who, by such act, have the control and management of the men and the measures and action for the prevention and extinguishment of fires. *Woodbridge v. New York*, 49 How. Pr. 67.

Under the system of laws applicable to the city of New York, the corporation is not the superior of the employees of the fire department, and is not liable for their acts or omissions. *Thompson v. New York*, 20 Jones & S. 427.

Officers of the fire department of a city, whether operating under general law or by special charter, are not the agents or servants of the corporation appointing them, but of the general public; and the doctrine of *respondet superior* does not apply to their conduct. *Shanewerk v. Fort Worth*, 11 Tex. Civ. App. 271, 32 S. W. 918.

A legislative or discretionary power to establish a fire department, conferred upon a city by the legislature, does not render the municipality liable for a loss by fire which might have been extinguished by proper exertion on the part of the officers of the fire department. *Heiler v. Sedalla*, 53 Mo. 159, 14 Am. Rep. 444.

In *Workman v. New York*, 63 Fed. Rep. 298, the city of New York was held liable for injuries to shipping, due to the negligent handling of a fire-boat owned by the city and in the custody of the fire department, while on its way to aid in extinguishing a fire, under N. Y. Laws 1882, chap. 410, § 27, declaring that for all purposes the local administration and government of the city of New York shall be continued to be performed by the corporation, and § 34, creating "other departments," of which the fire department is one, whose duties are elsewhere defined as "administrative and governmental."

The court said that the intent of the act was to make the work of the New York fire department a corporate duty, and that the decisions of the New York court of appeals are uniform to the effect that, as soon as it appears that duties are laid upon the city or rest upon the corporation, the city is answerable for negligence in performing them. But on appeal the judgment of the circuit court was reversed. *New York v. Workman*, 14 C. C. A. 530, 35 U. S. App. 210, 67 Fed. Rep. 347. The court said

2. A city is liable by maritime law for the negligence of its servants in charge of a fire-boat while hastening to put out a fire raging at the head of a dock, in consequence of which the boat collides with and injures another vessel.
3. An exemption of a fire-boat belonging to a city from seizure *in rem*, if such exemption exists, will not relieve the city from liability to an action *in personam* under the maritime law for injuries to another vessel, caused by negligence of those in charge of the fire-boat.

[No. 1.]

*Argued April 20, 1897. Ordered for reargument November 7, 1898. Reargued April 17, 1899. Decided December 24, 1900.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the

that the duties of municipal corporations in respect to protecting their citizens from the dangers of fires are governmental, not corporate; that "it is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

The value of this case as an authority for this principle is not affected by the reversal of the judgment in the principal case, as the reversal proceeds upon the theory that the maritime, and not the local, law governs.

The privilege of maintaining a fire department, conferred by legislative authority, is not of such local and special benefit to a municipality or its members that it cannot properly be classed among those governmental and public powers which exclude a civil liability for negligence in their exercise. *McKenna v. St. Louis*, 6 Mo. App. 320.

In conflict with the above cases is *Hesketh v. Toronto*, 25 Ont. App. Rep. 449, in which the voluntary establishment of the fire department by a municipality under the permission of a statute was held to render the municipality liable for the negligence of its firemen in the course of their employment.

Negligence of a fireman in opening the door of an engine house so as to strike a passerby on the sidewalk will not render the city liable. *Kies v. Erie*, 135 Pa. 144, 19 Atl. 942, 169 Pa. 598, 32 Atl. 621.

The negligence of an engineer of a fire department in allowing water to escape and freeze on the street while he was thawing out a hydrant does not make the municipal corporation liable for injury to a person who slipped and fell on the ice. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

The bursting of a hose, caused by negligence of firemen while engaged in extinguishing a fire, causing an injury to a person, does not render the city liable to the latter. *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

Negligently allowing the steam to escape from a fire engine in a public street while the engine is there for a necessary purpose, whereby a horse is frightened and runs away, causing damage, will not render the city liable. *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177.

So, the negligent, careless, or wanton acts of



Second Circuit to review a decision reversing a decree of a District Court on a libel against a city. *Reversed*.

See same case below, 14 C. C. A. 530, 35 U. S. App. 201, 67 Fed. Rep. 347.

Statement by Mr. Justice **White**:

[553] \*Workman, the libellant below, was the owner, on June 11, 1893, of the British barkentine *Linda Park*. On the date named, while the vessel was moored to a dock at pier 48 in the East river in New York City, she was struck and injured by the steam fire-boat *New Yorker*. At the time of the collision the *New Yorker* was running into the slip between piers 48 and 49 for the purpose of getting near to another fire-boat which had shortly prior thereto safely entered the slip. Both the fire-boats had been called in order to aid in extinguishing a fire in a ware-

house situated a distance of 85 to 100 \*feet[554] from the slip bulkhead. To recover the damage occasioned to his vessel, Workman filed, in the district court of the United States for the southern district of New York, a libel *in personam* against the mayor, aldermen, and commonalty of the city of New York. This libel was subsequently amended by adding the allegations essential to make, as additional respondents, the fire department of the city of New York and James A. Gallagher, the person in charge of the navigation of the *New Yorker* at the time of the collision.

The district court entered a decree in favor of the libellant against the city of New York and Gallagher, and dismissed the libel as to the fire department. 63 Fed. Rep. 298.

The circuit court of appeals, to which the case was taken, affirmed the decree of the district court against Gallagher and in favor

a city's firemen in ringing a bell attached to a piece of the fire apparatus will not render the municipality liable for injuries sustained by a person driving a horse which becomes frightened at the noise. *Saunders v. Fort Madison* (Iowa) 82 N. W. 428.

For negligence of firemen engaged in extinguishing a fire, by which sparks from a steam fire-engine are allowed to escape and set fire to a person's goods, the city is not liable. *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

And a municipality is not liable for an injury to property by water, occasioned by the negligence of its firemen in endeavoring to extinguish a fire. *Davis v. Lebanon*, 22 Ky. L. Rep. 384, 57 S. W. 471.

The rule that a municipal corporation is not liable for the negligent acts of its officers in performance of a public duty applies to the acts of members of a fire department in respect to keeping the apparatus in good order. *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

Thus, a municipality is not liable for the negligent or careless acts of its agents and servants acting in the line of their duty in caring for the fire apparatus owned by the municipality. *Saunders v. Fort Madison* (Iowa) 82 N. W. 428.

And a municipality is not liable for the negligence of members of its fire department in placing a hook and ladder truck, for the purpose of more easily cleaning the engine house, in such a position that the ladder projects across the sidewalk, in consequence of which a passerby is injured. *Dodge v. Granger*, 17 R. I. 664, 15 L. R. A. 781, 24 Atl. 100.

The negligence of a member of a fire department in testing the force and capacity of a hydrant, under direction of the mayor, will not make the city liable for damages caused by the resulting fright of a horse. *Edgerly v. Concord*, 59 N. H. 78.

That a fire tower was being tested by the fire commissioners preparatory to a purchase thereof by the city of New York does not render the municipality liable for injuries due to their negligence, where the corporation, under the laws applicable thereto, is not the superior of the employees of its fire department. *Thompson v. New York*, 20 Jones & S. 427.

Negligent driving of a fireman belonging to a city fire department while going to a fire will not render the city liable for damages thereby caused. *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; *Alexander v. 179 U. S.*

*Vicksburg*, 68 Miss. 564, 10 So. 62; *Knight v. Philadelphia*, 15 W. N. C. 307; *Howard v. San Francisco*, 51 Cal. 52; *McKenna v. St. Louis*, 6 Mo. App. 320.

The fact that running a fire engine on a sidewalk was in violation of a city ordinance will not render the city liable for injury to a person who was knocked down by it on the sidewalk. *O'Meara v. New York*, 1 Daly, 425.

Carelessness of firemen in drawing a hose carriage against a person on a public highway, upon an alarm of fire, does not render a city liable for the injuries occasioned. *Hafford v. New Bedford*, 16 Gray, 297.

But in *Hesketh v. Toronto*, 25 Ont. App. Rep. 449, *supra*, a municipal corporation which, though not bound to maintain a fire department, voluntarily established such a department, was held liable for injuries due to the failure of its firemen to keep under proper control the horses attached to one of the steam fire-engines.

The fact that there is no alarm of fire, but that the firemen are practising with their apparatus in the streets in order to become more efficient, will not render the city liable for such negligent driving. *Thomas v. Findlay*, 6 Ohio C. C. 241.

Thus, the reckless driving of a member of a fire department while exercising a team of horses in the street attached to a hook and ladder truck does not render the city liable for the death of a child who is run over by the truck. *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349, 52 N. W. 811.

And the rule that a municipal corporation is not responsible for the negligent acts of its firemen applies to an injury occasioned by the negligence of the firemen while exercising a team of horses, the property of the fire department. *Lilly v. Scranton*, 18 Pa. Co. Ct. 433.

And a municipal corporation is not liable to one injured by the negligence of the officers and employees of its fire department while they are practising with a water tower in one of the public streets. *Frederick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35, Affirming 3 Ohio N. P. 36.

And the rule is the same, also, where negligent driving occurred at a midnight parade of the fire department on a celebration of the national centennial anniversary, the parade being directed by a committee appointed by the common council of the city. *Smith v. Rochester*, 76 N. Y. 507.

So, the temporary and reasonable obstruction of a highway by a rope, in order to allow a parade of the fire department, does not make the city liable for a personal injury caused by



of the fire department. The appellate court, however, reversed that portion of the decree of the district court which held the city of New York liable, and remanded the case with instructions to dismiss the libel as against the city. 14 C. C. A. 530, 35 U. S. App. 201, 67 Fed. Rep. 347.

The case was then brought to this court by the allowance of a writ of certiorari.

Mr. Harrington Putnam argued the cause, and, with Mr. Charles C. Burlingham, filed a brief for petitioner:

The responsibility of the municipality should be determined, not by the municipal law of master and servant, but by the principles of the maritime law.

*The China*, 7 Wall. 68, *sub nom. The China v. Walsh*, 19 L. ed. 73; *Currie v. McKnight* [1897] A. C. 97.

By the law of the admiralty a lien in favor of the party injured follows a tortious collision.

*The Arturo*, 6 Fed. Rep. 313; *Ralli v. Troop*, 157 U. S. 403, 39 L. ed. 750, 15 Sup. Ct. Rep. 657; *The Siren*, 7 Wall. 152, *sub nom. The Siren v. United States*, 19 L. ed. 129.

Unlike the Federal government or the state, the city is suable in admiralty, and is

ordinarily liable for the marine torts of all its maritime instrumentalities.

*Shields v. New York*, 18 Fed. Rep. 748.

Nevertheless, from considerations of public policy, which make it unseemly and improper to arrest a city vessel which at the time is in municipal employ, the courts will not enforce the lien on the res.

*The Fidelity*, 16 Blatchf. 572, Fed. Cas. No. 4,758.

The exemption from actual arrest requires, in order that justice be done, that the corporate owner should be answerable *in personam*.

*Guthrie v. Philadelphia*, 73 Fed. Rep. 688.

The decisions of the state courts as to the liability of a municipality for the negligence of officers or employees of its departments cannot bind the admiralty.

*Greenwood v. Westport*, 63 Conn. 587, 60 Fed. Rep. 577; *The Giovanni v. Philadelphia*, 59 Fed. Rep. 303; *The F. C. Latrobe*, 28 Fed. Rep. 377.

The distinction taken by the state courts between one city department and another is not reasonable when applied to vessels engaged in navigation.

*Jones v. Mersey Docks & Harbour Bd. Trustees*, 11 H. L. Cas. 443.

a collision with the rope. *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

And no action will lie against a municipality to recover for the loss of a dwelling house by fire in consequence of a failure of the fire department to respond to a call for its services, due to the fact that it had been ordered on parade duty to attend the funeral of a city official, notwithstanding the fact that the expenses of the fire department are estimated each year in fixing the tax rate. *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419.

A municipality, whether operating under special charter or not, is not liable to a member of its fire department for personal injuries sustained by him by reason of the gross negligence and incompetency of another fireman, although the city employed and retained the latter knowing him to be incompetent. *Shanewerk v. Fort Worth*, 11 Tex. Civ. App. 271, 32 S. W. 918.

A city is not liable to a lineman on its fire-signal system for negligence in respect to the condition of a pole to which the wires of the system are attached, which breaks and injures him. *Pettingell v. Chelsea*, 161 Mass. 368, 24 L. R. A. 426, 37 N. E. 380.

The rule laid down in the principal case is in accord with several decisions in the lower Federal courts.

Thus, a municipality was held liable in admiralty as the owner of a fire-tug, in *Henderson v. Cleveland*, 93 Fed. Rep. 844, for injuries to shipping, due to the speed with which the tug was proceeding to render aid in extinguishing a fire, there having been an abundance of time for the tug to reach its destination without running any risk to itself or other vessels. The court said that, under the most imminent danger and where speed and prompt action are necessary, fire-tugs must exercise ordinary care in doing their work; that there was a distinction between the laws of a state exempting a municipality from all claims for negligence, growing out of accidents or injuries caused by the speed at which fire engines or hose carts were being driven to a fire, and the rules in admiralty, which relate to fire-tugs under the same allegations of negligence.

So, in *Thompson Nav. Co. v. Chicago*, 79 Fed. Rep. 984, a city was held liable *in personam* to the extent of the value of a fireboat owned by it, for injuries to another vessel, caused by the blind and thoughtless haste in which it was moving.

And this principle was recognized in *The F. C. Latrobe*, 28 Fed. Rep. 377, where the court, in holding a municipality liable *in personam* as the owner of an ice-boat, for injuries to another vessel, due to its negligent management, said that when in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, public policy requires that the municipality shall not be deprived of its use, and therefore the maritime lien cannot attach: but this furnishes no sufficient necessity or reason for denying a remedy against the municipality as the owner of the offending vessel.

And the fact that an action *in rem* will not lie against a fire-boat owned by a municipality will not prevent a decree *in personam* against the municipality for damages sustained by another vessel by reason of the negligence of those in charge of the boat. *Thompson Nav. Co. v. Chicago*, 79 Fed. Rep. 984.

A fire patrol, which is a corporation constituting a public agency, auxiliary to the city government or its fire department, and which is a charitable institution, is not liable for the death of a pedestrian on a street, caused by the negligence of an employee in throwing from the window of a building tarpaulins which had been left there on the occasion of a fire. *Boyd v. Insurance Patrol*, 113 Pa. 269, 6 Atl. 536.

The acts of a voluntary association of firemen while engaged in extinguishing a fire are to be regarded like those of paid firemen, in respect to the liability of the city for their negligence. *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 395.



This duty to refrain from running into and destroying the property of another has its sanction in the fundamental principle that every property owner is bound "to control the use of his property, and to use it in such a manner as not to produce injury to others."

*New York v. Bailey*, 2 Denio, 433.

Where the individual is injured by acts of omission, the inquiry may well be whether the neglected duty was imposed by statute upon the corporation; but where the act is a violent tort committed by or arising from municipal property, the breach of duty appears *ipso facto* in the tort itself, even by the rules of the common law.

*Clarissy v. Metropolitan Fire Dept.* 7 Abb. Pr. N. S. 352; *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. Rep. 570.

The contention for exemption from damages by collision is similar to the municipal defenses heretofore interposed and overruled by the Federal courts where property rights had been invaded.

*Allen v. New York*, 17 Blatchf. 350, Fed. Cas. No. 232; *Munson v. New York*, 18 Blatchf. 237, 3 Fed. Rep. 338; *Gamewell Fire-Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312; *Bliss v. Brooklyn*, 8 Blatchf. 533, Fed. Cas. No. 1,544; *May v. Mercer County*, 30 Fed. Rep. 246.

Mr. Francis M. Scott argued the cause and filed a brief for respondents:

The mayor, aldermen, and commonalty of the city of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the commissioners of the fire department in the performance of their public duties.

*Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bailey v. New York*, 3 Hill, 531; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Mitchell v. Rockland*, 52 Me. 118.

This exemption from liability, growing out of the nature of the duties performed, is recognized and enforced, even when the duties are defined and the executive officers created to perform the same by provisions in the charter or organic act creating the municipal corporation, as well as when the duties are imposed upon corporate officers by independent statutes.

*Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Hain v. New York*, 70 N. Y. 459.

The duties of a fire department are governmental, and not corporate, and consequently of the class of which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

7 Am. & Eng. Enc. Law, p. 997; Tiedeman, Mun. Corp. § 333a; 1 Beach, Pub. Corp. § 179 U. S.

744; Jones, Negligence of Mun. Corp. § 31; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788; *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Kies v. Erie*, 135 Pa. 144, 19 Atl. 942; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Edgerly v. Concord*, 59 N. H. 78; *Howard v. San Francisco*, 51 Cal. 52; *McKenna v. St. Louis*, 6 Mo. App. 320; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Heller v. Scdalia*, 53 Mo. 159, 14 Am. Rep. 444; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; *Freeman v. Philadelphia*, 7 W. N. C. 45; *Knight v. Philadelphia*, 15 W. N. C. 307; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Dodge v. Granger*, 17 R. I. 664, 15 L. R. A. 781, 24 Atl. 100; *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349, 52 N. W. 811; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

The decisions draw no distinction between liability for the acts of a fire department organized under a city charter, and fire departments organized under separate and special acts, but performing their functions within a specific area.

*O'Meara v. New York*, 1 Daly, 425; *Woolbridge v. New York*, 49 How. Pr. 67; *Thompson v. New York*, 20 Jones & S. 427. See also *Smith v. Rochester*, 76 N. Y. 506; *Terhune v. New York*, 88 N. Y. 247.

While the fire-boat may, perhaps, be classed as a maritime instrumentality, the result of this collision presents one of those exceptions to holding the city liable under the maritime law, which is distinctly a requirement of public policy.

*The F. C. Latrobe*, 28 Fed. Rep. 377.

All of the fire-boats owned by the city of New York are constructed, controlled, and operated under local laws, which laws have been construed by the highest court in the state of New York; and this court has held that, whenever the decisions of a state court relate to some law of a local character, the decisions upon that subject are conclusive.

*Detroit v. Osborne*, 135 U. S. 499, 34 L. ed. 262, 10 Sup. Ct. Rep. 1012; *Buecher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Haight v. New York*, 24 Fed. Rep. 93; *Edgerton v. New York*, 27 Fed. Rep. 232; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489.

Mr. Harrington Putnam also argued the cause on reargument, and, with Mr. Charles C. Burlingham, filed a supplemental brief for petitioner:

While the owners should always be answerable for damage by their ship, it is in the maritime courts that this principle is generally accepted. For that, among other reasons, the necessity that maritime courts

should administer one and the same system of law has been long recognized.

Exton, *Maritime Dicæologie, or Sea Jurisdiction of England*, London ed. 1755, p. 223; *Penhallow v. Doane*, 3 Dall. 54, 1 L. ed. 507; *Story*, Const. § 1670; *Benedict*, Admiralty, § 208.

This danger has been guarded against in former decisions of the Federal courts.

*The Lottawanna*, 21 Wall. 580, *sub nom. Rodd v. Heart*, 22 L. ed. 664; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

Thus, the admiralty protects maritime liens which arise during the control of a state receivership.

*The Resolute*, 69 Fed. Rep. 742.

The general rule in reference to ships, as we understand it, is not to yield the maritime law to any doubtful suggestions of the local power; and in no case to do so where its invasions are unjust and injurious to the general interests of commerce.

*The Avon*, Brown, Adm. 170, Fed. Cas. No. 680; *Harris v. The Henrietta*, Newberry, Adm. 284, Fed. Cas. No. 6,121.

Even in a suit *in personam* against Spanish shipowners they were not allowed to defend by pleading the law of Spain, under which they were freed from liability.

*The Leon*, L. R. 6 Prob. Div. 148.

Mr. Theodore Connolly argued the cause on reargument, and, with Messrs. John Whalen and James M. Ward, filed a brief for respondents.

[554] \*Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is clearly deducible from the record that the courts below concurred in dismissing the libel as against the fire department of the city of New York, upon the contention made in the answer of the department that under the provisions of a named statute of the state of New York, the fire department of the city of New York was neither a corporation nor [555] a quasi corporation, \*but was merely a department of the city. As no controversy is made respecting the correctness of the decree in this particular, we dismiss this subject from view.

With reference to the decree rendered by both courts against Gallagher, the district judge held that, giving due consideration to the emergency of fire, "the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary and negligent." 63 Fed. Rep. 298. The circuit court of appeals, in its opinion, affirming the decree against Gallagher, said:

"The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libellant's vessel by the impact of the fire-boat were caused by the negligent manner [management?] of the fire-boat while the latter was trying to reach a convenient location to play

upon a burning building near the pier at which the libellant's vessel was moored."

There is no substantial controversy raised on the record as to the premise of fact upon which the personal decree against Gallagher was rendered by both the courts below. And even if such were not the case, the facts upon which Gallagher's liability depends are not now open to controversy, because of the well-settled doctrine that where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred. *The Carib Prince*, 170 U. S. 655, 658, *sub nom. Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753, and cases there cited. It is clear that it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to negligence in the management of the fire-boat, the testimony would not justify the assertion. We shall therefore no further consider this feature of the case.

In order to elucidate the serious question which arises for discussion, we briefly state the reasons by which the courts below were led to reach opposing conclusions as to the liability or nonliability of the city.

The district court, on the assumption that the local law controlled, determined that by that law, as declared in decisions of the courts of the state of New York, the city was \*liable for the injury caused by the negligent management of its fire-boat. The circuit court of appeals, however, was of opinion that the city of New York was not answerable for the injury inflicted, for the reasons which it thus stated (14 C. C. A. 531, 35 U. S. App. 204, 67 Fed. Rep. 348):

"It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.



"It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

[557] Having thus determined the general principle by which the liability of the city was to be judged, the court reviewed some of the decisions of the court of appeals of New York, and deduced from them that the city, in the operation of the fire-boat, performed a governmental, and not a corporate, function, and, therefore, under the assumption that the decisions in question were authoritatively controlling, held the city not liable.

Whilst it is contended at bar that the district court correctly decided, considering the local law of New York alone, that the city was liable, it is also asserted that even if by such law there was no responsibility on the part of the city of New York, nevertheless the circuit court of appeals erred in deciding that the city was not bound, because by the maritime law the liability existed, and such law should have controlled, although the local law was to the contrary.

We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and, second, if the case is solely governed by the maritime law, whether the city of New York is liable.

In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit v. Osborne* (1890) 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012,—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but, Does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States?

[558] The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not \*because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act

causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. \*This follows if a corporation [559] must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a sup-



posed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty. For the principle which would exempt the municipal owner of a fire-boat from legal responsibility would be equally applicable to boats used by a street department for the removal of refuse, to ferries, to pilot boats, to training-school ships—one of which, it is suggested in argument, the city of New York now actually operates, and to all other vessels which the municipality might consider it necessary or desirable to use. The wrong and injustice which would thus arise need not be commented upon.

The evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity were very aptly pointed out in *Mersey Docks & Harbour Board v. Gibbs* (1866) L. R. 1 H. [560] L. 122. In that case it was sought to hold the dock trustees liable for damage occasioned to a ship and cargo in striking a mud bank while attempting to enter a dock. The trustees asserted an exemption on the ground that they did not collect tolls for their own profit, but merely as trustees for the benefit of the public. Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

And still later, in deciding the case of *Currie v. McKnight* [1897] A. C. 97, the House of Lords declared that while the admiralty law as known in England differs from the common law of England, and the common law of Scotland differs from the common law of England, because they were derived from divergent sources, yet the admiralty laws were derived both by Scotland and England from the same source, and "it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island."

Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing

so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

In *The Key City* (1872) 14 Wall. 653, 660, *sub nom. Young v. The Key City*, 20 L. ed. 896, 898, it was held that Federal courts of admiralty were not governed by state statutes of limitation in the enforcement of maritime liens. In *The Lottawanna* (1874) 21 [561] Wall. 558, 578, *sub nom. Rodd v. Heartt*, 22 L. ed. 654, 663, it was held that the maritime law as accepted and received in this country did not confer a lien upon a vessel in favor of those who had furnished necessary materials, repairs, and supplies for such vessel in her home port, but that the district courts of the United States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the state law.

In the course of the opinion, speaking through Mr. Justice Bradley, the court said (pp. 572, 573, 574, L. ed. p. 661):

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other.

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'

"The Constitution does not attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the [562]



Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 443, 32 L. ed. 788, 793, 9 Sup. Ct. Rep. 480, a maritime contract executed in New York was held to be an American contract, and the local law of New York was declared not to govern in its construction. In *Butler v. Boston & S. S. Co.* (1889) 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612,—a case growing out of a collision in navigable waters within the territorial boundaries of Massachusetts—it was held that a state statute could not operate to deprive the owner of the offending ship of the benefit of the limited liability act, and that state legislatures could not change or modify the general maritime law. In *The Max Morris* (1890) 137 U. S. 1, 14, *sub nom. The Max Morris v. Curry*, 34 L. ed. 586, 589, 11 Sup. Ct. Rep. 29, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libellant arising from his negligence, concurring with that of the vessel, "any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases." (p. 8, L. ed. p. 587, Sup. Ct. Rep. p. 30.) It was held (p. 15, L. ed. p. 589, Sup. Ct. Rep. p. 33) that "the mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." In *The J. E. Rumbell* (1893) 148 U. S. 1, 17, 37 L. ed. 345, 349, 13 Sup. Ct. Rep. 498, it was held that any priority given by a state statute, or by decisions in common law or in equity, to a mortgage upon a vessel as against a claim for supplies and necessities furnished to the vessel in her home port, was immaterial, "and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. *The Lottawanna* (1874) 21 Wall. 558, *sub nom. Rodd v. Heartt*, 22 L. ed. 654. Moreover, it has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. *The Albert Dumois* (1900) 177 U. S. 257-259, 44 L. ed. 761, 20 Sup. Ct. Rep. 595, and cases cited. But such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong

which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question, on the contrary, but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. This distinction is well illustrated by the ruling in *The Max Morris* (1890) 137 U. S. 1, 14, *sub nom. The Max Morris v. Curry*, 34 L. ed. 586, 589, 11 Sup. Ct. Rep. 29. There it was asserted that by the universal principles of the common law, as well as of the local laws of the states, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury. Whilst the premise was conceded the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, even although he had contributed thereto, *it was the duty of the admiralty courts to grant relief* in accordance with the principles of the maritime law.

It being then settled that the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime law, the city of New York was liable for the injury inflicted by the fire-boat. As a prerequisite to a solution of this question it is necessary to determine what relation the city of New York bore to the fire-boat and those in control of it.

The fire department of the city of New York, as constituted when the collision in question occurred, was established by chapter 410 of the New York Laws of 1882. In the statute it was declared (§ 27) that "for all purposes the local administration and government of the city and county of New York shall continue to be in, and be performed by, the corporation aforesaid," i. e., "the mayor, aldermen, and commonalty of the city of New York." By § 34 were established eleven enumerated "departments in said city," among them a fire department. By §§ 40, 106, and 108, provision was made for a board of fire commissioners, to act as the executive head of the department, to be nominated by the mayor, by and with the consent of the board of aldermen, and to be removable for cause by the mayor, subject to the approval of the governor of the state. The ministerial direction of the affairs of the department, including the preservation of the real and personal property used by it, was confided to this board of commissioners,



but the city was made liable for all expenses of maintenance and operation, and was the owner of all the property of the fire department. §§ 424 *et seq.* In addition to making the city liable for all expenses connected with the maintenance and operation of the department, it was provided in § 450 of the statute that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York.

In order to emphasize these material facts we repeat that it unquestionably appears that the fire department of the city of New York was an integral branch of the local administration and government of that city. The ministerial officers who directed the affairs of the department were selected and paid by the city; all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purpose; all the property of the department, including the fire-boats, belonged to the city; and the city was liable in case of an authorized destruction on land of property of individuals to prevent the spread of a conflagration.

That, upon such a state of things, the relation of master and servant existed between the city of New York and those in charge of the fire-boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondet superior*, is elementary. *Thorp v. Hammond* (1871) 12 Wall. 408, 20 L. ed. 419; *The Plymouth* (1866) 3 Wall. 35, *sub nom.* *Hough v. Western Transp. Co.* 18 L. ed. 128.

It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses. *Meriwether v. Garrett* (1880) 102 U. S. 472, 26 L. ed. 197.

As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. *The Fidelity* (1879) 16 Blatchf. 569, Fed. Cas. No. 4,758. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admir-

alty law in all cases has also been denied. *The Oyster Police Steamers of Maryland* (1887) 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question is correct we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made.

\*The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity, the sovereign of another country was not subject to be impeached, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests, not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles we have stated. *The Exchange v. M'Faddon* (1812) 7 Cranch, 116, 3 L. ed. 287, involved the right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

*The Siren* (1869) 7 Wall, 153, *sub nom.* *The Siren v. United States*, 19 L. ed. 130, involved the liability of a prize ship in the



possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 155, L. ed. p. 131):

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

"In England, when the damage is inflicted by a vessel belonging to the Crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the Crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol*, 1 W. Rob. Adm. 382, the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the Crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the Crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, Swabey Adm. 3, and *The Swallow*, Swabey Adm. 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared."

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis* (1869) 10 Wall. 15, *sub nom. United States v. Douglas*, 19 L. ed. 179 U. S.

875, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered, made in *The Siren* (1869) 7 Wall. 153, *sub nom. The Siren v. United States*, 19 L. ed. 130, makes it clear that, in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the Crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

*The Athol* (1842) 1 W. Rob. Adm. 374, was the case of a British troopship which had run down a brig in the English channel. The lords of the admiralty having refused a petition for compensation, the owner of the brig applied to the high court of admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

"Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of admiralty will avoid doing justice, or that upon a due consideration, they will take upon themselves to say that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition."

The lords of the admiralty subsequently directed that an appearance should be made on behalf of *The Athol*, and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, "the damages and costs were pronounced for."

*The Parlement Belge* (1879) L. R. 4 Prob. Div. 129, was an action instituted on behalf of the owners of a steam tug against the steamship *Parlement Belge* and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty the King of Belgium, and in the pay and service of his government. Besides carrying the mails between Dover and Ostend, *The Parlement Belge* carried passengers and merchan-



dise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law, rather than upon any direct precedent, and it was held that *The Parlement Belge* did not come within the category of a ship of war [570] or a pleasure vessel belonging to the \*Crown of Belgium, and was not exempt from the process of the court. On appeal, however, (1880) (L. R. 5 Prob. Div. 197), it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.

And these considerations would dispose of the case, were it not for two subordinate contentions which we deem it essential to notice before reaching a conclusion. The first, as expressed in the brief of counsel, is that the injury to the *Linda Parke* should have been held to have been the result of inevitable accident, because "whatever was done in regard to the navigation of the New Yorker was done in the excitement of the moment, and in view of the extent of, not only the possible, but probable, spread of the fire, under pressure of necessity." Pausing for a moment to analyze this contention, it results that it involves the self-destructive assumptions that the maritime law, in order to render the person and property of the individual safe, in case of an emergency arising from the happening of fire, causes both the person and property of the individual to be unsafe, since without necessity and through negligence injury can be inflicted or destruction be brought about, without power, in the admiralty courts, to redress the wrong, [571] although the wrongdoer \*be amenable to their jurisdiction. But, while it is true that the emergency of fire was an element to be considered in determining whether or not those in charge of the fire-boat were negligent on the occasion in question, since negligence is relative, that is, depends upon whether there was an absence of the care which it was the duty to exercise under the particular circum-

stances, yet, it does not follow that the emergency of fire exempted from the exercise of such due care as the occasion required towards property which was in the path of the fire-boat as it approached the slip for the purpose of getting into a position where it might assist in extinguishing the fire in question.

This principle has been heretofore applied by this court. Thus, in *The Clarita* (1875) 23 Wall. 1, *sub nom. The Clara Clarita v. Cox*, 23 L. ed. 146, a tug boat, whose business it was to give relief to vessels on fire, in towing a vessel on fire from out of a dock, used a manilla hawser. While so engaged the hawser was burnt, and the burning vessel, getting loose from the tug, drifted, and set fire to another vessel. It was urged upon the court "that it is the interest of shipping that an enterprising company, like the one which owned this tug—a company which at great expense fits up a tug with powerful steam pumps, and keeps the vessel ready with her fires banked, night and day, to move on a moment's notice everywhere about a harbor for useful service—should be encouraged;" and the emergency of the occasion it was claimed ought to exempt from liability. In holding that the tug was in fault this court said (p. 15, L. ed. p. 151):

"Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the burning ferryboat should be chain, and that it would be unsafe to use a hawser made of manilla. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance."

And in accord with this doctrine is the local law of New \*York. Thus, in *Farley v. New York* (1897) 152 N. Y. 222, 46 N. E. 506, in speaking of the obligation to exercise due care devolving upon the driver of a fire engine, while responding to an alarm of fire, the court said (p. 227, N. E. p. 507):

"The conduct of the plaintiff was for the consideration of the jury. . . . He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident."

And indeed, although there are a number of cases holding that a municipal corporation is not liable for a positive injury to the person or property of an individual inflicted by its fire department, they do not rest upon the doctrine of emergency, which we are now considering. On the contrary, *all these cases but expound the theory of sovereign attribute*, which we have seen does not control the maritime law, and cannot justify an admir-



alty court in refusing to redress a wrong where it has jurisdiction to do so.

The remaining suggestion is that as a proceeding *in rem* could not have been maintained against the fire-boat because it was the property of the city of New York, and therefore an instrumentality employed in the performance of its municipal functions, no action *in personam* was available to the owner of the injured vessel. As we at the outset said, there is contrariety of opinion in the lower admiralty courts of the United States as to whether the rule of the courts of common law which exempts from seizure the property of a municipality devoted to its municipal uses obtains in a court of admiralty of the United States. This conflict, as we have also said, we deem it unnecessary to determine in this case, because, even if it be conceded that the fire-boat could not have been seized by process from a court of admiralty, the proposition that, therefore, the owner could not be called upon, in an action *in personam*, to respond for the damages inflicted by the boat, is without foundation. Of course, as [573] has been repeatedly declared by this \*court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. *The John G. Stevens* (1898) 170 U. S. 113, 120, 42 L. ed. 969, 972, 973, 18 Sup. Ct. Rep. 544, and cases cited, 122, L. ed. 973, Sup. Ct. Rep. 548. A liability of the owners *in personam*, however, is not dependent upon ability to maintain a proceeding *in rem* because of the maritime tort. A maritime lien may not exist in a cause of collision, for instance, when the thing occasioning the tort was not the subject of a maritime lien (*The Rock Island Bridge* (1867) 6 Wall. 213, *sub nom. Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge*, 18 L. ed. 753), or such a lien, if it exist, may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation. *The Siren* (1869) 7 Wall. 152, *sub nom. The Siren v. United States*, 19 L. ed. 129. Or the remedy *in rem* may not be available owing to the offending thing being actually in another country, or because of its loss intermediate the collision and the institution of legal proceedings.

A recovery can be had *in personam*, however, for a maritime tort when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant. *Thorp v. Hammond* (1871) 12 Wall. 408, 20 L. ed. 419; *The Plymouth* (1866) 3 Wall. 35, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 128.

The prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. That a collision upon navigable waters of the United States, between vessels, by the fault of one of such vessels, creates a maritime tort and a cause of action within

the jurisdiction of a court of admiralty, is, of course, unquestioned. And, as said by this court in *Re Louisville Underwriters* (1890) 134 U. S. 488, 490, 33 L. ed. 991, 993, 10 Sup. Ct. Rep. 587:

"By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his."

Because we conclude that the rule of the local law in the \*state of New York—conced-[574] ing it to be as held by the circuit court of appeals—does not control the maritime law, and, therefore, affords no ground for sustaining the nonliability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in *Weightman v. Washington* (1861) 1 Black, 39, 17 L. ed. 52; *Barnes v. District of Columbia* (1875) 91 U. S. 540, 23 L. ed. 440; and in *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law, which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting the correctness of the doctrines expounded by this court in the cases just cited, or as even impliedly approving contentions which may conflict with the principles announced in those cases.

Our conclusion is that the district court rightly decided that the mayor, aldermen, and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park.

*The decree of the Circuit Court of Appeals for the Second Circuit is reversed, and the decree of the District Court is affirmed.*

Mr. Justice Gray, for himself and Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham, dissenting:

We are unable to concur in this decision; and the case appears \*to us of such import-[575] ance as to warrant, if not to require, a statement of the grounds of our dissent.

The question presented by the record is whether the owner of a vessel lying at a dock in the port of New York can maintain a libel in admiralty *in personam* against the city of New York for an injury to his vessel from being run into through the negligence



of those in charge of a fire-boat, owned by the city and in the custody and management of its fire department, while hastening to assist in putting out a fire raging in a building at the head of the dock.

We had supposed it to be well settled, on authority and on principle, that no private suit could be maintained against a municipal corporation for an injury to person or property caused by negligence of members of its fire department while engaged in the performance of their official duties.

How far a municipal corporation may be held liable to a private action for the neglect of itself, or of its officers, in the performance of duties imposed upon it or upon them by law, is a subject upon which, in some of its aspects, there has been much difference of opinion in the courts of this country.

The difference has been most marked in actions against a city for injuries from a defect in a highway which the city is bound by its charter to repair. Such actions, when not expressly given by statute, have been held not to be maintainable by the courts of the New England states, and by those of New Jersey, Michigan, Wisconsin, South Carolina, Arkansas, and California; but have been held to be maintainable by the courts of every other state in which the question has arisen. The decisions upon that point, in either class of states, are fully collected in 1 Shearman & Redfield on Negligence, 5th ed. §§ 258, 289.

What kinds of cases may fall within the same rule has been the subject of much doubt and discussion. But it has never, so far as we are aware, been held by the highest court of any state, that an action at law may be maintained against a municipal corporation for an injury to person or property caused by the negligence of the members of its fire department while engaged in the line of their duty.

[576] It is not only in states whose courts hold that, unless authorized \*by express statute, no action can be maintained against a city for the neglect of itself or its officers to keep a highway in repair—as throughout New England, and in New Jersey, Wisconsin, and California—that no action has been held to be maintainable against a city for negligence of members of its fire department while discharging their duty as such. *Hafford v. New Bedford* (1860) 16 Gray, 297; *Fisher v. Boston* (1870) 104 Mass. 87, 6 Am. Rep. 196; *Pettingell v. Chelsea* (1894) 161 Mass. 368, 24 L. R. A. 426, 37 N. E. 380; *Burrill v. Augusta* (1886) 78 Me. 118, 58 Am. Rep. 788, 3 Atl. 177; *Edgerly v. Concord* (1879) 59 N. H. 78, and (1882) 62 N. H. 8; *Welsh v. Rutland* (1883) 56 Vt. 228, 48 Am. Rep. 762; *Dodge v. Granger* (1892) 17 R. I. 664, 15 L. R. A. 781, 24 Atl. 100; *Jewett v. New Haven* (1871) 38 Conn. 368, 9 Am. Rep. 382; *Wild v. Paterson* (1885) 47 N. J. L. 406, 1 Atl. 490; *Hayes v. Oshkosh* (1873) 33 Wis. 314, 14 Am. Rep. 760; *Howard v. San Francisco* (1875) 51 Cal. 52.

But the same view has prevailed in those states where a different view is taken of the question of the liability of cities for defects in highways and bridges. In the states of

New York, Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska, and Washington (as appears in Shearman and Redfield on Negligence, *ubi supra*) cities are held liable to private actions for damages from defects in highways. Yet in each of those states it has been adjudged that cities are not liable to actions for negligence of members of their fire department engaged in the line of their duty.

In the case at bar, the decree of the district court in favor of the libellant against the city of New York proceeded upon the ground that by the local law of New York an action could be maintained against the city by the owner of property injured by the negligence of members of its fire department. The circuit court of appeals came to the opposite conclusion; and upon careful examination of the New York decisions we are satisfied that the circuit court of appeals was right upon that question.

In the court of appeals of the state of New York, the law has long been settled that a municipal corporation having a charter from the state, which requires it to construct and maintain highways and bridges, is liable to a person suffering injury \*in person or prop[erty] by a defect in the construction or repair of either by the negligence of the commissioner of highways. *Hutson v. New York* (1853) 9 N. Y. 163, 59 Am. Rep. 526; *Conrad v. Ithaca* (1857) 16 N. Y. 158, 161; *Requa v. Rochester* (1871) 45 N. Y. 129, 6 Am. Rep. 52; *Hume v. New York* (1878) 74 N. Y. 264; *Ehrgott v. New York* (1884) 96 N. Y. 264, 48 Am. Rep. 622; *Hughes v. Monroe County* (1895) 147 N. Y. 49, 57, 39 L. R. A. 33, 41 N. E. 47; *Missano v. New York* (1899) 160 N. Y. 123, 54 N. E. 744. [577]

But that court has constantly held otherwise in regard to negligence of members of the fire department, the police department, or even of the department of public charities, of public health, or of public instruction.

In *Maximilian v. New York* (1875) 62 N. Y. 160, 20 Am. Rep. 468, which has always been considered a leading case, Judge Folger, delivering the unanimous judgment of the court, said: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. . . . The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the



municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user nor for misuser by the public agents." 62 N. Y. 164, 165, 20 Am. Rep. 469, 470. The previous decisions holding municipal corporations liable to private actions for defects in highways or bridges were placed upon the ground that "the duty of keeping in repair streets, bridges, and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied \*acceptance of the power and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." 62 N. Y. 170, 20 Am. Rep. 474. But it was adjudged that the city was not liable for a personal injury caused by the negligence of the driver of an ambulance employed by the commissioners of public charities and correction, because the powers and duties of those commissioners were such as were to be exercised and performed, in every local political division of the state, not for the peculiar benefit of that division, but for the whole public, in the discharge of its duty to care for paupers, lunatics, and prisoners. 62 N. Y. 168.

In *Ham v. New York* (1877) 70 N. Y. 459, the decision in *Maximilian's Case* was approved, and was followed in holding that the city was not liable to one whose property was injured in consequence of the negligent construction of a schoolhouse by the department of public instruction of the city.

More directly in point is *Smith v. Rochester* (1879) 76 N. Y. 506, in which it was held that no action against the city could be maintained by a person injured by the negligent driving of a hose cart along the street, pursuant to a vote of the city council directing the fire department to assemble in front of the city hall at midnight as part of a celebration of the centennial anniversary of the National Independence. The judgment was put, not only upon the ground that the city had no authority to employ the horses and wagons of the fire department for a midnight parade of the fire department to celebrate the centennial anniversary of the nation, but upon the additional and distinct ground that assuming that the city had such authority under the statutes of New York, "the difficulty in maintaining the plaintiff's action is the well-settled rule that a municipal corporation is not liable for the negligence of firemen while engaged in the line of their duty." 76 N. Y. 513.

In *Terhune v. New York* (1882) 88 N. Y. 247, it was held that an officer of the fire department could not maintain an action against the city for his wrongful dismissal from office by the fire commissioners, because, as was said by Judge Earl, citing the cases of *Maximilian*, of *Ham* and of *Smith*, above [579] "referred to, "the fire commissioners were public officers, and not agents of the city." 88 N. Y. 251. See also *Springfield F. & M. Ins. Co. v. Keeseville* (1895) 148 N. Y. 46, 30 L. R. A. 660, 42 N. E. 405.

Quite in line with these decisions is *Far-*  
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*ley v. New York* (1897) 152 N. Y. 222, 227, 46 N. E. 506, which was an action by the driver of a hose carriage against the city to recover damages for injuries caused by driving against an obstruction in the highway. The New York statute of 1882, chap. 410 (consolidating the laws affecting public interests in the city of New York), provides in § 444 that "the officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way at any fire, and in any highway, street, or avenue, over any and all vehicles of any kind, except those carrying United States mail;" and in § 1932 that no person shall drive or ride any horse through any street in the city faster than 5 miles an hour. The court of appeals, speaking by Chief Justice Andrews, said: "The safety of property and the protection of life may, and often do, depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The further decision that negligence on the part of the driver would defeat his action against the city has no tendency to show that such negligence could render the city liable to third persons.

In the very recent case of *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, in which it was held that keeping the streets clean stood upon the same ground as keeping them in repair, and that the city was therefore liable for a personal injury caused by the negligence of the driver of an ash cart of the street-cleaning department, the court again affirmed the established distinction between such cases and those in which the corporation exercised a public and governmental power for the benefit of the whole public and as the delegate and representative of the state; and quoted with approval the statement of Judge Wallace in a similar \*case in the cir-[580] cuit court of the United States, where, speaking of the commissioner of the street-cleaning, he said: "His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them." *Barney Dumping-Boat Co. v. New York* (1889) 40 Fed. Rep. 50. See also *Hughes v. Auburn* (1899) 161 N. Y. 96, 103, 104, 46 L. R. A. 636, 55 N. E. 389, and the decisions of the district court of the United States for the southern district of New York in *Haight v. New York* (1885) 24 Fed. Rep. 93, and in *Edgerton v. New York* (1886) 27 Fed. Rep. 230.

The highest courts of the states of Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska, and Washington also, as already mentioned, have



adjudged that no private action can be maintained to recover damages against a city for an injury caused by negligence of members of its fire department while engaged in their official duties. The decisions are so uniform, and treat the point as so well settled, that it is enough to cite them, without stating them in detail. They are as follows: *Knight v. Philadelphia* (1884) 15 W. N. C. 307; *Fire Ins. Patrol v. Boyd* (1888) 120 Pa. 624, 646, 1 L. R. A. 417, 15 Atl. 553; *Kies v. Erie* (1890) 135 Pa. 144, 149, 19 Atl. 942; *Frederick v. Columbus* (1898) 58 Ohio St. 538, 546, 51 N. E. 35; *Wilcox v. Chicago* (1883) 107 Ill. 334, 338-340, 47 Am. Rep. 434; *Greenwood v. Louisville* (1877) 13 Bush, 226, 26 Am. Rep. 263; *Davis v. Lebanon* (1900) 22 Ky. L. Rep. 384, 57 S. W. 471; *Heller v. Sedalia* (1873) 53 Mo. 159, 14 Am. Rep. 444; *McKenna v. St. Louis* (1878) 6 Mo. App. 320; *Alexander v. Vicksburg* (1891) 68 Miss. 564, 10 So. 62; *Saunders v. Fort Madison* (1900; Iowa) 82 N. W. 428; *Grubb v. St. Paul* (1886) 34 Minn. 402, 26 N. W. 228; *Gillespie v. Lincoln* (1892) 35 Neb. 34, 46, 16 L. R. A. 349, 52 N. W. 811; *Lawson v. Seattle* (1893) 6 Wash. 184, 33 Pac. 347.

[581] The law on this point, as understood and administered throughout the country by the highest courts of all the states in which the question has arisen, is unqualifiedly recognized by the principal text writers. Mr. Dillon for instance, after observing that "police \*officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties," goes on to say: "So, although a municipal corporation has charter power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not liable for the negligence of firemen appointed and paid by it, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department; nor for like negligence whereby sparks from the fire engine of the corporation caused the plaintiff's property to be burned. The exemption from liability, in these and the like cases, is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given; the maxim of *respondet superior* has therefore no ap-

plication." 2 Dill. Mun. Corp. 4th ed. §§ 975, 976. See also 1 Shearm. & Redf. Neg. § 265; Tiedeman, Mun. Corp. § 333a; 1 Beach, Pub. Corp. § 744; 13 Am. & Eng. Enc. Law, 2d ed. p. 78.

The libellant relied on *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, in which the members of the town council of Liverpool and their successors, who had been formed by acts of Parliament into a corporation by the style of the Trustees of the Liverpool Docks, were held liable to an action for an injury to a vessel from a bank of mud which had been negligently suffered to remain in the docks. That decision proceeded upon the ground that the trustees of the docks were one of those corporations \*formed[582] for trading and other profitable purposes, and in their very nature substitutions on a large scale for individual enterprise; supplying to those using the docks the same accommodation and the same services that would have been supplied by ordinary dock proprietors to their customers; and being paid for such accommodation and services sums of money, constituting a fund which, although not belonging to them for their own use, was devoted to the maintenance of the works, and presumably to pay claims against the corporation for injuries caused by their negligence. See L. R. 1 H. L. 105-107, 122. It was of such bodies that Lord Cranworth, after observing that the fact that the appellants, in whom the docks were vested, did not collect tolls for their own profit, but merely as trustees for the benefit of the public, made no difference in principle in respect to their liability, went on to say: "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

But the city of New York, in establishing and carrying on a fire department, is not a substitution for individual enterprise; nor does it perform any such services as ordinary individuals might perform to their customers; nor does it receive any compensation for the use of the fire-boat, or from those benefited by the acts of the fire department.

The decisions of this court contain nothing, to say the least, inconsistent with the conclusion that no action at law could be maintained in such a case as this.

This court, taking the same view of the liability of municipal corporations to actions at law for injuries caused by defects in highways or bridges, which has prevailed in New York and in most of the states, has held that an action of that kind may be maintained in the courts of the District of Columbia (*Weightman v. Washington* (1861) 1 Black, 39, 17 L. ed. 52; *Barnes v. District of Colum-*[583] *bia* (1875) 91 U. S. 540, 23 L. ed. 440; *District of Columbia v. Woodbury* (1890) 136



U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990; *Bauman v. Ross* (1897) 167 U. S. 548, 597, 42 L. ed. 270, 291, 17 Sup. Ct. Rep. 966; or in the courts of a territory (*Nebraska City v. Campbell* (1862) 2 Black, 590, 17 L. ed. 271); or in the circuit court of the United States held in a state whose courts maintain such an action, as in New York *York v. Sheffield* (1866) 4 Wall. 189, 18 L. ed. 416; in Illinois (*Chicago v. Robbins* (1862) 2 Black, 418, 17 L. ed. 298 and (1866) 4 Wall. 657, 18 L. ed. 427, and *Evansston v. Gunn* (1878) 99 U. S. 660, 25 L. ed. 306); in Virginia (*Manchester v. Ericsson* (1881) 105 U. S. 347, 26 L. ed. 1099); or in Ohio (*Cleveland v. King* (1889) 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90); but that in a state where, as in Michigan, its highest court holds that a municipal corporation is not liable to such an action, no such action will lie in the circuit court of the United States, because, as was said by Mr. Justice Brewer in delivering judgment, the question "is not one of general commercial law; it is purely local in its significance and extent." *Detroit v. Osborne* (1890) 135 U. S. 492, 498, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012.

In the leading case of *Weightman v. Washington*, which was an action against the city of Washington for injuries caused by a defect in a bridge, the court said: "In view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants in consideration of the privileges and immunities conferred by the charter." 1 Black, 51, 17 L. ed. 57. And the court took occasion, by way of precaution, to observe that powers granted by the legislature to a municipal corporation to pass ordinances prescribing and regulating the duties of policemen and firemen "are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty." 1 Black, 49, 17 L. ed. 57.

In *Barnes v. District of Columbia*, the action was for a defect in a street in the District of Columbia, constituted a municipal corporation by the act of Congress of February 21, 1871, chap. 62, which vested in a board of public works appointed by the

[584] \*President, the entire control and regulation of the streets, avenues, and alleys of the city. 16 Stat. at L. 419, 427. The decision proceeded upon the ground that the care of the streets was "peculiarly a municipal duty," and that the board of works, being charged by Congress with the exclusive control of the streets, was, in that respect, like an ordinary agent of the city, and its proceedings were proceedings of the city. 91 U. S. 547, 555, 23 L. ed. 442, 445.

But there is no ground for assuming that the duty of putting out fires was imposed upon the city of New York "in consideration of the immunities and privileges conferred 179 U. S.

by the charter," or was "peculiarly a municipal duty."

In *Bowditch v. Boston* (1879) 101 U. S. 16, 25 L. ed. 980, it was adjudged that no action would lie, either at common law or by statute, against the city of Boston to recover damages for the destruction of a building, blown up under a general order of the chief engineer of the city to prevent the spreading of a conflagration; that the action, not being maintainable at common law, could only be supported by an express statute; and that the statutes of Massachusetts, as construed by the highest court of the state, did not authorize such an action against the city, except for the destruction of a building by specific order of three firewards or engineers acting jointly. In support of the position that the action would not lie at common law, this court relied on the ancient rule, as stated by Coke, that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; . . . and a thing for the commonwealth every man may do without being liable to an action." *Case of the King's Prerogative in Saltpetre*, 12 Coke, 12, 13. The expression "the commonwealth" was evidently used by Coke as equivalent to "the common weal" or "the public welfare;" for he added, after the proposition above quoted, "as it is said in 3 H. VIII. fol. 15," evidently intending to refer to the Year Book of 13 Hen. VIII. 15, 16, in which the rule is introduced by the words "the common wealth shall be preferred before private wealth;" and in a statement of the rule in a case in 29 Hen. VIII. the corresponding expression is "the common weal." *Maleverer v. Spinke*, 1 Dyer, 35b, 36b.

\*The precise question whether a municipal [58 corporation is liable to an action at law for injuries caused by negligence of members of its fire department has never been decided or considered by this court.

But the principles affirmed and illustrated in the authorities already cited forbid the maintenance of a private action against a municipal corporation for injuries caused by the negligence of members of a fire department, while engaged in the performance of their official duties.

The putting out of fires which are in danger of spreading is for the benefit of the whole public, and for the protection of the property of all. The danger is so great and imminent that it is especially one of those cases in which the public safety must be preferred to private interests. *Salus populi suprema lex*. It is the public good, the general welfare, that justifies the destruction of neighboring buildings to prevent the spreading of a fire which as yet rages in one building only. The duty of protecting, so far as may be, all property within the state against destruction by fire, is a public and governmental duty, which rests upon the government of the state; and it does not cease to be a duty of that character because the state has delegated it to, or permitted it to be performed by, a municipal corporation. When intrusted by the legislature to a municipal corporation, a political division of the state, it



is not for the peculiar benefit of that corporation or division, but for its benefit in common with the whole public. A fire department is established in a municipality, not merely for the protection of buildings and property within the municipality itself, but equally for the protection of buildings and property beyond its limits, to which a fire originating within those limits may be in danger of spreading. Moreover, the necessity and appropriateness of the course and measures to be taken to stay a conflagration must be promptly determined, in the first instance, by those charged with the performance of the duty at the time of the exigency; and often cannot be as accurately judged of long after the fact. The members of the fire department of a city, therefore, whether appointed by the municipal corporation or otherwise, are not mere agents or servants of the corporation,\* but are public officers charged with a public service; and for their acts or their negligence in the performance of this service no action lies against the corporation, unless expressly given by statute.

It appears to us to be equally clear that no suit upon a like cause of action can be maintained in a court of admiralty; or, as expressed by the circuit court of appeals in this case: "That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion." 14 C. C. A. 531, 35 U. S. App. 204, 67 Fed. Rep. 348.

It was argued that all the admiralty courts of the United States should be governed by one rule of maritime law, without regard to local decisions. Such is doubtless the case in the courts of admiralty, as it is in the other courts of the United States, upon questions of general commercial law. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 443, 32 L. ed. 788, 793, 9 Sup. Ct. Rep. 480. Courts of admiralty are also governed by their own rules, and not by the common law or by local statute, in matters affecting their own jurisdiction and procedure, as, for instance, in regard to the rules of navigation in navigable waters (*The New York v. Rea* (1855) 18 How. 223, 15 L. ed. 359), to the limitation of the liability of shipowners (*Butler v. Boston & S. S. Co.* (1889) 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612); to the duration, the enforcement, and the marshaling of maritime liens (*The Chusan* (1842) 2 Story, 455, 462, Fed. Cas. No. 2717; *The Lottawanna* (1874) 21 Wall. 558, *sub nom.* *Rodd v. Heartt*, 22 L. ed. 654; *The J. E. Rumbell* (1893) 148 U. S. 1, 17, 37 L. ed. 345, 349, 13 Sup. Ct. Rep. 498); and to the effect of contributory negligence of a suitor upon his right to recover, and upon the assessment of damages. *Atlee v. Northwestern Union Packet Co.* (1874) 21 Wall. 389, 395, 22 L. ed. 619, 621; *The Max Morris* (1890) 137 U. S. 1, *sub nom.* *The Max Morris v. Curry*, 34 L. ed. 586, 11 Sup. Ct. Rep. 29. But the decision of this case does not turn upon any such question.

By the general admiralty law of this country, often declared by this court, a ship, by

whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of her master or crew to another vessel. *United States v. The Malek Adhel* (1844) 2 How. 210, 233, 234, 11 L. ed. 239, 249; *The China* (1868) 7 Wall. 53, 68, *sub nom.* *The China v. Walsh*, 19 L. ed. 67, 75; *Ralli v. Troop* (1895) 157 U. S. 386, 403, 39 L. ed. 742, 750, 15 Sup. Ct. Rep. 657; *The John G. Stevens* (1898) 170 U. S. 113, 120, 42 L. ed. 969, 972, 18 Sup. Ct. Rep. 544. But that does not warrant the inference \*that a libel in personam can be maintained against the owner for a tort which would neither sustain a libel in rem against the ship, nor an action at law against her owner.

There is no case, we believe, in which a libel in admiralty has been maintained by this court, as for a tort, upon a cause of action on which, by the law prevailing throughout the country, no action at law could be maintained. On the contrary, it has repeatedly held that, as no action lies at common law for the death of a human being, no suit for a death caused by the negligence of those in charge of a vessel on navigable waters, either within a state or on the high seas, can be maintained in admiralty in the courts of the United States, in the absence of an act of Congress, or a statute of the state, giving a right of action therefor; and in delivering judgment in the leading case Chief Justice Waite said: "We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched." "The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule." *The Harrisburg* (1886) 119 U. S. 199, 213, *sub nom.* *The Harrisburg v. Rickards*, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; *The Alaska* (1889) 130 U. S. 201, *sub nom.* *Metcalf v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; *The Corsair* (1892) 145 U. S. 335, *sub nom.* *Barton v. Brown*, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; *The Albert Dumois* (1900) 177 U. S. 240, 259, 44 L. ed. 751, 762, 20 Sup. Ct. Rep. 595.

The cases of *The Siren* (1868) 7 Wall. 152, *sub nom.* *The Siren v. United States*, 19 L. ed. 129, and *The Davis* (1869) 10 Wall. 15, *sub nom.* *United States v. Douglas*, 19 L. ed. 875, related wholly to claims against the United States, as compared with claims against private persons; no question of the liability of municipal corporations was contested by the parties, or alluded to by the court; and neither decision has any tendency to support the libel in the present case. In *The Siren*, a claim against a prize ship for damages from a collision with her while in the possession of the prize crew was sustained against the proceeds of the sale after condemnation, solely because the United States were the actors in the suit to have her condemned. So, in *The Davis*, salvage against goods belonging to the United States, and part of the cargo of a private ship, was



allowed because the possession of her master [588] was not \*the possession of the United States, and the United States could only obtain the goods by claiming them in court. In short, in each case, as Mr. Justice Miller afterwards pointed out, "the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others. *Case v. Terrell* (1870) 11 Wall. 199, 201, 20 L. ed. 134. The opinion in each of the three cases distinctly affirmed the well-settled doctrine of our law, that no suit can be maintained in a judicial tribunal against a state, or against its property, without its consent. See also *Cunningham v. Macon & B. R. Co.* (1883) 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; *Stanley v. Schwalby* (1892) 147 U. S. 508, 512, 37 L. ed. 259, 261, 13 Sup. Ct. Rep. 418, and (1896) 162 U. S. 255, 270, 40 L. ed. 960, 965; *Belknap v. Schild* (1896) 161 U. S. 10, 16, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; *Briggs v. Light-Boats* (1865) 11 Allen, 156, 179-185. In England, it is equally well settled that no libel in admiralty can be maintained against the Crown, or against a foreign sovereign, or against any property of either, without his consent. See *The Lord Hobart* (1815) 2 Dodson Adm. 100; *The Athol* (1842) 1 W. Rob. Adm. 374; *The Parlement Belge* (1880) L. R. 5 Prob. Div. 197, in which the court of appeals, speaking by Lord Justice Brett (since Lord Esher, M. R.), reversed the exceptional decision of Sir Robert Phillimore in (1879) L. R. 4 Prob. Div. 147. The decisions that no suit can be maintained against the sovereign without his consent have certainly no tendency to support a suit against a municipal corporation for negligence in exercising powers delegated to it as a political division of the state, or to its officers, for the benefit of the whole public, and not for the benefit of the corporation only.

The cases of *The Blackwall* (1869) 10 Wall. 1, *sub nom. The Blackwall v. Sancelito Water & Steam Tug Co.* 19 L. ed. 870; *The Clarita* (1875) 23 Wall. 1, *sub nom. The Clara Clarita v. Cox*, 23 L. ed. 146, 23 Wall. 15, *sub nom. New York Harbor Protection Co. v. The Clara*, 23 L. ed. 150, and *The Connemara* (1883) 108 U. S. 352, *sub nom. Sinclair v. Cooper*, 27 L. ed. 751, 2 Sup. Ct. Rep. 754,—related to the rights and liabilities of private persons engaged in saving, or attempting to save, vessels from imminent danger of destruction by fire; and decided nothing as to the rights or liabilities of municipal corporations or of their firemen. In *The Clarita*, it was a private corporation owning a ferry boat that was held liable for negligence while engaged in an attempt to save a vessel from destruction by fire; and *The Blackwall*, *The Clara*, and *The Connemara* concerned the allowance of salvage to private [589] salvors for services in putting out a \*fire on a vessel. In *The Blackwall*, the court avoided, as unnecessary to the decision, the expression of any opinion upon the question whether members of a fire department could recover salvage for such services. 10 Wall. 12, 19 L. ed. 874. It was afterwards decided 179 U. S.

by Mr. Justice Bradley, sitting in the circuit court, that they could not, because "the firemen were merely engaged in the line of their duty," and "the attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy." *Davey v. The Mary Frost* (1876) 2 Woods, 306, Fed. Cas. No. 3,592; *The Suliote* (1880) 4 Woods, 19.

In *The F. C. Latrobe* (1886) 28 Fed. Rep. 377, in the district of Maryland, and in *Giovanni v. Philadelphia* (1894) 59 Fed. Rep. 303, and 10 C. C. A. 552, 17 U. S. App. 642, 62 Fed. Rep. 617, and in *Guthrie v. Philadelphia* (1896) 73 Fed. Rep. 688, in the eastern district of Pennsylvania, in each of which a libel in admiralty was maintained against a city for a collision with the libellant's vessel of a steamboat maintained by the city for the purpose of clearing its harbor of ice, the steamboat, at the time of the collision, was not engaged in its usual public service, but in a special service for a private benefit; and stress was laid upon that fact in each of the opinions.

The decisions of the circuit court of the United States in Massachusetts in *Boston v. Crowley* (1889) 38 Fed. Rep. 202, and of the district court of the United States in Connecticut, in *Greenwood v. Westport* (1894) 63 Conn. 587, 60 Fed. Rep. 560, were only that libels in admiralty *in personam* could be maintained against a city or town for injuries caused to vessels by not keeping open a draw in a bridge. It may also be observed that in *Crowley's Case* the decision was not in accord with the earlier decision in *French v. Boston* (1880) 129 Mass. 592, 37 Am. Rep. 393, and proceeded upon the assumption (38 Fed. Rep. 204) that the question was one of general municipal or commercial law upon which the courts of the United States were not bound to follow the decisions of the highest courts of the state—an assumption inconsistent with the later judgment of this court in *Detroit v. Osborne*, 135 U. S. 492, 498, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012, above cited. In *Greenwood's Case* the question was considered to be an open one in the courts of Connecticut; and it has since been decided the \*other way by the highest court [590] of the state. 60 Fed. Rep. 569, 575, 576; *Daly v. New Haven* (1897) 69 Conn. 644, 38 Atl. 397.

The only instance cited at the bar, in which a libel in admiralty has been maintained in such a case as the present, is that of *Thompson Nav. Co. v. Chicago* (1897) 79 Fed. Rep. 984, decided by the district court for the northern district of Illinois since this suit was commenced, and avowedly a departure from the case of *The Fidelity* (1873) 9 Benedict, 333, Fed. Cas. No. 4,757, and (1879) 16 Blatchf. 569, Fed. Cas. No. 4,758, in the southern district of New York, in which it was held by Mr. Justice Blatchford, then district judge, and by Chief Justice Waite in the circuit court on appeal, that a libel *in rem* could not be maintained in admiralty against a steam tug owned by the city of New York, and under the exclusive control of the commissioners of public charities and correction, and employed in the per-

formance of their official duties, for her collision with the libellant's vessel through the negligence of those in charge of the tug.

The duty of the state to protect the property of all from destruction by fire covers vessels in its harbors, as well as buildings within its territory. The authority of the fire department and its members as to both kinds of property is derived from the municipal law, and not from the maritime law. *Ralli v. Troop*, 157 U. S. 386, 419, 420, 39 L. ed. 742, 756, 15 Sup. Ct. Rep. 657. All the shipping, foreign and domestic, in the port, is under the same safeguard, and subject to the same risks. Prompt, decisive, and unembarrassed action of the firemen is necessary to the protection of both buildings and vessels from the dangers of a conflagration. The necessity of allowing a municipal fire-boat to proceed on her way to put out a fire affords a special reason for not allowing her, while so occupied, to be seized on a libel *in rem*. But all the reasons for not maintaining an action of this kind against the city in a court of common law apply with undiminished force to a libel against the city *in personam* in a court of admiralty.

[591] In any aspect of the case, therefore, we are of opinion that this suit cannot be maintained against the city of New York; not by the local law of New York, because that law, as declared by the court of appeals of the state, is against the maintenance of such a suit; not by the maritime law, because according to \*the municipal law prevailing throughout this country, as declared by the highest court of every state in which the question has arisen, cities are not liable to such suits, and no authoritative precedent or satisfactory reason has been produced for applying a different rule in a court of admiralty.

JOHN JOYCE, *Plff. in Err.*,  
v.

H. F. AUTEN, Successor of Sterling R. Cockrill, as Receiver of the First National Bank of Little Rock, Arkansas.

(See S. C. Reporter's ed. 591-597.)

*Principal and surety—implied condition of suretyship—reliance on the reservation of a lien—lien of bank on paper held for collection—insolvency of depositor.*

1. A surety on a note given by the purchaser at a receiver's sale is not released by the receiver's failure to reserve a lien on the property sold, as he is directed to do by the order of the court, when the surety signs an apparently unconditional obligation, and fails to notify either the receiver or his principal that he signs upon condition of the retention of such lien.
2. A bank holding negotiable paper for collection does not lose its lien thereon for debts

NOTE.—As to discharge and rights of surety—see note to *Griswold v. Hazard*, 35 L. ed. U. S. 679.

On bankers' liens—see note to *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 26 L. ed. U. S. 693.

due it from the depositor, by reason of the fact that the depositor becomes insolvent, makes an assignment for creditors, and goes into the hands of a receiver, even if the bank accepts the assignment, where there is nothing to show any waiver of its lien.

[No. 83.]

*Argued November 7, 1900. Decided December 24, 1900.*

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision affirming a judgment in favor of the plaintiff in an action on a note. *Affirmed.*

See same case below, *sub nom. Joyce v. Cockrill*, 35 C. C. A. 38, 92 Fed. Rep. 838.

Statement by Mr. Justice **Brewer**:

On March 20, 1893, the plaintiff in error, as a surety, executed with his principal the following note:

Three years after date, we, or either of us, promise to pay to the order of C. H. Whittemore, as receiver of the McCarthy & Joyce Company, the sum of nine thousand (\$9,000.00) dollars, with interest at six per cent per annum from date till paid. This is one of the three notes executed for purchase money of the assets of the McCarthy-Joyce Company, this day sold to James E. Joyce & Company.

James E. Joyce & Co.

John Joyce.

Little Rock, Arkansas, March 20, 1893.

This note was transferred before due for value to the First National Bank of Little Rock, which afterwards went into the hands of a receiver. Such receivership was changed, and the defendant in error is the present receiver. The note not having \*been[592] paid at maturity, this action was brought in the circuit court of the United States for the southern district of Ohio. The defendant answered, pleading two defenses, as follows: First, that the McCarthy & Joyce Company, a corporation, of Little Rock, Arkansas, became involved, and on or about January 16, 1893, assigned its property to one C. H. Whittemore, as assignee, for the benefit of creditors; that such assignment was confirmed by the chancery court of the county, and the assignee appointed receiver; that thereafter the receiver was directed by said court to sell all the property belonging to the insolvent company; that such sale was made on April 20, 1893, to James E. Joyce & Company, the principal in this note, for \$38,200, all of which has been paid by the purchaser, except this note and another of like date and amount, signed by another party as surety. The answer then proceeds as follows:

"Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining indorsers or sureties upon the notes given for the deferred payments, to retain and re-



serve a lien, under the statutes of the state of Arkansas, upon all the real and personal property so ordered to be sold, and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien upon said property, real and personal, and improperly conveyed all of said real and personal property to the said James E. Joyce & Company, free and clear of any lien whatsoever. The defendant further says that said James E. Joyce & Company, after so receiving said property, have sold and conveyed all the personal property and nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost; and \*the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the deferred payments, and the said First National Bank of Little Rock, Arkansas, as well as its receiver, having received the said note with notice of the foregoing facts, this defendant is discharged and released from the said note, he asks that the plaintiff be compelled to surrender said note and that the same be canceled by order of this court."

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The second defense was that, when the McCarthy & Joyce Company made its assignment, a part of the property assigned consisted of certain promissory notes, the dates, amounts, and payers of which were specifically described; that such notes at the time of the assignment were in the possession of the First National Bank of Little Rock for collection; that such bank was a preferred creditor to a large amount; that all the property of said McCarthy & Joyce Company, including such notes, was ordered sold, and that the sale was made for \$38,200, as heretofore stated; that thereafter the First National Bank and its receivers declined to surrender the notes, or the proceeds of such as had been collected; that the purchaser, James Joyce & Company, paid to the receiver of the McCarthy & Joyce Company \$20,200, and that the notes retained by the bank and its receiver were of sufficient value to pay the unpaid purchase price, both this note and the other note heretofore described. A demurrer to such answer was sustained, and judgment entered in favor of the plaintiff, which judgment was affirmed by the court of appeals of the sixth circuit (35 C. C. A. 38, 92 Fed. Rep. 838), and thereafter this writ of error was sued out.

Mr. Thomas E. Powell argued the cause, and, with Mr. Thomas B. Minahan, filed a brief for plaintiff in error:

The order of the court to the receiver in this case, to reserve a lien upon the prop-

erty sold, was to reserve a lien which would be good for all persons and against all persons claiming an interest in the property. In other words, it is a mortgage incorporated in the deed of conveyance.

*Stroud v. Pace*, 35 Ark. 100; *Sheppard v. Thomas*, 26 Ark. 628.

The surety is entitled to the benefit of all the securities in the hands of the creditor, and if any be lost by his wilful neglect or want of due diligence the surety is, to that extent, discharged.

*Brändt, Suretyship & Guaranty*, § 440; *Burr v. Boyer*, 2 Neb. 265; *Law v. East India Co.* 4 Ves. Jr. 824; *City Bank v. Young*, 43 N. H. 457; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Gillespie v. Darwin*, 6 Heisk. 21; *Watts v. Shuttleworth*, 5 Hurlst. & N. 235.

If the surety signs the obligation upon the understanding that certain conditions shall be performed, and the creditor knows these conditions, the surety will not be bound if the conditions are not complied with.

*Hickok v. Farmers' & Mechanics' Bank*, 35 Vt. 476; *Jones v. Keer*, 30 Ga. 93; *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389; *Cooper v. Joel*, 1 De G. F. & J. 240.

An act of omission on the part of the creditor when the law requires him to act may be quite as potent for mischief to the surety as an act of commission.

*Toomer v. Dickerson*, 37 Ga. 428; *Teaff v. Ross*, 1 Ohio St. 469; *Capel v. Butler*, 2 Sim. & Stu. 457; *City Bank v. Young*, 43 N. H. 457; *Schock v. Miller*, 10 Pa. 401; *Holt v. Bodey*, 18 Pa. 207; *Cummings v. Little*, 45 Me. 187; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Moore v. Gray*, 26 Ohio St. 525.

Mr. Talfourd P. Linn argued the cause, and, with Mr. Joseph Outhwaite and Messrs. Outhwaite, Linn, & Thurman, filed a brief for defendant in error:

By attaching his signature to the note and delivering it to the principal maker, without any conditions stipulated therein other than the absolute contract of suretyship as evidenced by his signature, plaintiff in error in effect gave credit to the note as and for an absolute promise of payment, unconditional and without any notice, either to the payee or to the subsequent indorsees, of any stipulation or agreement not contained in the paper itself.

*Davis v. Gray*, 61 Tex. 506; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Stoddard v. Kimball*, 4 Cush. 604; *Merriam v. Rockwood*, 47 N. H. 81; *Deardorf v. Foresman*, 24 Ind. 481; *Selser v. Brock*, 3 Ohio St. 308; *Wornell v. Williams*, 19 Tex. 180.

The doctrine is well settled that mere laches on the part of a creditor will not deprive him of his action against the surety.

*Humphrey v. Hitt*, 6 Gratt. 523, 52 Am. Dec. 133; *Farners' Bank v. Reynolds*, 13 Ohio, 85; *Dye v. Dye*, 21 Ohio St. 93, 8 Am. Rep. 40; *Schroepell v. Shaw*, 3 N. Y. 446; *Brick v. Freehold Nat. Bkg. Co.* 37 N. J. L. 307; *Pittsburg, Ft. W. & C. R. Co. v. Shaefer*



*fer*, 59 Pa. 350; *Monroe County Supers. v. Otis*, 62 N. Y. 88. See also *Thompson v. Hall*, 45 Barb. 214; *United States v. Simpson*, 3 Penr. & W. 437, 24 Am. Dec. 331; *Kindt's Appeal*, 102 Pa. 441; *Winton v. Little*, 94 Pa. 64; *Mundorff v. Singer*, 5 Watts, 172; *Allen v. Brown*, 124 Mass. 77; *Hunt v. Bridgham*, 2 Pick. 581, 13 Am. Dec. 458; *Horne v. Bodwell*, 5 Gray, 457; *Deal v. Cochran*, 66 N. C. 269; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 668.

It is not denied that the note sued upon herein came into the hands of the defendant in error by purchase for full value before maturity, in the due course of business, and in good faith. These elements are all that are necessary to entitle the holder to the immunities granted by the law merchant.

2 Randolph, Com. Paper, § 557; *Baker v. Arnold*, 3 Caines, 279; Dan. Neg. Inst. 4th ed. § 174, p. 190; Byles, Bills, 236; 1 Parsons, Bills & Notes, 192; *Hoffman v. National City Bank*, 12 Wall. 191, 20 L. ed. 369.

A banker has a lien on all the securities of his debtor in his hands for the general balance of his accounts, unless such a lien is inconsistent with the actual or presumed intention of the parties. A lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account. And so, if the securities be deposited after the credit is given, the banker has a lien for his general balance of account, unless there be an expressed contract, or circumstances that show an implied contract, inconsistent with such lien.

1 Jones, Liens, 2d ed. § 244; *Kelly v. Phelan*, 5 Dill. 228, Fed. Cas. No. 7,673; *Reynes v. Dumont*, 130 U. S. 392, 32 L. ed. 945, 9 Sup. Ct. Rep. 496; *Bank of the Metropolis v. New England Bank*, 1 How. 239, 11 L. ed. 116; *Cockrill v. Joyce*, 62 Ark. 216, 35 S. W. 221.

[593] \*Mr. Justice Brewer delivered the opinion of the court:

The surety, defendant below, now plaintiff in error, did not \*in his answer aver that the note was not given for value, or that either he or his principal had paid it. His defenses were that he was discharged from liability, first, by the conduct of the payee; and, second, by that of the plaintiff.

With regard to the first defense, we may put the plaintiff out of consideration, and inquire whether the defense would have been good if the payee had not transferred the note, but had himself brought the action. For the plaintiff, though charged to have had knowledge of the facts, is, if in no better, certainly in no worse, position than the payee would have been.

That defense was, in substance, that the receiver was directed in making a sale to retain a lien, as well as to take personal security. The surety knew that such order had been made, expected that it would be complied with, and signed as surety, relying upon compliance; but there is no allegation that he ever notified either his principal or

the receiver that he signed upon that condition. So far as the paper disclosed it was an absolute promise on the part of the principal to pay so much money, and an unconditional guarantee by the surety of such payment. Could the principal defend against an action on this note on the ground that no lien was retained upon the property sold by the receiver and purchased by him? Clearly not. But the paper puts both principal and surety on the same plane. If the surety has any other defense it must be because the writing does not fully express his contract. He says that it does not express the contract he intended to make, but no conditions are named. If he wanted to attach conditions to his guaranty he should have stated them in the writing, or, at least, given notice of them to the payee, the other party to the contract. Even if he had told his principal that he signed only upon a condition, such notice would not bind the payee unless communicated to him; much less when, so far as the answer discloses, he never notified either the principal or the payee, but, relying upon the payee's complying with the order of the court, signed an apparently unconditional promise. The receiver was not acting in behalf of the defendant. His duty was to the estate and its creditors. True, he ought, in compliance with the order of the court, to have retained a lien, but his failure so to do was a \*breach of duty to the estate [595] in his hands, for which failure the estate and its creditors might hold him responsible. Undoubtedly, one may not after receiving the promise of a surety release other securities which he holds to the prejudice of the surety, but a release of security after the receipt of the promise of a surety is very different from a failure to take more security than such promise. It would seem from the allegations in this answer that the surety signed supposing that he was incurring no liability; that his unconditional promise that the principal should pay the note meant nothing, and this because he expected that other primary and sufficient security would be taken. And yet he gave no notice that such was the condition upon which he signed as surety, and did nothing to compel compliance by the receiver with the order of the court. He was willing to make his unconditional promise and take the chances of the receiver doing as he was ordered, and now seeks to release himself from that promise simply because of the receiver's neglect.

There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance, or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise. See, among other cases, *Goodman v. Simonds*, 20 How. 343, 366, 15 L. ed. 934, 942; *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491; *Merriam v. Rockwood*, 47 N. H. 81; *Selser v. Brock*, 3 Ohio St. 302, 308; *Passumpsio Bank v. Goss*, 31 Vt. 315; *State use of Bothrick v. Potter*, 36 Mo. 212, 21 Am. Rep. 440;



[596] Baylies, Sureties & Guarantors, 440; 2 Brandt, Suretyship & Guaranty, § 407. Without citing other of the many authorities to the same effect, it may not be out of place to refer to one decision which presents the question in almost precisely the same form that it is presented here, *Wornell v. Williams*, 19 Tex. 180. In that case an administrator sold property of the estate, the order of sale directing that he take from the purchaser two good sureties as well as mortgages upon the property, as provided by the statute. He took the \*sureties but failed to take the mortgage. The sureties, when sued, setting forth these facts, averred in their answer:

"Further answering, these defendants say that they became sureties to the note aforesaid in consideration of the requirement made by the statute and said order, that a mortgage should be taken upon the said slave; and they would not have become sureties, but for that requirement, and the belief and assurance that it would be complied with."

There was no allegation of notice to the administrator of the condition upon which they signed. The court, overruling the defense, said:

"There is no allegation of any actual deception, imposition, or fraud practised upon the defendants. The only ground for relief really disclosed by the plea is that the plaintiff did not perform his duty by taking the required additional security. The taking of that security should have been contemporaneous with the taking of the note upon which the defendants became sureties. Hart. Dig. art. 1181. If they intended to become such, only upon the taking of the mortgage upon the property, it became them, before giving their note, to see that the mortgage security was taken. There was nothing to prevent them from doing so. If, instead of taking that precaution, they saw fit to trust to the prudence and discretion of the administrator, the estate he represents cannot be made to bear the consequences of the want of their vigilance and care. They cannot make a hardship, against which they had ample power and opportunity to provide, a ground to relieve them from their obligation to the estate."

The demurrer to the first defense in this answer was properly sustained.

The second defense is substantially that the bank was a creditor of the insolvent firm; that it was a preferred creditor; that it had certain notes for collection; that those notes were included in the sale, but were not turned over to the purchaser, and that they were of sufficient value to offset the amount due on this note. It is not alleged that the debt due from the insolvent to the bank had been paid by collection of those notes or otherwise, but the defense is rested on the aver-

[597] ment that notes \*thus deposited and unpaid were of sufficient value to pay the unpaid purchase money. It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract, expressed or implied, to the contrary, to retain them as security for the debt of the party depositing

the notes. 1 Jones, Liens, 2d ed. § 244; *Bank of the Metropolis v. New England Bank*, 1 How. 234, 239, 11 L. ed. 115, 116; *Reynes v. Dumont*, 130 U. S. 354, 391, 392, 32 L. ed. 934, 944, 9 Sup. Ct. Rep. 486. But if such banker's lien existed the sale transferred nothing but the equity in those notes after the payment of the debt secured by their deposit.

The fact, as alleged, that the bank, although a preferred creditor, accepted the assignment, cannot be construed as an admission that the bank waived its lien on the notes deposited with it for collection. Nowhere is there a suggestion that the bank either directly or indirectly consented that the assignment should operate to divest itself of its lien and transfer the notes in its hands to the receiver discharged from such lien. While the amount of the indebtedness of the insolvent to the bank is not in this answer disclosed, counsel refer us to the case of *Cockrill v. Joyce*, 62 Ark. 216, 35 S. W. 221, a case decided before the commencement of this action, in which the purchaser, the principal debtor, sought to defeat the title of the bank to these notes, and compel an inclusion of them *in solido* in the sale to the purchaser discharged of any lien of the bank thereon. And in that case it appeared that prior to the insolvency the company was indebted to the bank in the sum of nearly \$100,000, and that these notes were placed in its hands for collection. The court sustained the title of the bank to the notes, and their proceeds as security for its indebtedness, notwithstanding the assignment. While we may not refer to that case for matters of fact, yet the facts therein disclosed add weight to the conclusion to which, irrespective thereof, we have come, that an assignment in insolvency does not disturb liens created prior thereto expressly or by implication in favor of a creditor. We conclude, therefore, that the demurrer to the second defense was properly sustained. *The judgment of the Circuit Court of Appeals is affirmed.*

\*STATE OF ARKANSAS and John A. [598]  
Hinkle, as Sheriff of Independence County,  
Arkansas, Appts.,

v.

CHARLES A. M. SCHLIERHOLZ.

(See S. C. Reporter's ed. 598-601.)

*Appeal from circuit court—certifying question of jurisdiction—constitutional question—presented first in assignment of errors.*

1. A sufficient certification of a question of jurisdiction by the circuit court to the Supreme Court of the United States is not made by an order allowing an appeal from a decision that a special agent of the Land Office is entitled to his discharge from the custody of a sheriff, and stating the question whether the court has jurisdiction to discharge him, or whether it should remand him to the custody of the sheriff to be dealt with by the state court, where there is no intimation that the Fed-



eral court did more than pass upon the merits of the controversy, and the questions merely imply that the court assumed that it had discretion, either to dispose of the case on its merits, or to remand the case to the state court and require him to resort to his remedy by writ of error.

2. A constitutional question which will give jurisdiction to the Supreme Court of the United States on appeal from a circuit court is not presented by a record which does not show that the question was presented to the court below, and merely shows that the question is contained in an assignment of errors made for the purposes of the appeal.

[No. 122.]

*Argued and submitted December 6, 1900.  
Decided December 24, 1900.*

**A** PPEAL from the District Court of the United States for the Eastern District of Arkansas to review a decision in favor of the petitioner in a habeas corpus case. *Dismissed.*

Statement by Mr. Justice **White**:

- [598] \*Two indictments were found by the grand jury of Independence county, Arkansas, against Schlierholz, appellee herein, for alleged violations of statutes of Arkansas. One indictment charged the taking possession, unlawfully, of certain timber; the other, the unlawful marking of timber. Upon such indictments Schlierholz was taken into custody by the appellant John A. Hinkle, as sheriff of Independence county. Thereupon Schlierholz presented a petition in habeas corpus to the judge of the district court of the United States for the eastern district of Arkansas. In said petition it was alleged, in substance, that the acts complained of in the indictments referred to were done by Schlierholz in the performance of his duty as a special agent of the General Land Office under the Department of the Interior of the United States. A writ of habeas corpus was allowed, and it was ordered to be served, not only on Hinkle, the sheriff, but on the prosecuting attorney of the state of Arkansas for the third judicial circuit. Issue was joined by a return filed by said prosecuting attorney. On motion, the case was transferred to the district court of the United States for the [599] \*northern division of the eastern district of Arkansas. Hearing having been had, the court found that Schlierholz, in the doing of the things complained of in the indictments, acted in the performance of his duty as a special agent of the General Land Office of the United States, and in strict conformity with the rules and regulations of the Secretary of the Interior, and that his arrest and detention were illegal and void. It was adjudged that the petitioner "be discharged from the custody of the sheriff under the writ in the petition and response set out and go hence without day." Thereupon, the court allowed an appeal to this court, and in the order doing so the following recitals are found:

"And at the request of the said state of Arkansas and John A. Hinkle, as sheriff, the  
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following questions, among others involved herein, are certified to the said Supreme Court of the United States:

"1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence county, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

"2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence county, Arkansas, to be dealt with by the Independence circuit court of the state, or to discharge him from said custody."

Mr. **Morris M. Cohn** submitted the cause for appellants; Messrs. *Jeff Davis, S. D. Campbell,* and *J. C. Yancey* were with him on the brief.

*Solicitor General Richards* argued the cause and filed a brief for appellee:

The certification of the question of jurisdiction contemplated by § 5 of the circuit court of appeals act must be a certification of the "question of jurisdiction alone."

*Chappell v. United States*, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397.

A constitutional question not raised in the lower court or passed upon by it cannot be raised in the assignment of errors, so as to give jurisdiction to the Supreme Court of the United States.

*Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 79, 41 L. ed. 77, 16 Sup. Ct. Rep. 969; *Muse v. Arlington Hotel Co.* 168 U. S. 435, 42 L. ed. 532, 18 Sup. Ct. Rep. 109; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

\*Mr. Justice **White**, after making the [599] foregoing statement, delivered the opinion of the court:

Before we can consider the principal propositions which have been argued at bar we must determine whether on this record jurisdiction exists to entertain this appeal.

The authority of this court to review the action of the court \*below must be found in [600] one of three classes of cases, in which, by § 5 of the judiciary act of March 3, 1891, an appeal or writ of error may be taken from a district or circuit court direct to this court. The classes of cases alluded to are as follows:

1. Cases in which the jurisdiction of the court is in issue, in which class of cases the question of jurisdiction alone is to be certified from the court below for decision;

2. Cases involving the construction or application of the Constitution of the United States; and,

3. Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

We are of opinion that the case at bar is not embraced within either of the classes of cases just mentioned.

As respects the first class, it was said in  
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*Huntington v. Laidley* (1900) 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526, as follows:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Davis v. Geissler*, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796.

Now, on looking at the proceedings had prior to the judgment rendered below, we do not find even a suggestion that an issue was made and decided by the district court as to the jurisdiction of that court to hear and determine the controversy presented by the petition in habeas corpus and the return thereto. On the contrary, the defense set forth in the return went simply to the merits, being based upon the contention that Schlierholz, in the acts charged in the indictment, had acted outside of his instructions and contrary to law. Nor, if the record imported that an issue as to jurisdiction had been made in the trial court and had been by it decided, do the questions propounded to this court constitute a sufficient certification of

[601] such question of jurisdiction. The statements in the order allowing the appeal, setting forth the questions propounded for the decision of this court, whether considered by themselves or in connection with the record, cannot in reason be treated as "a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction." *Shields v. Coleman* (1895) 157 U. S. 177, 39 L. ed. 663, 15 Sup. Ct. Rep. 570. As declared in the case just cited, "no mere suggestion that the jurisdiction of the court was in issue will answer." But in the questions propounded by the district court there is not even an intimation that the court, in the judgment rendered, did more than pass upon the merits of the controversy. In effect, the questions but imply that the court assumed that it had a discretion either to dispose of the case on its merits or to remand the accused to the state court and require him to resort to his remedy by writ of error, and that the instruction of this court was desired by the court below as to the proper exercise of its discretion in the premises. But the power to certify to this court other than jurisdictional questions is vested only in the circuit courts of appeals. *Bardes v. Hawarden First Nat. Bank* (1899) 175 U. S. 526, 528, sub 179 U. S. U. S., Book 45.

*nom. Bardes v. First Nat. Bank*, 44 L. ed. 261, 20 Sup. Ct. Rep. 196.

As respects the second and third class of cases. The record does not lend support to the claim that any constitutional question was presented to the court below for its determination. Full opportunity existed in the return filed to the writ to set up any constitutional provision which might have been deemed adequate to defeat the application of Schlierholz for his discharge from custody. The only suggestion, however, of a contention based upon the Constitution of the United States is that contained in the assignment of errors made for the purpose of this appeal. Clearly, therefore, the record presents no constitutional question for review by this court, since it fails to disclose that a controversy on such subject was called to the attention of the court below prior to the hearing, and when it also does not appear that the court below considered or necessarily passed upon an issue of that character. *Chapin v. Fye* (1900) 179 U. S. 127, ante, 119, 21 Sup. Ct. Rep. 71; *Loeb v. Columbia Twp.* 179 U. S. 472, ante, 280, 21 Sup. Ct. Rep. 174.

*Dismissed for want of jurisdiction.*

\*THE MISSOURI, KANSAS, & TEXAS [602]  
RAILWAY COMPANY OF TEXAS,  
Plff. in Err.,

v.  
MOLLIE F. FERRIS, Mattie Lee, Sam.  
Richard Ferris, Price Franklin Ferris,  
Mina Katie Ferris, Millie Caldon Ferris,  
Henry Cordell Ferris, Dovie Emeline Ferris,  
and Lovie Eveline Ferris.

(See S. C. Reporter's ed. 602-606.)

*Error to state court—Federal question—decision on other grounds.*

The ruling of a trial court in favor of the constitutionality of Tex. act April 22, 1897, which makes the statutory provisions for *ex parte* depositions, to the effect that refusal to answer shall be taken as an admission, inapplicable to cases in which either party is a corporation, does not present a Federal question for review by the Supreme Court of the United States on writ of error, where the final decision of the trial court is based on the ground that there had been no such refusal to answer as would constitute an admission, even if the general statutory provisions were applicable to the case.

[No. 349.]

Submitted December 8, 1900. Decided December 24, 1900.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kiple v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



**I**N ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a decision affirming a judgment in an action for negligence. On motion to dismiss or affirm. *Affirmed.*

**Statement by Mr. Justice Brewer:**

This was an action commenced in the District Court of Bastrop County, Texas, on January 31, 1899, by the defendants in error, as plaintiffs, to recover damages sustained by the death of their father, charged to have been occasioned through the negligence of the railway company. Judgment having been rendered in favor of the plaintiffs, it was taken on appeal to the court of civil appeals for the third supreme judicial district of the state of Texas, and by that court affirmed. An application to the supreme court of the state for a writ of error having been denied, this writ of error was sued out.

The case presents these facts: An act of the legislature of the state of Texas, passed February 15, 1858, appearing in chapter 3, title 40, Revised Statutes of 1895, in the following sections reads:

"Article 2293. Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted, and his testimony received, in the same manner, and according to the same rules, which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter.

"Article 2294. It shall not be necessary to give notice of the filing of the interrogatories, or to serve a copy thereof on the adverse party, before a commission shall issue to take the answers thereto; nor shall it be any objection to the interrogatories that they are leading in their character.

[603] "Article 2295. A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and be executed and returned by any authorized officer as in other cases."

"Article 2297. If the party interrogated refuses to answer the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed."

On April 22, 1897, this amendment was made:

"Where either party to any suit is a corporation, neither party thereto shall be permitted to take *ex parte* depositions." Tex. Gen. Laws 1897, p. 117.

Prior to the trial an effort was made to take the testimony of two of the plaintiffs, Sam Ferris and Frank Ferris, the one fourteen years of age and the other twelve years of age. Interrogatories were prepared by the defendant, and the clerk of the court was designated as the officer to take the depositions. On the trial he testified in substance

that he went to the place where the boys were living with their uncle; that the uncle refused to permit them to be questioned, though neither of the boys was asked any question or declined to answer any interrogatory. He further testifies that the uncle "told me that he had seen no attorney; . . . that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection Judge Garwood (counsel for defendant) could ask them what he wanted to."

The trial court overruled the motion of defendant to take the interrogatories confessed as against the two plaintiffs.

**Mr. H. M. Garwood** submitted the cause for plaintiff in error:

When the record makes it clear that the judgment of the state court rests upon the Federal question, this court will not indulge in conjecture or speculation as to whether there may or may not be grounds independent of the Federal question upon which it may sustain the judgment.

*Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Neilson v. Lagow*, 12 How. 110, 13 L. ed. 914.

For this court to refuse to entertain jurisdiction upon the ground that the question involved may have been correctly decided under the local law will compel it to examine and decide a question of fact which the several state courts declined to do, to wit, it must decide that the refusal to answer was not wilful; and this it will not do.

**Mr. John W. Parker** submitted the cause for defendants in error:

The rights of the minor plaintiff's cannot be prejudiced by anything their uncle did. Even their next friend was powerless to do anything to the prejudice of their rights.

*Kingsbury v. Buckner*, 134 U. S. 680, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638; 14 Enc. Pl. & Pr. 1035.

A refusal to answer until the party could consult with his counsel was not contumacious, and afforded no ground for taking the interrogatories as confessed.

*Bounds v. Little*, 75 Tex. 318, 12 S. W. 1109; *Robertson v. Melasky*, 84 Tex. 561, 19 S. W. 776; *Wofford v. Farmer*, 90 Tex. 655, 40 S. W. 788; *McLaughlin v. Carter*, 13 Tex. Civ. App. 699, 37 S. W. 666.

This court will dismiss a writ of error to the judgment of the state court, although the judgment decided a Federal question adversely to the plaintiff in error, where another question not Federal was raised and decided against him, which was sufficient to sustain a judgment.

*Harrison v. Morton*, 171 U. S. 46, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; *Pierce v. Somers et R. Co.* 171 U. S. 648, 43 L. ed. 319, 19 Sup. Ct. Rep. 64; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 471, 43 L. ed. 519, 19 Sup. Ct. Rep. 265; *Egan v. Hart*, 165 U. S. 191, 41 L. ed. 681, 17 Sup. Ct. Rep. 300; *Eustis v. Bolles*, 150 U. S. 366, 37 L. ed. 1112, 14 Sup. Ct. Rep. 131.



[603] \*Mr. Justice **Brewer** delivered the opinion of the court:

This case is before us on a motion to dismiss or affirm. The \*parties being citizens of the same state, the jurisdiction of this court is invoked on the alleged ground of a Federal question. It is contended that the amendment of April 22, 1897, which takes away, in cases in which a corporation is a party on either side, the right to preliminary *ex parte* depositions, is in conflict with the 14th Amendment to the Federal Constitution, inasmuch as it is unwarranted class legislation, and denies the equal protection of the laws.

If we examine the opinion of the court of civil appeals, or the proceedings in the supreme court of the state, we find no reference to that question. It either was not called to the attention of those tribunals or was unnoticed by them. Turning to the record of the trial in the district court it appears that when the interrogatories were presented, together with the certificate of the clerk that the two plaintiffs named had refused to answer, the court ruled that the act of April 22, 1897, was constitutional; that, therefore, the defendant had no right to present such interrogatories, and overruled its motion that they be taken as confessed; and that the defendant excepted upon the ground of a conflict between such statute and the 14th Amendment. It further appears that thereupon the plaintiffs asked permission to introduce testimony in respect to such refusal, and the testimony being produced, it was disclosed that the only refusal was that of the uncle; that the boys not only did not decline to answer, but were not even asked any of the interrogatories; and that the uncle declared that he would take the boys to town that afternoon to consult attorneys, and then, if there was no objection, the defendant's counsel might ask them what he wished. Upon this testimony the court again overruled the motion of the defendant to take the interrogatories as confessed.

While the court, in the first instance, expressed an opinion that the act of 1897 was constitutional, yet its final ruling was based upon the disclosure made by the testimony. That disclosure was of facts which, under the original statute and irrespective of the amendment of 1897, did not, according to the rulings of the supreme court of the state, entitle the defendant to have the interrogatories taken as confessed. In *Wofford v.*

[605] \**Farmer*, 90 Tex. 651, 40 S. W. 788, it appeared that the notary, acting for the defendants, without having given any previous notice, came to the plaintiff and demanded that he should answer the interrogatories; that the plaintiff refused to answer, assigning as a reason that he wished to see his attorneys, and that it was necessary that he should examine some papers before giving his answers. The supreme court sustained the action of the trial court in declining to hold the interrogatories taken as confessed, saying, p. 654, S. W. p. 789:

"The statute gives a party to whom interrogatories are propounded by his adversary the right, 'in answer to the questions pro-

pounded, to state any matter connected with the cause and pertinent to the issue to be tried.' Rev. Stat. art. 2296. Consultation with his counsel is necessary to a judicious exercise of this right. The privilege given by the statute to a party to a suit to propound interrogatories to the opposite party for the purpose of discovering evidence is an important one; but in our opinion was not given for the purpose of entrapping his adversary, and hence the latter should not be denied the right of consultation with his attorney. A refusal to answer without giving a reasonable time for such consultation should not be deemed contumacious, and a certificate made under such circumstances should, upon a proper motion, supported by proof of the facts, be suppressed. *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1109; *Robertson v. Melasky*, 84 Tex. 559, 19 S. W. 776.

The cases cited in this quotation go to sustain the proposition that the refusal of the party to answer must be wilful and contumacious. Such being the construction placed by the supreme court of the state upon the statute, the trial court properly held that the certificate of the officer to the refusal of the plaintiffs was not conclusive, and that upon the facts as disclosed the interrogatories should not be taken as confessed. Now, whatever may have been the opinion of the trial court as to the validity of the act of 1897, no matter what may have been said in the progress of the trial in respect to its validity, if the final ruling was based upon a state of facts which put the act entirely out of the case, it cannot be that we are called upon to consider any expression of opinion concerning it, for such expression \*was not [606] necessary for the decision. Moot questions require no answer.

This being the only matter suggested, and it appearing that the Federal question stated in the record calls for no decision, judgment is affirmed.

MARY LOUISE KENADAY, Executrix,  
Plff. in Err. and Appt.,

v.

ARABELLA D. SINNOTT, William A.  
Piles, Ida Piles Miller, and Belle Hubert.

(See S. C. Reporter's ed. 606-621.)

*Appeal—decree of probate court as a decree in equity—finality of decree—bequest of money in bank—effect of subsequent purchase of bonds therefrom.*

1. Exceptions to an accounting by an executrix in the supreme court of the District of Columbia sitting as an orphans' court make

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

As to what are final decrees or judgments for purposes of review—see notes to *Gibbons v. Ogden*, 5 L. ed. U. S. 302; *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238, and *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482.



a case for equitable cognizance which is properly reviewed by appeal rather than by writ of error.

2. Jurisdiction over an alleged residue of personality in the hands of an executrix, undisposed of by the will, can be exercised by the supreme court of the District of Columbia sitting as an orphans' court, in a controversy between the next of kin and the executrix, under Md. testamentary act of January 20, 1799, chap. 101, subchap. 15, § 12 (2 Kilty Nov. Scss. 1798), giving the court power to decree upon accounts, claims, and demands existing between legatees or persons entitled to any distributable part of an intestate's estate, and executors and administrators, with power to enforce obedience to such decrees in the same ample manner as the court of chancery may.
3. A decision of the court of appeals of the District of Columbia, reversing and remanding a case for the restatement of the account of an executrix, and determining who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise, was not final so as to justify an appeal by the executrix therefrom, although the other parties might have appealed had it been a decree of affirmance.
4. A will inartificially drawn, showing beyond doubt an intention to dispose of all the testator's property, and bequeathing to his wife deposits in a bank "amounting to \$10,000, more or less," entitles her to bonds purchased after the will was made, amounting to about \$9,000, when the deposit in the bank was reduced by a corresponding amount, and the bonds must otherwise remain undisposed of by the will.

[No. 66.]

*Argued November 5, 1900. Decided December 24, 1900.*

**I**N ERROR to and Appeal from the Court of Appeals of the District of Columbia to review a decision approving a final account of an executrix on her appeal from the Supreme Court sitting as an orphans' court. *Reversed.*

See same case below, 14 App. D. C. 1.

Statement by Mr. Chief Justice **Fuller**:

[607] \*This was a proceeding for the settlement of the final account of Mary Louise Kenaday, as executrix of Alexander M. Kenaday, in the supreme court of the District of Columbia, holding a special term for orphans' court business. Alexander M. Kenaday died in the District of Columbia, March 25, 1897, leaving a will, which was probated in the orphans' court of the District at the April term, 1897, and was as follows:

"In the name of God, Amen. I, Alexander McConnell Kenaday, resident of Washington, District of Columbia, being of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs and directing how the estates which it has pleased God to bless me shall be disposed of—after my decease—while I have strength and capacity so to do, do make and publish this last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore

made. And first, I commend my mortal being to Him who gave it, and my body to the earth, to be buried with [as] as little expense by my executor hereinafter named.

"*Imprimis.* My will is that all my just debts and funeral charges shall be paid out of my estate, by my executrix.

"*Item.* I give, devise and bequeath to my beloved wife, Mary Louise Kenaday, all my real estate, household furniture, and claims pending in the courts in relation to said real estate, to wit:

"House and lot known as No. 507 & 509 on F street, northwest, Washington, D. C. lot No. 2 (east half) of square 482, 30 x 101.10.

"House and lot known as No. 621 H street, northwest, lot No. 483 sq. No. 483, 20<sup>1</sup>/<sub>4</sub> x 133 to an alley.

"House and lot known as No. 2006 G street northwest, lot No. 25 in square No. 103, 20<sup>3</sup>/<sub>4</sub> x 120 ft. to an alley.

"And I hereby authorize my wife, as executrix, to convey by deeds in fee simple any or all of said real estate in accordance with the laws of the District of Columbia, under the advice of some competent attorney.

"*Item.* Included as claims pending in the courts are: An account for taxes against the estate of De Vaughn v. De Vaughn, unjustly withheld, in charge of my attorney Woodbury Wheeler, Esq. Also, an account for moneys withheld by the trustees of Edwards v. Maupin. In charge of my attorney Frank W. Hackett, Esq., amounting to \$1,078 with interest at 6 per cent per annum from March 7, 1888.

"Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c. Also, 200 shares of Sutro Tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of the National Metropolitan Bank, amounting to \$10,000.00 more or less.

"*Item.* I give, devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans, La., twelve thousand dollars in registered U. S. 4 % bonds, on special deposit in the National Metropolitan Bank.

"*Item.* I give, devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4% bonds deposited as aforesaid (\$3,500.00) as follows: To Mrs. Belle Hubert, \$500.00. To Wm. A. Piles, \$500.00. To Ida Piles, \$500.00. To Eloise Piles, \$500.00. To Edith K. Piles, \$750.00. To Henry C. Piles, \$250.00.

"*Item.* The promissory note for \$1,100.00 filed with a chattel mortgage in my name in the office of the recorder of deeds, in the District of Columbia, signed by Mrs. Anna Hemenway, shall be cancelled and my executrix may allow Mrs. Hemenway \$500 in settlement of her account.

"The bond of the city of Richmond, for \$5,000.00 bearing 5 per cent. interest, payable January and July—(on special deposit with the 4%, bonds of the U. S. in the National Metropolitan Bank) is hereby devised and bequeathed to my wife and executrix.

†Word inclosed in brackets erased in copy.

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[609] \*The sum of \$5,000.00 advanced to Wm. C. McGeorge of San Francisco, California, no account of which has been rendered by him, is hereby devoted to the relatives of my wife, and used according to her discretion." The will was subscribed by the testator, April 3, 1894, in the presence of three witnesses, whose attestation was sworn to.

Mrs. Kenaday duly qualified as executrix, and proceeded in the discharge of her duties. On June 10, 1898, under the order of the orphans' court, the executrix gave notice, appointing Friday, July 8, 1898, as the day for the settlement of her final account as executrix by that court; and for making distribution of the estate under its orders.

Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert appeared and filed their petition, claiming as distributees as the only surviving next of kin and heirs at law of the decedent. They admitted the receipt from the testatrix of their respective legacies under the will, and that another legatee therein named, Edith K. Piles, since dead, had also received her legacy; and said: "The other two legatees, to wit, Henry C. Piles, and Eloise Piles, have not been paid the amounts left them, the said Eloise having died before the testator, Alexander M. Kenaday, and the said Henry C. not having been heard from during the last six years and who your petitioners believe is dead."

The final account of the executrix was made up and filed July 15, 1898, showing that she charged herself with a \$5,000 bond of Richmond, Virginia; \$24,500 United States registered bonds; 200 shares stock Comstock Tunnel Company and one certificate of scrip of that company, appraised as valueless; cash found on deposit in National Metropolitan Bank, \$810.60; and some items of interest, etc.; that the Hemenway note had not been found; that she credited herself with disbursements for costs, funeral expenses, etc.; with commissions; and with legacies paid or otherwise satisfied, but not

including therein the \$810.60 on deposit; and that there was in her hands \$9,218.76, "consisting mainly of United States bonds and deposits in bank," which the executrix credited herself with "on account \*of the bequest [610] to her by the testator of 'notes and evidences of indebtedness to me,' 'deposits of currency entered on my bank book,' and other personal estate," and thus balanced and closed the account in full.

The intervening next of kin claimed the balance on the ground that it was residuary estate, and that, there being no residuary clause in the will, it necessarily belonged to them; and filed their exceptions to the account as stated, particularly excepting to the credit of the \$9,218.76.

A certificate of the Register of the Treasury was filed, to the effect that the records of his office showed that registered 4 per cent bonds of the United States were standing in the name of Alexander M. Kenaday on the 1st day of April, 1897, to the amount of \$24,500; of which, bonds to the amount of \$15,500 bore date April 23, 1889, and bonds to the amount of \$9,000 bore date April 1, 1895.

The orphans' court, Hagner, J., presiding, on October 11, 1898, overruled the exceptions, and approved the final account of the executrix as stated. All said next of kin thereupon appealed from this order to the court of appeals for the District of Columbia.

At the January term, 1899, the cause was heard, the order was reversed with costs, and the cause was remanded to the court below with a direction "that the account be restated in accordance with the principles of the opinion of this court." 14 App. D. C. 1. The mandate having gone down the account of the executrix was restated as directed by the court of appeals, and approved February 10, 1899.

The balance for distribution according to that account was stated to be \$8,285.64, and the distributive shares as follows:

To Arabella D. Sinnott, sister, $\frac{1}{2}$ .....	\$4,142 82
" Mrs. Belle Piles Hubert, niece, $1-\frac{5}{8}$ of $1-\frac{1}{2}$ .....	828 56
" Edith K. Piles " " " ".....	828 56
" Ida Piles Miller, " " " ".....	828 56
" William A. Piles, nephew, " " " ".....	828 56
" Henry C. Piles, " " " ".....	828 56
Fractions.....	02
	<hr/>
	\$8,285 64

[611] \*On the same 10th of February, Mrs. Kenaday was ordered to pay over and deliver to the said Arabella D. Sinnott, through her attorneys of record, the sum of \$4,142.82, being her distributive share of said estate, taking receipt for the same. Thereupon Mrs. Kenaday appealed in open court to the court of appeals from the order of February 10, approving and passing the account, and from the order directing the distribution to Arabella D. Sinnott of the amount therein mentioned as her share. An appeal bond in the sum of \$8,000 running to Arabella D. Sinnott, to operate as a supersedeas to the order directing the payment to her of \$4,142.82 was required by order of court, and it was also directed that the penalty of a bond for costs in the matter of the appeal from the order approving the account, filed the same day, be fixed at \$50, or in lieu of such bond for costs, a deposit of that amount in cash. A supersedeas bond in the penalty of \$8,000 was approved, filed, and recorded, and \$50 was deposited in lieu of bond on appeal from the order approving the account. The court of appeals filed an opinion, *per curiam*, that on examining the transcripts of record it was found that the court below had in the restatement of the account followed and observed the mandate sent down on the former appeal, and that it was ordered that the motion made by the said Arabella D. Sinnott to dismiss or affirm the order of the court below approving and passing said final account of the estate, under rule sixteen of the court, be denied, but that

the said final order of said court approving and passing said account, the same bearing date the 10th day of February, 1899, on the appeal of the said Mary L. Kenaday, executrix, be affirmed, "the said account appearing to be stated in accordance with the mandate of this court issued on the former appeal." Thereupon judgment was entered April 5, 1899, "that the order of the said supreme court in this cause, of February 10, 1899, approving and passing account be, and the same is hereby, affirmed with costs." A writ of error to remove the cause to this court was thereupon allowed by that court, and issued, a supersedeas bond being given and approved. Subsequently the executrix, being in doubt whether the proceedings to obtain a review should be by writ of error, or [612] appeal, prayed an appeal, which \*was granted in these words: "On motion of Mary L. Kenaday, executrix, by her attorney, and it appearing to the court that the practice in cases exactly of the character of the present one has not been established by precedent, it is adjudged and ordered by the court this 17th day of April, 1899, that said executrix be, and she is hereby, allowed an appeal from the order of this court passed herein April 5, 1899, and that the same bond in the sum of \$10,000 to act as a supersedeas upon the issuing a writ of error in this case, shall stand and act as a supersedeas upon said appeal, or according as a writ of error or appeal is ultimately decided to be the method of obtaining a review of the decision of this court in said cause."

The supersedeas bond was in the sum of \$10,000, and ran to Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert.

**Mr. William Henry Dennis** argued the cause and filed a brief for plaintiff in error and appellant:

The writ of error was applied for and granted under the authority of *Campbell v. Porter*, 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871.

The Supreme Court of the United States will only entertain cases where the action of the court below is final and leaves only ministerial, and not judicial action to be taken by the court or courts below.

*Lodge v. Twell*, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170.

The enforced distribution of any residue in the hands of an executor after payment of debts and legacies is exclusively within the jurisdiction of equity or chancery, and the doctrine is unknown in any other court.

*Petit v. Smith*, 1 P. Wms. 7; *Hatton v. Hatton*, 2 Strange, 865; 2 Wms. Exrs. 1st ed. \*1270.

Where a testator, as in this case, appoints an executrix, he does not die intestate as to any part of his personal property, for the legal title to all of it vests in the executrix, subject only to the obligation of paying debts and legacies.

*Story*, Eq. Jur. § 1208; *Hays v. Jackson*, 342

6 Mass. 149; *Lowndes, Legacies*, 249; *Sinnott v. Kenaday*, 14 App. D. C. 18.

The construction given by the court of appeals to the declaratory clauses quoted from Md. act 1798, chap. 101, would apparently, with equal force, allow the orphans' court to entertain a suit against an executor for a debt, or replevin by him for part of the assets of the estate, or many other suits admittedly beyond its jurisdiction.

*United States use of Wilson v. Walker*, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277; *Keyser v. Breitbarth*, 3 Mackey, 19; *Re Thompson*, 6 Mackey, 536.

Probate courts have no general power to construe wills.

*Fiester v. Shepard*, 92 N. Y. 251.

The next of kin could not prevail in face of the natural, obvious, and reasonable construction of the will.

*Given v. Hilton*, 95 U. S. 594, 24 L. ed. 460; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; *Home for Incurables v. Noble*, 172 U. S. 383, 43 L. ed. 486, 19 Sup. Ct. Rep. 226. See also *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

A widow who has relinquished her *par rationabilis*, or thirds of the personal estate, and accepted the provision made for her by her husband's will, has a much stronger claim to a liberal construction in her favor than the heir at law has against a devisee, or next of kin against a legatee, inasmuch as she is a purchaser for a fair consideration.

*Durham v. Rhodes*, 23 Md. 233.

The principle that the comparative values of what is relinquished and gained by the wife make no difference in the application of the rule is declared by the Supreme Court of the United States.

*Sykes v. Chadwick*, 18 Wall. 141, 21 L. ed. 824.

The will speaks from testator's death.

*Van Vechten v. Van Vechten*, 8 Paige, 104; *Gold v. Judson*, 21 Conn. 622; *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156; *Turpin v. Turpin*, Wythe (Va.) 22; *Allen v. Harrison*, 3 Call (Va.) 289; *Warner v. Swearingen*, 6 Dana, 195; *Means v. Evans*, 4 Desauss. Eq. 242; *Dennis v. Dennis*, 5 Rich. L. 468; *O'Brien v. Heeney*, 2 Edw. Ch. 242; *Gilmer v. Gilmer*, 42 Ala. 9; 2 Wms. Exrs. \*885; 1 Jarman, Wills, 5th ed. 319, 326; *All Souls College v. Coddington*, 1 P. Wms. 597; *Wilde v. Holtzmeier*, 5 Ves. Jr. 816; *Masters v. Masters*, 1 P. Wms. 424; *Bridgman v. Dove*, 3 Atk. 201; *Bland v. Lamb*, 2 Jac. & W. 399.

The courts in general are averse to construing legacies as specific; and the intention of the testator that they should be so must be clear.

2 Wms. Exrs. 741; 13 Am. & Eng. Enc. Law, 1st ed. title *Legacies*, and cases cited, p. 15.

Any reasonable construction of a will con-  
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sistent with its terms will be adopted by the courts in order to give it effect to dispose of the testator's entire property, instead of holding that he died intestate as to part.

*Minkler v. Simons*, 172 Ill. 323, 50 N. E. 176.

It is not necessary that a clause of a will, in order to have the effect of a residue clause, shall be the last clause, or that it shall contain any technical word such as "residue," and it may be followed, without impairing its effect, by a special bequest, which will be treated as an exception out of it, liable to fall back into it in case of lapse.

*Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283.

**Messrs. William A. Milliken and F. P. B. Sands** argued the cause and filed a brief for defendants in error and appellees:

The authorities all agree that where a superior court renders a decree fixing the liability and rights of parties, and remands the case to a subordinate court for a judicial purpose, upon which a further decree is to be entered, it is not a final decree.

*California Nat. Bank v. Statsler*, 171 U. S. 447, 43 L. ed. 233, 19 Sup. Ct. Rep. 6.

But where the case is remanded to the lower court for a ministerial purpose only, in order to carry out the decree of the superior court, such a decree is final and conclusive of the case.

*McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 537, 36 L. ed. 1081, 13 Sup. Ct. Rep. 170; *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799.

The whole question whether a decree is final or not hinges on the point whether the reference to a master, or the mandate to the court below, is for a judicial purpose or a mere ministerial purpose. All the cases recognize this distinction.

*Whiting v. Bank of United States*, 13 Pet. 6, 10 L. ed. 33; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; *Ex parte Norton*, 108 U. S. 237, 27 L. ed. 709, 2 Sup. Ct. Rep. 490; *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17 L. ed. 673; *Washington, G. & A. R. Co. v. Bradley*, 7 Wall. 577, *sub nom.* *Washington, G. & A. R. Co. v. Washington*, 19 L. ed. 275; *Thomson v. Dean*, 7 Wall. 342, *sub nom.* *Dean v. Nelson*, 19 L. ed. 94; *French v. Shoemaker*, 12 Wall. 86, 20 L. ed. 270. See also *Tippecanoe County Comrs. v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *St. Clair County v. Lovington*, 18 Wall. 628, 21 L. ed. 813; *Coit v. Robinson*, 19 Wall. 283, 22 L. ed. 154; *North Carolina R. Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136.

Second appeals or writs of error will lie in certain cases where it is alleged that the mandate of the appellate court has not been properly executed; but the appeal or writ of error in such case will bring up nothing for re-examination except the proceedings subsequent to the mandate. Needful explanations may be derived from the original record, but the re-examination cannot  
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not extend to anything that was decided on the antecedent appeal or writ of error.

*The Lady Pike*, 96 U. S. 461, *sub nom.* *Pearce v. Germania Ins. Co.* 24 L. ed. 672; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Hinchley v. Morton*, 103 U. S. 764, 26 L. ed. 458; *Ames v. Quimby*, 106 U. S. 348, 27 L. ed. 102, 1 Sup. Ct. Rep. 116; *Clark v. Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568.

Indeed the circuit courts of appeals have held in numerous cases that an appeal should not be entertained from a decree of a circuit court rendered pursuant to a mandate of the court of appeals, when no errors are assigned as to matters arising subsequent to the mandate.

*Gregory v. Pike*, 23 C. C. A. 138, 33 U. S. App. 700, 77 Fed. Rep. 241; *Re Pike*, 22 C. C. A. 244, 33 U. S. App. 673, 76 Fed. Rep. 400.

This honorable court has also laid down the principle that no appeal or writ of error will be allowed from a decree entered by a lower court in accordance with a mandate of a superior court.

*Humphrey v. Baker*, 103 U. S. 736, 26 L. ed. 456; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1044.

\*Mr. Chief Justice **Fuller** delivered the [612] opinion of the court:

The court of appeals allowed a writ of error to review its decree approving the final account, and, a few days subsequently, and at the same term, in view of the fact that the practice in cases of this precise character had not been established, also allowed an appeal, the supersedeas bond on the writ to stand on the appeal, if appeal were determined to be the correct method of procedure. The cause was docketed in this court as on writ of error, and as on appeal, and appellees or defendants in error move to dismiss the appeal because the writ of error had previously issued, and the writ of error because the remedy was by appeal. We must decline, however, to sustain both motions on these grounds under the circumstances. The determination of the proper course to be taken in seeking our jurisdiction will dispose of one motion or the other.

\*By § 8 of the act of February 9, 1893, 27 [613] Stat. at L. 434, chap. 74, final judgments or decrees of the court of appeals are to be re-examined by this court on writ of error or appeal in the same manner and under the same regulations as theretofore provided in cases of writs of error or appeals from judgments in the supreme court of the District of Columbia.

In *Ormsby v. Webb*, 134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478, it was ruled that a writ of error would lie to review a judgment of the supreme court of the District of Columbia, admitting a will to probate, not merely because in that case a trial by jury had been actually had, but upon the more general grounds, thus stated by Mr. Justice Harlan: "It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the



original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the supreme court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity." And see *Campbell v. Porter*, 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871.

But while that is the established rule in that class of cases, it by no means follows that it is applicable in this case.

At common law jurisdiction over the estates of deceased persons vested in the ecclesiastical, common-law and chancery courts, and, in this country, courts of probate or orphans' courts have universally been created by statute for the general exercise [614]\* of that jurisdiction, including the exercise of equitable, as well as common-law, powers and the pursuit of appropriate procedure.

The District supreme court sits as an orphans' court, and by § 1 of subchap. 15 of chap. 101 of the Maryland testamentary act of January 20, 1799 (2 Kilty, November Session, 1798), the orphans' court was instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration, directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons, according to law."

By other sections it is made the duty of the executor or the administrator, on settlement of his account, to deliver up the estate, or deliver up and distribute the surplus or residue.

And by § 12 of subchap. 15, it is provided that "the orphans' court shall have full power, authority, and jurisdiction to examine, hear, and decree upon, all accounts, claims, and demands existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

There can be no question that the District supreme court was clothed, as an orphans' court, with ample powers to proceed in the [615]

settlement of estates and the distribution thereof to those entitled, in accordance with equitable principles and procedure; and we think that the controversy raised by the exceptions of the next of kin to this final account was in its nature of equitable cognizance, and that the decree of the court of appeals is properly reviewable on appeal rather than on writ of error.

The reasoning which conducts to this conclusion in proceedings of this character in effect disposes of the contention of appellant that the decree should be reversed because the orphans' court had no jurisdiction over an alleged residue of personalty \*in the hands [615] of an executrix undisposed of by the will, as jurisdiction over it belonged solely to a court of equity, as a matter of trust. Alvey, Ch. J., in the opinion reported 14 App. D. C. 1, 21, discussed the subject at length, and, among other things, said: "The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed of surplus or residue of the personal estate, by mere implication or construction, as by the former English rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect of the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the orphans' courts of Maryland, and the special term of the supreme court of this District for orphans' court business, by the testamentary act of 1798, chap. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself." The Chief Justice then gave a *résumé* of the act, and quoted the sections to which we have already referred.

There being a controversy over the distribution between the next of kin and the executrix, we are entirely satisfied that the powers vested in the orphans' court gave it jurisdiction to dispose thereof, and that appellees were not compelled to go into the equity court.

Appellees also moved to dismiss both the writ of error and the appeal, on the ground that the judgment of the court of appeals on the first appeal was a complete and final decree, settling and fixing the rights of the parties, and that appellant, because she did not appeal therefrom, was concluded from any review by this court of the matters then considered.

We do not think so. On the appeal of the next of kin, the \*court of appeals reversed [616] and remanded the cause "that the account be restated in accordance with the principles of the opinion of this court."



The account was to be entirely recast under the mandate, and the determination of who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise, were remitted to the court below. The settlement was to be a final settlement, and the decree reversing and remanding that such a settlement might be had on the principles indicated was not final so as to justify an appeal by the executrix therefrom, although, had it been a decree of affirmance, the present appellees might have appealed.

We come, then, to the case upon the merits, and it must be determined on the correct construction of the will, arrived at in accordance with well-settled applicable rules.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail, if consistent with the rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given. And in principle this must be so when it is contended that the executor takes merely for next of kin claiming as distributees of an alleged undisposed-of residue.

The general intention of the testator in this instance is perfectly clear. The will was inartificially drawn, but its various provisions, taken together, put it beyond doubt that he intended to dispose of all of his property, and we think that he accomplished that purpose. In doing so all property not expressly given another destination was, in substance, devised and bequeathed to his wife, including some \$10,000 on deposit. His intention that she should thus take is evident. And if by the will he disposed of all the property he had, there appeared no necessity for a technical residuary clause.

The property enumerated in the will was the property he owned at the time of his death, except that there was but \$810.60 on deposit in bank, and he had \$9,000 in United States bonds more than when the will was [617] executed. These bonds \*were of a subsequent date to that of the execution of the will, and were necessarily, therefore, purchased afterwards.

The will, executed April 3, 1894, referred to \$15,500 of bonds, and, at his death, he had bonds for \$24,500, \$15,500 dated April 23, 1889, and \$9,000 dated April 1, 1895.

The question then really comes to this, whether an irrebuttable presumption arises that the testator, by reducing the amount of money on hand at the date of his will, intended that the amount of such reduction, though remaining in his assets in another form, should be distributed to his next of kin rather than that his wife should receive it.

And it is to be observed at the outset that to each of the next of kin he made a bequest. To his sister, Mrs. Sinnott, a specific legacy of \$12,000 of the \$15,500 of bonds, and to the children of a deceased sister legacies aggregating \$3,000 out of the \$3,500 of bonds remaining after the delivery of the \$12,000 to Mrs. Sinnott. Certain enumerated promises

sory notes were otherwise disposed of, and all the rest of his property, real estate, household furniture, Richmond city bonds, money, etc., was devised and bequeathed to his beloved wife. There was indeed an apparent surplus of \$500 of the \$3,500 of bonds, but the allowance to Mrs. Hemenway of \$500 immediately followed the bequests to the next of kin.

At his death there were on hand \$9,000 more in bonds, and \$9,000 less in money. Do the rules of law require it to be held that by this change he intended to withdraw so much from what he had designed his wife to have, and to bestow it on the next of kin in addition to what he had originally expressly given them?

The question involved is one of ademption, and not of satisfaction. Without going into refinements in respect of the definition of the word "ademption," it may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy \*should fail is presumed. At least a [618] different intention in that regard which is not expressed will not be implied, although the intention which is expressed relates to something which has ceased to exist.

Williams on Executors says in reference to the different kinds of legacies that, "a legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. . . . A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians a *demonstrative* legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with general legacies upon a deficiency of assets." Vol. 2, p. 1158. And he adds: "The courts in general are averse from construing legacies to be specific; and the intention of the testator, with reference to the thing bequeathed, must be clear."

These rules are considered and applied in well-nigh innumerable cases. Many of them will be found cited in the notes to *Ashburner v. Macquire*, 2 Bro. Ch. 108, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. from 4th London ed. p. 600.

In *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456, Chancellor Kent reviews the subject at large with his usual ability, and criticises the observation of Lord Thurlow in *Stanley v. Potter*, 2 Cox. Ch. Cas. 180,



that the question in these cases does not turn upon the intention of the testator, saying: "But I apprehend the words of Lord Thurlow are to be taken with considerable qualification; and that it is essentially a question of intention, when we are inquiring into the character of the legacy, upon the distinction taken in the civil law, between a demonstrative legacy, where \*the testator gives a general legacy, but points out the fund to satisfy it, and where he bequeaths a specific debt."

[619] In *Wilcox v. Wilcox*, 13 Allen, 256, Wells, J., said: "Courts do not incline to construe legacies to be specific, and will not do so unless such be the clear intention of the testator. *Kirby v. Potter*, 4 Ves. Jr. 748; *Atty. Gen. v. Parkin*, 2 Ambl. 566; *Briggs v. Hosford*, 22 Pick. 288; *Boardman v. Boardman*, 4 Allen, 179. If a legacy be given, with reference to a particular fund only, as pointing out a convenient mode of payment, it is to be construed as demonstrative, and the legatee will not be disappointed though the fund wholly fail."

In *Tift v. Porter*, 8 N. Y. 516, Johnson, J., speaking for the majority of the court, said: "A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate which is so distinguished. . . . The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific its terms must clearly require such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon the collateral condition that he shall remain, till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees, are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention."

And so Alvey, Ch. J., in *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247: "Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a *demonstrative* legacy; and such legacy is so far [620] general, and \*differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan v. Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate with general legacies, upon a deficiency of the assets, except to the extent that it is to

be treated as a general legacy, after the application of the fund designated for its payment. *Mullins v. Smith*, 1 Drew. & S. 204; 2 Wms. Exrs. 995. The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or is one dependent *exclusively* upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. . . . It is certainly true, as a general proposition, as was said by the Vice Chancellor in *Dickin v. Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a *separate and independent intention* that the money shall be paid to the legatee *at all events*, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund."

These references—and rulings of similar import are legion—serve to illustrate the governing principles. The intention of the testator must prevail, and legacies will not be held specific, when the result would be that the mere transmutation of money into securities raised an irrebuttable presumption of ademption inconsistent with the intention of the testator as plainly deducible from all the terms of his will taken together.

As we have already stated, the general intention of the testator in this case was to leave all his property to his wife except what was expressly otherwise disposed of, and among the clauses inserted in effectuation of that result were these: "Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c. Also 200 shares of Sutro tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of \*the National Metropolitan Bank amount- [621] ing to \$10,000.00, more or less." If the latter item stood alone, and were not read in connection with the will as a whole, it might well be that it should be held to be a specific legacy, adeemed *pro tanto* by the use of the money except \$810.60 in the purchase of additional bonds, or otherwise. But, taken in connection with all the provisions of the will, with the manifest general intention of the testator, and with the rules against partial intestacy, and against treating legacies as specific, if that construction can be avoided, we think that it should be regarded as in its nature a demonstrative legacy, and not adeemed by the change from money into property.

Assuming that the testator had at the date of the will about \$10,000 on deposit in the bank, his intention was clear that his wife should receive the amount, and we are of opinion that we ought not to defeat that intention by holding that the pecuniary legacy was specific, and that the subsequent change was an ademption, and so a rule of law rather than a question of intention.

In *Towle v. Swasey*, 106 Mass. 100, a legacy of "whatever sum may be on deposit" in a certain savings bank was held to be



specific, but there the provisions of the will evidenced no intention to the contrary, and the language used essentially differed from that in this case.

It results that Mrs. Kenaday was entitled to credit herself with the \$9,218.76, and that the original decree of the orphans' court was correct. But in view of the lapse of time and the course of the litigation, we shall simply reverse the decree of the Court of Appeals and remand the cause to that court with a direction to remand it to the court below for a restatement of the final account in accordance with the views we have expressed.

So ordered.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

(622)\*BOARD OF LIQUIDATION OF THE CITY DEBT, *Plff. in Err.*,  
v.

STATE OF LOUISIANA on the Relation of  
LUCRETIA B. WILDER *et al.*

DRAINAGE COMMISSION OF NEW ORLEANS, *Plff. in Err.*,  
v.

LUCRETIA B. WILDER *et al.*

(See S. C. Reporter's ed. 622-641.)

**Error to state court—capacity to raise Federal question—state decision on local law—impairing obligation of contract—bonds of city of New Orleans—issued to pay debts of school board—Independent judgment of Federal court on contract right.**

1. A case involving a constitutional question as to the impairment of the obligation of a contract, on writ of error to a state court, will not be dismissed by the Supreme Court of the United States on the ground that the constitutional question was raised only by certain public boards which had not the capacity to raise the question, when the state court has held that such boards have a fiduciary capacity to present the constitutional question, since this is a matter of local law on which the state decision will be accepted.
2. Although it is the duty of the United States Supreme Court to exercise an independent judgment as to the nature and scope of a contract, when its jurisdiction is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, nevertheless, when the contract alleged to have been impaired arises from a state statute, the Fed-

eral court, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state courts, if the question seems balanced with doubt.

3. The sale of city bonds to pay the debts of the New Orleans school board, in obedience to the command of La. Const. 1898, art. 317, does not impair the obligation of prior contracts of the city with the holders of its bonds and other creditors who were entitled to payment out of the proceeds of a 1 per cent ad valorem tax, from which also the new bonds must be paid, since the rights of the takers of the new bonds will be subject to antecedent contract rights against the proceeds of such tax.
4. A judgment commanding the sale of city bonds because of the existence of a legal duty arising from the provisions of La. Const. 1898, art. 317, should not be construed as excluding the right and duty to refer, in issuing the bonds, to the fact that they are issued by virtue of the Constitution and as a result of the command of the court.

[Nos. 114, 119.]

*Argued December 4, 5, 1900. Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of the State of Louisiana to review a decision sustaining a provision of the state Constitution against the contention that it impairs the obligation of contracts. *Affirmed.*

See same case below, 51 La. Ann. 1849, 26 So. 679.

**Statement by Mr. Justice White:**

In 1890 the legislature of Louisiana enacted a law for the refunding or retirement of certain outstanding debts of the city of New Orleans, and for the further carrying out of a plan relating to a portion of the city debt, known as the premium bond plan. The act specified the debts to be refunded or retired, and provided, moreover, substantially as follows:

The board of liquidation of the city debt, which we shall hereafter refer to as the board [623] of liquidation, which had been created by previous laws, in addition to the powers which it already possessed, was made a corporation, and was authorized to execute the refunding law. The city was directed to deliver to the board of liquidation municipal bonds not exceeding in amount \$10,000,000, the series to be known as the "constitutional bonds of the city of New Orleans." The board of liquidation was directed to countersign and issue as many of these bonds as might be required for the refunding or retiring operations. To pay the interest on the bonds and to provide

**NOTE.**—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the construction and effect of state laws and constitutions and state decisions in regard to the same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to when the United States Supreme Court 179 U. S.

follows decisions of state courts—see note to *Forepaugh v. Delaware, L. & W. R. Co. (Pa.)* 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

That a state constitution is a law within the meaning of the clause of the Federal Constitution prohibiting laws impairing the obligation of contracts—see note to *Franklin County Grammar School v. Bailey (Vt.)* 10 L. R. A. 405.



for a sinking fund, which the law directed should be accumulated, as well as for the execution of its other provisions, a special ad valorem tax of 1 per cent was directed to be levied by the municipality annually upon all the taxable property within the city of New Orleans until "the principal and interest of the bonds herein provided to be issued are fully paid." The proceeds of this tax were directed to be paid over to the board of liquidation day by day as collected, and the city was deprived of all control over or custody of the avails of the tax, the disbursement thereof being solely vested in the board of liquidation, subject to its duty to account to the city for the expenditure. It was recited (§ 16) "that all of the substantial provisions of this act are hereby declared to be a contract between the state of Louisiana, the city of New Orleans, the taxpayers of said city, and each and every holder of the said constitutional bonds." The law (§ 8), after limiting the purposes to which the funds arising from the 1 per cent tax should be primarily disbursed by the board of liquidation, contained the following:

"After making, in each year, the provisions above required, and after deducting the expenses incurred by such board, and after paying any deficiency in the interest fund of any previous year, one half of the surplus of said tax shall be passed to the credit of a special fund, to be known as the 'permanent public improvement fund,' to be disposed of as hereinafter provided. The other half of said surplus shall be paid over to the school board of the city of New Orleans, in addition to [624] any fund appropriated \*by said city out of other funds, to be used in the maintenance and support of the public schools in said city."

It was further provided (§ 10):

"That the permanent public improvement fund, above provided for, shall be used exclusively for the construction of permanent public improvements in the city of New Orleans, such as levees, canals, drainage stations, pavements, public buildings, public parks, and bridges; and an ordinance passed by the said council, to be paid out of this fund, shall first be approved by said board of liquidation, who shall not draw any check on said fund unless they are convinced, upon proper inquiry, that said ordinance covers the construction of a permanent public improvement within the purview of this act. The true intent and meaning of this clause is not to give said board any authority to say to what permanent public improvement any fund shall be applied, but only to see that said funds shall be applied exclusively to the construction of improvements that are permanent."

The Constitution of the state of Louisiana, at the time the foregoing law was passed, contained restrictions upon the authority both of the legislature and the city of New Orleans, with which many of the provisions of the refunding law were in conflict. It was consequently provided that the main provisions of the law should not go into effect until they were ratified by the adoption of a

constitutional amendment, which was submitted by an act passed at the same session at which the refunding law was adopted. This amendment to the Constitution was ratified at a general election in 1892. The amendment to the Constitution, however, was not solely confined to an approval of the refunding act, but contained a provision empowering the city of New Orleans "to examine into and assume the payment of the claims or obligations of the board of school directors for the city and parish of Orleans due for the years 1880, 1881, 1882, 1883, and 1884, now in the hands of original owners, who have in nowise parted with their rights of ownership, or pledged the same, as may be found to be equitably due by said board for services rendered, labor performed, or materials furnished by authority of said board." The power of the \*city [625] to exercise the discretion thus conferred depended upon the adoption of the amendment to the Constitution, because the school board was a distinct corporation from the city of New Orleans, and its debts were not debts of the city; and without the amendment the legislature could not have empowered the city to assume to pay a sum which it did not owe, because the amount was solely due by another and distinct corporation.

After the adoption of the amendment the city of New Orleans contracted for various works of public improvement, and the cost of these works, it was either expressly or impliedly agreed, should be paid out of the permanent public improvement fund, to arise from one half the surplus of the 1 per cent tax, as provided in the amendment of 1892 and the refunding law.

In July, 1895, a plan for the drainage of the city of New Orleans was devised by the municipality. In 1896 a law was enacted creating the drainage commission of New Orleans, with authority to execute the aforestated plan of drainage, with such modifications as might be deemed necessary for its successful accomplishment. The law provided (§ 6), in order "to raise funds for the purpose of doing such work speedily and on an extensive scale, said drainage commission of New Orleans shall have power to issue and dispose of its negotiable bonds to an amount not exceeding \$5,000,000. . . . All moneys and funds dedicated and applied by this act to the purposes thereof are consecrated to the payment of the principal and interest on said bonds." The funds thus referred to were enumerated in the act (§ 3), and consisted of the moneys in the hands of the board of liquidation derived from one half the surplus of the 1 per cent tax levied after January 1, 1898. In other words, as the city had, prior to 1896, contracted for public improvements payable out of the surplus, so much of the surplus fund as accrued from taxes levied prior to January 1, 1898, was not transferred to the drainage commission, but was left to be applied to the discharge of the sum due on the contracts which the city had theretofore made on the faith of the surplus fund. In addition, the act also "dedicated and applied" to the purposes



[626] of the drainage commission "all moneys and funds now under the control of the city of New Orleans, and hereafter to \*be received, arising from the sale of street-railroad franchises and other franchises." In 1898 the law just referred to was amended in various particulars, one of these amendments reducing the amount of bonds which the drainage commission was authorized to issue from \$5,000,000 to \$1,500,000.

The board of liquidation received from the city of New Orleans the series of ten millions of constitutional bonds, and sold or otherwise issued \$8,998,500 thereof, leaving in its hands bonds amounting to \$1,001,500. There yet remained, however, certain outstanding debts subject to be refunded or retired, amounting to about \$137,050.

The drainage commission, as it was authorized to do, caused to be prepared 1,500 bonds of \$1,000 each. Five hundred of these bonds were sold in June, 1898, realizing \$505,238. There was paid over to the commission the proceeds of the sale of certain street-railroad franchises, amounting to \$579,582.12. Between May, 1897, and the 12th of May, 1898, the commission made contracts for the work of draining the city to the amount of 1,834,465.35, and prior to May 12, 1898, had paid on account of these contracts, as the work progressed, \$797,363.06, leaving due the sum of \$1,037,102.29, which was payable as the work proceeded.

In 1896 a convention to frame a new constitution for the state of Louisiana was assembled, and the instrument which that body adopted was, subsequent to May 12, 1898, declared to be the Constitution of the state without submitting the provisions thereof for ratification by a vote of the people. By article 314 of this Constitution the constitutional amendment adopted at the election of 1892, relating to the retirement or the refunding of the city debt, was reiterated. The discretion, however, which had been conferred upon the municipal government of the city of New Orleans by the constitutional amendment of 1892, to assume payment of certain claims against the school board, apparently not having been availed of, article 315 of the new Constitution imposed a positive duty on the city to examine specified debts due by the school board, and to issue certificates of indebtedness to the amount

[627] found to be due. \*These debts the Constitution provided for in article 317, as follows: "The funds requisite to pay said claims shall be provided by said board of liquidation, by the sale of a sufficient number of the constitutional bonds of the city of New Orleans of the issue provided for by act No. 110 of the general assembly for the year 1890, and by the amendment to the Constitution of the state submitted to the people by said act and adopted at the general election in 1892."

The city of New Orleans ascertained the amount of the claims to be \$115,558.33, and issued certificates as required by the constitution. The board of liquidation, refusing to sell bonds for the payment of the certificates, proceedings by mandamus to compel it to do so were commenced. The return of the board of liquidation to the alternative

rule for mandamus denied the right of the relators to the relief by them prayed, for various reasons based upon purely local and non-Federal contentions, to which we need not refer. The return thereupon specially set up and claimed that the carrying out of article 317 of the new Constitution by selling any of the constitutional bonds to provide the funds to pay the debt of the relators would bring about an impairment of the obligations of certain contracts, and therefore would cause the article of the Constitution to be repugnant to § 10, article 1, of the Constitution of the United States. The return, besides, alleged that the sale of the bonds, as required, would deprive the contract creditors of their property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. The grounds upon which the protection of the Constitution of the United States was invoked were stated in the return with much elaboration. All the averments on this subject, however, are reducible to the following:

First. That under the powers conferred upon it the respondent board was qualified in every respect to enforce the rights of all the bondholders, and of each and every person having a contract claim to any portion of the 1 per cent tax.

Second. That as the refunding law and the amendment to the Constitution of 1892 had authorized a series of constitutional bonds to be issued solely for certain specified debts, the sale of \*any such bonds, as required by [628] the provision of the new Constitution, to pay debts other than those originally contemplated, would impair the obligations of the contracts which had arisen from the refunding law and amendment of 1892 in favor of those to whom the constitutional bonds had already been issued, and would also impair the obligation of the contract in favor of the premium bondholders and other creditors who had not exchanged their claims for bonds of the constitutional series.

Third. That as the surplus of the 1 per cent tax had been directed to be applied, one half to the school board and the other half to a permanent public improvement fund, the issue of bonds payable out of the 1 per cent tax for any other debts than those originally contemplated would necessarily, to the extent of such issue, increase the payments to be made out of the 1 per cent tax, and therefore diminish the sum of the surplus. That this decrease in the amount of the surplus would impair the obligations of the contracts existing in favor of the following classes of creditors: First, those who had contracted with the city to execute certain works of public improvement on the faith of the surplus. Second, those bondholders who had taken the \$500,000 of bonds issued by the drainage commission upon the faith of the surplus fund. Third, those who had contracted with the drainage commission in reliance upon the surplus fund. The return in addition alleged that the sale of the bonds as prayed would injuriously affect the sale by the drainage commission of the \$1,000,000 bonds which that board had not yet disposed of, and therefore would further im-



pair the obligation of the contracts existing in favor of all the creditors of the drainage commission, as such creditors had contracted with the commission upon the faith of the undiminished and unimpaired power to sell the bonds as originally provided for. It was besides alleged that, as one half of the surplus had been consecrated to the school board, the diminution of the surplus which would be occasioned by the sale of bonds for any other debts than those originally provided for would impair the obligations of the contract which had been engendered in favor of the school board as the result of the provision dedicating the one half of that surplus to that board.

[629] \*The drainage commission intervened in the cause, and after asserting its right to protect its own interest so far as the further issue of bonds was concerned, and to champion the interest of those to whom bonds had been issued and with whom contracts had been made, specifically charged that the provision of the new Constitution was in violation of the contract clause of the Constitution of the United States and the 14th Amendment upon grounds substantially identical with those which had been alleged in the return of the board of liquidation.

After hearing, the trial court dismissed the intervention of the drainage commission, because it concluded that the commission had no capacity to stand in judgment for the purpose of protecting either its own right to further issue bonds, or in order to protect the rights of the holders of drainage bonds already issued, and those who had contracted to do the drainage work. On the merits the trial court held that the return made by the board of liquidation was insufficient, and it therefore allowed a peremptory mandamus commanding the board of liquidation to sell a sufficient quantity of the constitutional bonds to provide the means for paying the sum of the certificates held by the relators, with 5 per cent interest thereon from the date of the application for mandamus. Both the board of liquidation and the drainage commission prosecuted appeals to the supreme court of the state of Louisiana.

That court, in deciding the appeals, delivered an elaborate opinion. After holding that the school board was a distinct corporation from the city of New Orleans, and therefore the debts of the school board were not those of the city, the court determined that it was within the power of the constitutional convention to impose the duty on the city of assuming debts of a different corporation. Having reached this conclusion, the court approached the consideration of the power of the convention to direct the board of liquidation to sell a sufficient number of constitutional bonds to pay the debt thus assumed. It considered this question, first, from the aspect of the authority of the convention over the board of liquidation and the drainage commission, without reference to the limitations imposed \*by the contract clause of the Constitution of the United States, and then passed on the question of contract and its impairment. In the first aspect it was

decided that, as the board of liquidation and the drainage commission were but creatures of the lawmaking power of the state, both these bodies were subject to and controlled by the imperative command of the Constitution. That, albeit by the original act of refunding and the amendment which ratified it the bonds of the constitutional series were only to be issued for particular classes of debt, a subsequent constitutional requirement that certain of the bonds should be sold to pay another class of debts was paramount, and therefore must be obeyed by the board of liquidation. It was held that although the drainage commission, by the act creating it, was empowered to execute a general plan of drainage for the city of New Orleans, its duty in this regard was subject to future control, and hence that it was within the power of a subsequent legislature to modify or wholly suspend the drainage work by discontinuing the duties of the board, and, *a fortiori*, it was within the power of the constitutional convention to bring about the same result. Having established this premise, the learned court reached the conclusion that, even although the future execution of the drainage work, under the plan originally conceived, might be wholly impeded or seriously diminished by making other charges against the surplus than those originally contemplated, nevertheless it was the duty of the board to comply with the state Constitution, because whether or not the drainage work should be continued as first designed was a question of public policy, which the convention had a right to determine.

While laying down the foregoing, when the court considered the question of the alleged impairment of contract rights it held that the propositions which it had previously announced were all qualified and restrained by the contract clause of the Constitution of the United States, and therefore the provision of the Constitution requiring the sale of the bonds to produce the funds to pay the school debt would be relatively void if it conflicted with or impaired the contract rights of the following classes of creditors, *viz.*: The holders of the constitutional and of \*the pre-[631]mium bonds; those who held debts subject to be funded into constitutional bonds, but who had not yet exercised such right; those who had contracted with the city for works of public improvement on the faith of the surplus; those who held the drainage bonds issued by the drainage commission; and, finally, those who had contracted with that commission prior to the adoption of the Constitution.

In coming to consider the question of impairment the court declared that the contract which had arisen with the holders of the constitutional bonds was that no bonds of that series should be issued for any other than the debts specified in the refunding and retiring act and in the constitutional amendment of 1892; that the surplus fund contemplated by the act and the amendment was not simply the surplus arising after applying the 1 per cent tax to the payment of a



ten-million issue of bonds, but was the surplus which might arise from the application of the 1 per cent tax to the payment of such amount of the ten-million issue as had been, and would be from time to time, required in the refunding or retiring of the debts specified in the act and amendment. It was therefore decided that the sale of any bonds of the series for the purpose of paying any other debts than those specified and originally contemplated would impair the obligation of the contract creditors having a right to payment out of the 1 per cent tax and of the contract creditors having a right to be paid out of the surplus fund. This impairment, however, it was held, could only arise in the event the payment of the bonds provided to be sold to pay the school debts assumed by the city interfered in any way with the funds required to discharge the claims of the contract creditors as above stated. But such interference, the court held, did not and could not arise, inasmuch as the bonds which the Constitution provided should be sold would be, when issued by the board of liquidation, subordinate to all the contract rights above stated. That is to say, that it was the duty of the board of liquidation to sell the bonds, but that when issued they would not be entitled to payment out of either the 1 per cent tax or the surplus fund until all the contract rights had been provided for, as above enumerated. Indeed, it was held that, \*if it was necessary

[632] for the drainage commission to sell the bonds which it was authorized to issue for the purpose of paying for the work contracted for prior to the adoption of the Constitution, these drainage bonds when thus sold would also be entitled to a priority of application of the surplus of the 1 per cent tax before any part thereof could be used to pay the bonds which the board of liquidation was directed to sell for the purpose of the retirement of the school certificates.

While it was thus decided that the bonds to be sold for the school purposes would be subordinate to all the contract rights, and therefore, in the nature of things, could not interfere with or impair such contract rights, the bonds in question were yet declared by the court to be entitled to be paid out of any of the surplus fund which might remain after the discharge of the contract claims, with the preference over any rights which might arise from contracts made by the drainage commission after the adoption of the new Constitution for the further execution of the drainage plan; this being predicated upon the conclusion that the state Constitution, while it could not impair contract rights, could yet lawfully diminish or change the plan of drainage in so far as its future execution was concerned. In the margin† are excerpts from the opinion of the

[633] supreme \*court of Louisiana (51 La. Ann. 1849, 26 So. 679), which more elaborately

state the conclusions which we have above summarized.

\*And all the views which the court ex-[634] pounded were based on a ruling by it made, that the board of liquidation, under the \*pro-[635] visions of the statutes of Louisiana defining the powers of that board, was invested with such a relation to the contract creditors as empowered it to stand in judgment for the purpose of protecting the contracts from impairment, and hence authorized it to plead the defenses which it had asserted in its return to the rule for mandamus. The judgment of the trial court was affirmed.

The board of liquidation applied for a rehearing mainly on the ground that, although the views expressed in the opinion of the court had fully recognized the rights of the contract creditors, nevertheless the decree had deprived the contract creditors of the protection to which the opinion acknowledged they were entitled under the Constitution of the United States. This was on the assumption that, as the decree of the trial court directed the issue of bonds according to the refunding act and the amendment of 1892, therefore a compliance with its commands would compel the board to sell negotiable bonds indistinguishable from the other bonds of the same series, and hence put those thus sold on exactly the same footing as the bonds previously issued.

The drainage commission also applied for a rehearing on grounds substantially identical with those urged by the board of liquidation, and upon the further contention that an injustice had been done it, since the court, although it in effect, in its opinion, recognized the right of the commission to intervene, had nevertheless affirmed the judgment of the trial court, which dismissed the drainage commission from the cause upon the assumption that it had no capacity to stand in judgment and champion the rights of the creditors. Both the applicants for rehearing complained of the affirmance of the decree below in so far as it directed the payment of interest on the claims of the certificate holders.

The court granted the rehearing to a limited extent, reversed the judgment below in so far as it dismissed the intervention of the drainage commission and to the extent that it allowed interest, and in other respects reiterated the affirmance. These writs of error were then prosecuted. At a previous term of \*this court motions to dismiss or affirm [636] were made, and their consideration was postponed to the hearing on the merits.

Mr. Branch K. Miller argued the cause and filed a brief for the Board of Liquidation:

The rights of the holders of constitutional bonds, premium bonds, and other outstanding bonds of the city, contractors of the city for permanent public improvements, con-

†At page 1870 (So. p. 687), the court said: "Defendants assume that the mere fact that constitutional bonds should be sold for the purpose of paying the certificates held by relators, or should be given in exchange for those certificates, would of necessity entitle the holders  
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of such bonds to prime the holders of permanent improvement bonds, bonds drawn against the 'surplus' of the 1 per cent tax dedicated to permanent public improvements, and also to necessarily come in on a footing of equality with all the other holders of consolidated bonds, and



tractors for the drainage commission and the bonds issued by it,—are questions governed by the state statutes upon which they are founded, and the finding of the supreme court of the state upon these issues should be accepted as binding by this court.

U. S. Rev. Stat. § 721; *Bauserman v. Blunt*, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466; *Balkam v. Woodstock Iron Co.* 154 U. S. 187, 38 L. ed. 956, 14 Sup. Ct. Rep. 1010; *Leavenworth County Comrs. v. Barnes*, 94 U. S. 71, 24 L. ed. 63; *Stone v. Wisconsin*, 94 U. S. 183, 24 L. ed. 103; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318.

It has been held by the supreme court of Louisiana that the reasons for a judgment can form no part of the judgment itself.

*Keane v. Fisher*, 10 La. Ann. 261; *Davidson v. Carroll*, 23 La. Ann. 108; *Chaffe v. Morgan*, 30 La. Ann. 1310; *State ex rel. Orleans R. Co. v. Orleans Dist. Judge*, 35 La. Ann. 218; *Cucullu v. Brackenridge Lumber Co.* 48 La. Ann. 681, 19 So. 688.

The difference between the judgment and reasons for the same, so clearly pointed out in the jurisprudence of Louisiana, and the distinction between the two, which was applied with such fatal results in the case last cited, are found in decisions rendered by courts of last resort in other states, whereby the opinion of the court and its judgment in the same case are declared to be distinct things.

*Houston v. Williams*, 13 Cal. 27, 73 Am. Dec. 565; *Burke v. Table Mountain Water*

they maintain, if this be true, the rights of contract creditors under the funding act, would be impaired.

"Relators, on the other hand, insist that the only portion of the 1 per cent tax ever set aside for permanent public improvements was one half of the surplus produced by the tax which would remain after having retained in the hands of the board of liquidation enough to meet the payment in full of a ten-million issue of consolidated bonds, and that therefore it would be legally immaterial to creditors basing contracts on such surplus, to whom the other portion of the fund would go; it would be enough for them to know it would not go to them, and relators urge that other holders of consolidated bonds would have no ground of complaint; that they should be permitted to share equally with them from the tax fund, as they had accepted their bonds on the expected basis of coming in concurrence with an issue of ten millions of bonds; that they might be interested that the limit as to the amount of the bonds should not be passed, but that they were without legal interest, when the limit should not have been passed, as to who should be the holders of the bonds sharing the fund with them.

"In support of this last position they rely upon the decision of the Supreme Court of the United States in *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623. If the collection of the 1 per cent tax would suffice to pay each year the holders of consolidated bonds issued in taking up or retiring the bonds and claims such as were provided for by the act No. 110 of 1890 and the constitutional amendment of 1892, without any conflict with the bonds

*Co. 12 Cal. 403; Ex parte Dial*, 14 S. C. 586. See also *Watkins v. Junker*, 4 Tex. Civ. App. 632, 23 S. W. 802.

*Mr. Walker B. Spencer* argued the cause, and, with *Mr. W. W. Howe*, filed a brief for the Drainage Commission.

*Mr. Charles J. Theard* argued the cause, and, with *Messrs. Arthur McGuirk* and *Henry L. Lazarus*, filed a brief for defendants in error.

\**Mr. Justice White*, after making the foregoing statement of the case, delivered the opinion of the court:

The motion to dismiss is without colorable support. The contention that, as public bodies charged with the performance of ministerial duties, both the board of liquidation and the drainage commission had not the capacity to plead that the provisions of the state Constitution impaired the obligations of contracts in violation of the Constitution of the United States, is foreclosed by the decision of the court below. In that court, as we have said in the statement of the case, the want of capacity in both the bodies to urge the defenses in question was expressly put at issue and was directly passed on, the court holding that under the statutes of the state of Louisiana both the bodies occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state Constitution would impair the obligations of the contracts entered into on the faith of the collection and application of the 1 per cent tax and of the surplus arising therefrom. Without implying that the

ordered to be sold by article 317 of the Constitution of 1898, the former, of course, would have no cause of complaint; but if from any cause the amount of the tax collected would be insufficient for that purpose, we do not think the holders of these latter bonds could force the former to pro rate with them the amount in hand.

"This condition of things is not existing. It may never arise, and should it arise the board of liquidation would doubtless have taken steps to distinguish bonds issued under article 317 from those which had been otherwise issued."

Again the court said (*Ibid*, p. 1872, So. p. 668):

"There is no constitutional objection to the convention's ordering the board of liquidation to sell bonds to take up the relators' certificate, but there would be constitutional objection to be urged if the effect of the issuing of such bonds would be to place the holders thereof on an equality with the holders of bonds issued to take up the bonds and claims provided for as to their funding and payment by act No. 110 of 1890, act No. 114 of 1896, and the constitutional amendment of 1892. *Duperier v. Police Jury*, 31 La. Ann. 710; *Shields v. Pipes*, 31 La. Ann. 765."

Yet further, in analyzing the rights of the drainage bondholders and contract creditors, the court said (*Ibid*, p. 1871, So. p. 688):

"We do not take the same view that relators do as to what was meant and intended to be conveyed by the 'surplus' referred to by act 110 of 1890, act 114 of 1896, and the constitutional amendment of 1892. We think the lawmakers intended that any portion of the 1 per cent tax provided for in act 110, not needed for the



reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it as the construction put by the supreme court of the state of Louisiana on the statutes of that state in a matter of local and non-Federal concern.

[637] \*Accepting, then, in this regard, the decision of the state court, the proposition now pressed reduces itself to this: Although under the state law both of the bodies in question bore such a relation to the interests involved as to empower them to assert that the contract rights were impaired, nevertheless they do not possess the capacity to prosecute error to a decision if adverse to the contract rights. This, however, is but to say at one and the same time that there was capacity and incapacity to assert and protect the contract rights. The proposition that the judgment of the supreme court of the state of Louisiana rests upon an independent non-Federal ground finds no semblance of support in the record. It is true the court primarily considered the case from the point of view of the duty and rights of the defendant and intervener as depending on the law of Louisiana irrespective of the contract rights, but these considerations were by the court declared to be merely a prelude to the decision of the fundamental issue, that is, whether, if the relief prayed was allowed, there would arise an impairment of the obligations of the contracts as specifically alleged both in the

return made by the board of liquidation and in the petition of intervention of the drainage commission. Indeed, the opinion of the learned court, which we can consider (*Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 360), expressly announced that the defenses asserted under the contract clause of the Constitution of the United States were the real issues, and were essentially necessary to be decided in order to dispose of the cause. The argument that no Federal question is presented because the court below awarded to the contract creditors all the rights to which they were entitled involves the assumption that jurisdiction to review the decision of a state court disposing of a Federal question depends upon the conception of the state court, or some of the parties to the record, as to the correctness of the decision rendered. This in effect denies the power to review a decision disposing of a Federal question in every case where the state court assumes that such question has been by it correctly disposed of. But this necessarily imports that, in no case whatever where a state court has decided a Federal question, can review in this court be had, since in every case it must be assumed that a state court of last resort has decided, \*according to its understanding, [638] the issues presented to it for determination.

On the merits the errors assigned substantially raise all the controversies which were below decided. They hence embrace some subjects not essential to be considered in order to dispose of the Federal question.

The power of the constituent body to direct the board of liquidation to sell the bonds, and the right to diminish the fund applica-

payment or retirement of the particular bonds or claims therein specially provided for as to payment or retirement, should constitute the surplus of the tax. That it was not contemplated, when these laws were passed or the amendment of 1892 adopted, that in order to exhaust any portion of the \$10,000,000 originally expected to be needed to pay the existing bonds and the existing claims therein specially enumerated, which might not be necessary for the purpose, new classes of claims should or would be thrown under the provisions of the original funding law.

"We think the 'surplus' was intended to connect at once and follow immediately behind, as to its appropriation, the amount beyond that actually needed to carry out the plan as originally mapped out and planned. The surplus was provisionally ascertained each year in a manner particularly specified to be readjusted the next in a manner also particularly specified. All the surroundings and circumstances connected with the legislation negative the idea that the surplus mentioned was to be only any surplus over \$10,000,000 which might result from the collection of the 1 per cent tax.

"We think the board of liquidation, the drainage commissioners, and those with whom they contracted were justified in placing that interpretation upon the legislation, and that contract rights based upon the same should be protected from impairment. The convention, while ordering the payment of the certificates held by the relators, through sales of consolidated bonds, could not confer upon the holders of such bonds rights which in any way would come in competition with the contract rights of cred-

itors existing against the tax at the time of the adoption of the Constitution. Though there was no mention in the Constitution as to the rank of the bonds which would be issued to take up relators' certificates, that rank resulted from legally existing conditions which could not be constitutionally interfered with."

Summing up its conclusion, the court declared (*Ibid.*, p. 1873, So. p. 688):

"The consolidated bonds which relators seek to have issued upon their prayer will really be drawn against (when issued) any surplus which will remain of the 1 per cent tax after the payment of all the bonds issued and to be issued by the board of liquidation, under act No. 110 of 1890, and the constitutional amendment of 1892, in order to fund and retire and pay the bonds and debts therein specially enumerated, and also the bonds issued and to be issued by the drainage commission under the provisions and authority of act No. 114 of 1896, to pay the contracts existing at the date of the adoption of the Constitution, which were entered into upon the faith of the surplus directed to be set aside to the credit of the permanent improvement fund by the act No. 110 of 1890, act No. 114 of 1896, and the constitutional amendment of 1892.

"The effect of this will be to subordinate the rights of holders of bonds issued by the drainage commission to pay for contracts entered into after the adoption of the Constitution of 1898 to those of the holders of consolidated bonds to be issued under the orders of article 317 of the Constitution of 1898. This may check and impede the work of public improvement, but it is a matter which we cannot control."



ble to the drainage of the city of New Orleans, when viewed apart from the contract rights, involve purely local and non-Federal contentions. When the jurisdiction of this court is invoked because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract which, it is alleged, has been impaired, arises from a state statute, as said in *Burgess v. Seligman*, 107 U. S. 34, 27 L. ed. 365, 2 Sup. Ct. Rep. 10, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

It is indeed disputable, as a matter of independent judgment, whether the rights of the contract creditors were as broad as the court below held them to be. *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623. Considering the many, and in some respects ambiguous, statutes of the state of Louisiana which are the sources of the contract rights, and permitting the opinion as to those rights entertained by the supreme court of the state of Louisiana to operate upon the doubt which must arise from a review of the statutes alone, we conclude, as a matter of independent judgment, that the contract rights were correctly defined by the supreme court of the state of Louisiana. The question then is, Taking the contract rights to be as thus declared, were they substantially impaired by the conclusions reached by the supreme court of the state? If the answer to this question is to be deduced from the opinion of that court, a negative response is plainly required, since, in the most explicit terms, the opinion holds that the rights to arise in favor of the purchasers of the bonds which the new Constitution directed [639] to \*be sold were subordinate in each and every respect to all the prior contract rights. In the nature of things it cannot be said that subsequent rights which are so limited as to prevent them in any degree from interfering with prior ones can, as a matter of legal conclusion, be held to impair such previous contract rights. But it is contended,—and this is the controversy most strenuously pressed in the argument at bar,—although by the opinion of the supreme court of the state of Louisiana the contract rights were protected, the decree of that court in effect brought about the destruction of the identical rights which the opinion held could not be lawfully impaired. This proceeds on the assumption that, as the decree of the trial court which was affirmed directed the board of liquidation to sell bonds under the refunding act and constitutional amendment of 1892, it therefore imposed the duty of offering bonds for sale exactly in the form required by the prior legislation without affixing any distinguishing statement to them, thereby causing the negotiable bonds, when sold, to be exactly on the same footing of legal right with those previously used for the purpose of retiring or refunding the debt. Under the

law of Louisiana, it is asserted, the judgment, and not the reasoning used in the opinion of the court, is conclusive, and therefore the result above indicated must necessarily flow from the judgment which is now under review.

We do not stop to examine the Louisiana authorities cited to sustain the abstract proposition relied upon, as we consider the premise from which the contention is deduced to be unsound. It is to be borne in mind that under the act of 1890 and the amendment of 1892 the city of New Orleans was to issue a series of ten millions of bonds, to be placed in the hands of the board of liquidation for the retiring and refunding operations, and these bonds, so delivered to the board for the purposes specified, were required to be countersigned and issued by that body before they became complete and perfect evidences of debt against the city. Now, while it is true the mandamus which was awarded against the board directed it to sell bonds placed in its hands under the act of 1890, the ground for the allowance of the writ was the duty imposed upon the board to \*do so by [640] the new Constitution. Indeed, the opinion of the supreme court negatives the assumption that there was any authority conferred on the board to issue the bonds for the school debt by the act of 1890 or the amendment of 1892. Conceding, *arguendo*, only that there be, as contended, an exceptional and narrow rule in Louisiana excluding an examination of the pleadings for the purpose of elucidating the scope of a judgment rendered in a given cause,—though the opposite doctrine is upheld by this court (*Hornbuckle v. Stafford*, 111 U. S. 393, 28 L. ed. 469, 4 Sup. Ct. Rep. 515),—we do not think there is reason for the assertion that the effect of the judgment below is to preclude the board of liquidation, when countersigning the bonds in question for the purpose of sale, from affixing to them a statement that they are issued in virtue of the authority of the new Constitution and as a result of the command of the supreme court of the state. This being done, beyond peradventure, the takers of such bonds would be affected with notice of the legal authority under which they were issued, and of the nature of the rights conferred by that authority, and therefore the inconvenience or possible wrong suggested in argument could not in any event arise. It would be beyond reason to assume that a judgment which commanded the performance of a particular act, because of the existence of a legal duty arising from a specified provision of a state Constitution, should be construed as excluding the right and duty to refer, in issuing the bonds in obedience to its command, to the authority by which alone the power exercised could be brought into play. Not only does the reason of things require this conclusion, but so also does the respect which we entertain for the learned tribunal below preclude the possibility of our accepting the impossible and contradictory construction of the effect of the opinion and decree advanced in the argument which we are considering. Of course, if the



judgment below was susceptible of the interpretation contended for, in view of the nature of the contract rights as recognized by the supreme court of the state and established by the opinion which we have just expressed, it would be our duty to reverse the judgment below rendered.

[641] Our affirmance, however, will be without prejudice to the \*right of the board of liquidation and the drainage commission to hereafter assert the impairment of the contract rights, which would arise from construing the judgment contrary to its natural and necessary import, so as to deprive the board of liquidation of the power, in countersigning the bonds, to state thereon the authority in virtue of which they are issued.

*Affirmed.*

Mr. Justice **Peckham** took no part in the decision of this cause.

SOUTHERN RAILWAY COMPANY, *Plff.*  
*in Err.,*  
*v.*

POSTAL TELEGRAPH-CABLE CO.

(See S. C. Reporter's ed. 641-645.)

*Error—finality of decision.*

A writ of error cannot be sustained when it is taken without waiting for any further proceedings after the appointment of commissioners in condemnation proceedings, and the sustaining of a demurrer to an answer which is filed, and a refusal to permit testimony in support of the answer, since there is no final decision in the case.

[No. 64.]

*Argued November 2, 1900. Decided January 7, 1901.*

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a ruling in a proceeding for condemnation of property. *Affirmed.*

See same case below, 35 C. C. A. 366, 93 Fed. Rep. 393.

Statement by Mr. Justice **Brewer**:

This was a proceeding commenced by the Postal Telegraph-Cable Company (hereinafter called the telegraph company) against the Southern Railway Company (hereinafter called the railway company) to acquire by condemnation the right to construct its telegraph line along and over the railway company's right of way through the state of North Carolina. The petition therefor was filed by the telegraph company in the office of the clerk of the superior court of Guilford county, North Carolina, on June 11, 1898. A

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

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summons was issued requiring the railway company to appear before the clerk of the superior court on June 22, 1898, and answer. On that day the railway \*company entered a special appearance and filed a petition and bond for the removal of the case to the United States circuit court for the western district of North Carolina. Sundry proceedings were had in that court, such as a motion to remand, which it is unnecessary to notice. On August 31, 1898, the telegraph company by leave filed an amended petition. On September 15, 1898, the court made an order by which it directed its clerk to appoint three commissioners to assess damages and prescribed their powers and duties. On September 19, 1898, the clerk appointed the commissioners as directed, and fixed the time and place for their meeting, and on the same day issued a notice to the railway company of his action. These orders were made on the application of the telegraph company and without notice to the railway company. Thereupon the railway company moved the court to set aside its order of September 15 and for leave to answer. On September 23 the court temporarily suspended the order of September 15. On October 24 an answer was filed, a demurrer of the telegraph company was sustained, and when the railway company asked leave to introduce testimony sustaining the averments of its answer the court overruled the application and refused to permit the railway company to introduce testimony, and so far as was needed reinstated its order of September 15, 1898. Before any further proceedings and without waiting for the assessment of damages by the commissioners and the confirmation of their award by the court, a writ of error and supersedeas was obtained by the railway company, and the case was transferred under such writ of error to the circuit court of appeals for the fourth circuit. That court, on March 31, 1899, dismissed the writ of error for want of jurisdiction, on the ground that no final order had been entered in the circuit court. 35 C. C. A. 366, 93 Fed. Rep. 393. To review this ruling this writ of error was sued out.

**Messrs. Addison L. Holladay and Robert Stiles** argued the cause and filed a brief for plaintiff in error:

An appeal always lies at once from an interlocutory order or judgment that might in effect put an end to the action, or that might prejudice a substantial right of the party complaining if the appeal should be delayed until after the final judgment upon the merits.

*Merrill v. Merrill*, 92 N. C. 657; *State ex rel. Wake County Comrs. v. Maguin*, 78 N. C. 181; *Ramsay v. Richmond & D. R. Co.* 91 N. C. 418; *Clements v. Rogers*, 95 N. C. 248.

The right to condemn should be determined before the appointment of commissioners, and the order determining such right is an appealable one.

*Chesapeake & O. R. Co. v. Pack*, 6 W. Va. 397; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453; *Wheeling Bridge Co. v. Wheel-*

*ing & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009; *Wheeling Bridge & Terminal R. Co. v. Camden Consol. Oil Co.* 35 W. Va. 205, 13 S. E. 369; *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301.

The oft-quoted rule, that an order or decree which leaves anything further of a judicial nature to be done in the cause is not final or appealable, is not to be regarded as a rule of universal application.

*Ray v. Law*, 3 Cranch, 179, 2 L. ed. 404; *Whiting v. Bank of United States*, 13 Pet. 6, 10 L. ed. 33; *Forgay v. Conrad*, 6 How. 201, 12 L. ed. 404; *Bronson v. La Crosse & M. R. Co.* 2 Black, 524, 17 L. ed. 359; *Thomson v. Dean*, 7 Wall. 342, *sub nom. Dean v. Nelson*, 19 L. ed. 94; *Internal Improv. Fund Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Farmers' Loan & T. Co., Petitioner*, 129 U. S. 206, 32 L. ed. 656, 9 Sup. Ct. Rep. 265; *Hill v. Chicago & E. R. Co.* 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690.

*Mr. J. R. McIntosh* argued the cause and filed a brief for defendant in error:

The orders appealed from by the writ of error were not final, but merely interlocutory, from which the right of appeal did not lie.

*Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. ed. 233; *Latta v. Kilbourn*, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; *Burlington C. R. & N. R. Co. v. Simmons*, 123 U. S. 52, 31 L. ed. 73, 8 Sup. Ct. Rep. 58; *The Palmyra*, 10 Wheat. 502, 6 L. ed. 376; *Chace v. Vasquez*, 11 Wheat. 429, 6 L. ed. 511; *Luxton v. North River Bridge Co.* 147 U. S. 341, 37 L. ed. 194, 13 Sup. Ct. Rep. 356; *American Union Teleg. Co. v. Wilmington, C. & A. R. Co.* 83 N. C. 426; *Hendrick v. Carolina C. R. Co.* 98 N. C. 431, 4 S. E. 184; *Davie County Comrs. v. Cook*, 86 N. C. 18; *Norfolk & S. R. Co. v. Warren*, 92 N. C. 620.

[643] \**Mr. Justice Brewer* delivered the opinion of the court:

The single question we deem it necessary to consider is whether a final judgment or order had been entered by the circuit court which could be taken by writ of error to the circuit court of appeals.

*Luxton v. North River Bridge Co.* 147 U. S. 337, 341, 37 L. ed. 194, 196, 13 Sup. Ct. Rep. 356, is decisive of this question. Indeed, little more seems necessary than a reference to the opinion in that case. There, as here, in condemnation proceedings, an order was made appointing commissioners to assess damages. To reverse this order a writ of error was sued out, and by that writ of error an attempt was made to challenge the constitutionality of the act authorizing the condemnation, but this court dismissed the writ on the ground that the order was not a final judgment, saying, after referring to possible proceedings in the state court, that the action of the United States circuit court could be reviewed here "only by writ of error, which does not lie until after final judgment disposing of the whole case and adjudi-

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cating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. Act of September 24, 1789, chap. 20, § 22; 1 Stat. at L. 84, chap. 20; Rev. Stat. § 691; *Rutherford v. Fisher*, 4 Dall. 22, 1 L. ed. 724; *Holecomb v. McKusick*, 20 How. 552, 554, 15 L. ed. 1020, 1021; *Louisiana Nat. Bank v. Whitney*, 121 U. S. 284, 30 L. ed. 961, 7 Sup. Ct. Rep. 897; *Key-stone Manganese & Iron Co. v. Martin*, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170."

Reference is made by counsel to *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301, in which this court sustained its jurisdiction of a writ of error to the supreme court of appeals of West Virginia, and inquired into the validity of a judgment of that court affirming an order of a trial court appointing commissioners under a somewhat similar statute. But that decision was based on the fact that the order of the trial court had been held by the state supreme court to be a final judgment, on which a writ of error would lie, and therefore, being a final judgment in the view of the highest court of the state, it ought to be considered final here for the purposes of review. But no such ruling obtains in the supreme court of \*North Caro- [644] lina. On the contrary, that court has repeatedly held that an order appointing commissioners in condemnation proceedings is not a final judgment, nor subject to review until after the confirmation of the award of the commissioners. *American U. Teleg. Co. v. Wilmington, C. & A. R. Co.* 83 N. C. 420, is a case directly in point. In that case a proceeding was commenced by a telegraph company to obtain a right of way for the construction and operation of its telegraph lines along the roadway of a railroad company, and, as shown by the opinion of the supreme court, at a hearing before the trial judge he adjudged the telegraph company entitled to the right of way, and appointed commissioners to ascertain and report the damages. An attempt was made to take this order to the supreme court for review, but the right to do so was denied, the court saying (p. 421):

"Upon a careful examination of the statute, and the portions of the act of February 8th, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceeding authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then and not before may any error committed during the progress of the cause, and made the subject of exception at the time, be reviewed and corrected in the appellate court, and an appeal from an interlocutory order is premature and unauthorized."

In *Davie County Comrs. v. Cook*, 86 N. C. 179 U. S.



18, the same ruling was made and the prior case in terms affirmed. Again, in *Norfolk & S. R. Co. v. Warren*, 92 N. C. 620, the two prior cases were cited and approved. Still again, in *Hendrick v. Carolina C. R. Co.* 98 N. C. 431, 4 S. E. 184, the same ruling was made, although it appeared that the facts were all agreed upon, the court saying (p. 432, S. E. p. 185):

“That the defendant broadly denies the plaintiff’s alleged rights and grievances, and the parties agreed upon the facts, could not give the right of appeal at the present stage of the proceeding, because the order appealed from was nevertheless interlocutory, and an appeal from the final judgment would bring up all questions arising in the course of the proceeding, without denying or impairing any substantial rights of the defendant.”

“The order appealed from is very different from that in the similar case of *Click v. Western N. C. R. Co.* 98 N. C. 390, 4 S. E. 183; in the latter the court denied the motion for an order appointing commissioners, and dismissed the proceeding, thus putting an end to the right of the plaintiff therein, and therefore an appeal lay in that case.”

The changes in the statute referred to by counsel for plaintiff in error, made subsequently to these decisions, may affect the mode of procedure and the basis for estimating damages, but in no manner affect the question as to the finality of the order appointing commissioners.

Neither does the order made by this court at the last term, denying the defendant’s motion to dismiss, have any bearing on this question. That ruling determined simply our jurisdiction, not that of the circuit court of appeals. That we have jurisdiction in such a case had already been adjudged. *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 50, 14 Sup. Ct. Rep. 236. Having jurisdiction to examine the proceedings in the circuit court of appeals, if we had found its ruling erroneous, we should have reversed its order dismissing the writ of error, but as we hold that its ruling was correct, its judgment is affirmed.

[646]\*MICHAEL F. DOOLEY, Receiver, and John A. Pangburn, *Appts.*,

*v.*  
HAROLD F. HADDEN and James E. S. Hadden.

HAROLD F. HADDEN and James E. S. Hadden, *Appts.*,

*v.*  
M. F. DOOLEY, Receiver, and John A. Pangburn.

(See S. C. Reporter’s ed. 646-657.)

*Attachment—priority of lien—effect of keeping goods concealed.*

One who has actual possession of the goods of

NOTE.—On the right of creditors to question validity of attachment—see *Glaser Bros. v. First Nat. Bank (Ark.)* 35 L. R. A. 765, and note.

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a debtor under an unfounded claim of title is not precluded from obtaining a lien by attachment thereon, which shall have priority over an attachment subsequently levied by other creditors whose attachment was first issued, by the fact that he has put the goods in the nominal possession of his attorney, in a place known only to himself, so as to prevent the levy of attachments by other parties until after he has perfected his own attachment.

[Nos. 96 and 99.]

Argued November 9, 12, 1900. Decided January 7, 1901.

APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing in part a decree of the Circuit Court dismissing a bill for an injunction against selling property under executions in attachment suits. Decree of Circuit Court of Appeals reversed and that of the Circuit Court affirmed.

See same case below, 34 C. C. A. 333, 63 U. S. App. 173, 92 Fed. Rep. 274, and 35 C. C. A. 554, 93 Fed. Rep. 728.

Statement by Mr. Justice Shiras:

In July, 1895, Harold F. Hadden and James E. S. Hadden brought an action in the New York supreme court for the city and county of New York, against the Natchaug Silk Company, Michael F. Dooley, personally and as receiver of the First National Bank of Willimantic, John A. Pangburn, and others, including William I. Buttling, sheriff of Kings county. The complaint alleged certain fraudulent and collusive proceedings between the Natchaug Silk Company, Dooley, receiver of the First National Bank of Willimantic, and John A. Pangburn, and, under a prayer of the bill, an injunction *pendente lite* was granted restraining the sheriff of Kings county from selling property of the silk company in his possession as sheriff upon executions against said company in favor of John A. Pangburn \*or Dooley, as receiver, [648] and restraining Pangburn and Dooley from further proceedings at law against the property of the silk company in the state of New York.

The action was removed to the circuit court of the United States for the southern district of New York; and repeated motions made to dissolve the temporary injunction were made and denied; and the order of the circuit court denying the motions was, on appeal, affirmed by the circuit court of appeals. 20 C. C. A. 494, 38 U. S. App. 651, 74 Fed. Rep. 429.

Subsequently, the taking of testimony in the case having been closed, the defendants Dooley and Pangburn made another motion, upon the plenary proofs, to dissolve the injunction; and this motion was granted, after hearing, by Circuit Judge Lacombe, on November 27, 1896.

The case came to final hearing in the circuit court, and resulted in a decree dismissing the bill on January 27, 1898.

Upon appeal by the complainants the circuit court of appeals reversed the decree in

part, and affirmed it in part. From this decree of the circuit court of appeals the complainants have appealed to this court, on the ground that the decree should have been adjudged to the complainants' priority of lien on all the goods in dispute; and the defendants have appealed on the ground that the circuit court of appeals erred in reversing the decree of the circuit court.

The facts, as stated in the opinion of Circuit Judge Shipman, were substantially these:

On April 23, 1895, the Natchaug Silk Company, a Connecticut corporation, owed the First National Bank of Willimantic, a national banking association located in Connecticut, over \$300,000, and was entirely insolvent. In consequence of this indebtedness, the bank suspended, and Michael F. Dooley was appointed its receiver on April 26, 1895, by the comptroller of the currency. On April 23, 1895, J. D. Chaffee, as president and general manager of the silk company, in consideration of and to reduce this indebtedness, sold to the bank 107 cases of manufactured silk, the value of which cannot be accurately ascertained, but which is said to be about \$20,000. They were then, or had been, shipped to New York city, where they [649] were \*subsequently taken by Dooley into his possession, and removed to Brooklyn. On May 8, 1895, he, as receiver, attached the goods by an attachment, which was subsequently dissolved. On May 30, 1895, he sold and assigned to Pangburn, who is a resident of the state of New York, notes of the silk company, not paid by this transfer, amounting to about \$67,000, for the nominal consideration of \$200, which sale Dooley made by virtue of an order of the circuit court of the southern district of New York, with the approval of the comptroller of the currency, for the purpose of enabling a suit to be brought in the state of New York by a resident of that state, in his own name, against the silk company, a foreign corporation. Pangburn did bring suit on said notes against the silk company on June 1, 1895, in the proper state court, obtained an order of attachment, a judgment for the full amount thereof, and an execution, which was levied by the sheriff of Kings county upon these cases of silk. The sale was stopped by this injunction order.

On June 6, 1895, the complainants, who are creditors of the silk company to the amount of about \$22,000, brought suit against it, in a court of the state of New York, and obtained an order of attachment, under which the sheriff of Kings county levied an attachment upon the same silk.

On July 2, 1895, the complainants brought a bill in equity upon which the injunction order now in question was issued against Dooley, Pangburn, the silk company, and others, alleging that all their acts in connection with the silk were fraudulent, and praying for relief by injunction and otherwise.

It thus appears that the bank and the complainants are creditors of the silk company, and that Dooley, as receiver of the bank, and the complainants, are each striving to obtain

a hold upon the silk as a means of payment for their respective debts.

**Messrs. William B. Putney and Henry B. Twombly** argued the cause and filed a brief for Hadden *et al.*:

Where a party wrongfully takes property which he afterwards procures to be seized and sold under process in his own favor, such process affords him no protection, and is held of no legal force.

*Wehle v. Butler*, 61 N. Y. 245; *Waples, Attachm.* § 301; *Shinn, Attachm.* § 207; *Powell v. McKee*, 4 La. Ann. 108; *Drake, Attachm.* § 193; *Corning v. Dreyfus*, 20 Fed. Rep. 426; *Paradise v. Farmers & Merchants' Bank*, 5 La. Ann. 710; *Wingate v. Wheat*, 6 La. Ann. 238; *Myers v. Myers*, 8 La. Ann. 369, 58 Am. Dec. 689; *Gilbert v. Hollinger*, 14 La. Ann. 445; *Pomroy v. Parmlee*, 9 Iowa, 140, 74 Am. Dec. 328; *Upton v. Craig*, 57 Ill. 257; *Deyo v. Jennison*, 10 Allen, 410; *Chubbuck v. Cleveland*, 37 Minn. 466, 35 N. W. 362.

The bank, its receiver, and the receiver's dummy, Pangburn, an assignee without consideration and with notice, are all and equally estopped by the fraud of the bank from claiming any title to or lien upon the goods in question.

*Bacon v. Harris*, 62 Fed. Rep. 99; *Smith v. Craft*, 11 Biss. 340, 12 Fed. Rep. 856; *Holden v. New York & Erie Bank*, 72 N. Y. 286.

**Mr. Edward Winslow Paige** argued the cause and filed a brief for Dooley *et al.*:

No right comes to anyone by the issuing of an attachment, and none until a levy is made.

*Rodgers v. Bonner*, 45 N. Y. 379; *Lynch v. Crary*, 52 N. Y. 181; *Tim v. Smith*, 93 N. Y. 87; *Scott v. Morgan*, 94 N. Y. 508; *Learned v. Vandenburg*, 7 How. Pr. 379, 8 How. Pr. 77; *Marsh v. Lawrence*, 4 Cow. 461.

The right of attaching creditors who, as against their common debtor, have equal claims to the satisfaction of their debts, must depend upon strict law; and if one loses a priority once acquired, by any want of regularity or legal diligence in his proceedings, it is a case where no equitable principles can afford him relief; it is a case where the equities are equal, and the right must be governed by the rule of law.

*Suydam v. Huggefords*, 23 Pick. 465; *Drake, Attachm.* § 221.

\***Mr. Justice Shiras** delivered the opinion of the court: [650]

Whether Chaffee, as president and general manager of the silk company, had authority to sell a large portion of the personal property of the company to one of its creditors in part payment of its debt, and whether his action, if regarded as unauthorized, was ratified by the directors of the company, were questions much discussed in the courts below, and which occupy a large part of the briefs of counsel filed in this court, but which, in the view that we take of the case, need not be considered by us.



In both the circuit court and the circuit court of appeals it was held, upon all the facts, that the notes of the silk company held by Dooley, as receiver of the First National Bank of Willimantic, were valid obligations of the silk company; that the sale of these notes by Dooley, as receiver, to Pangburn, under the order of the circuit court, with the approval of the comptroller of the currency, vested a good title in Pangburn, and that the judgment therein obtained, on June 27, 1895, in the supreme court of the state of New York, in favor of Pangburn, was a valid judgment.

What remained to consider was the validity of the warrant of attachment issued and served in favor of Pangburn on June 3, 1895, and of the execution levied on the attached property on June 27, 1895, as against the attachment issued on June 6, 1895, upon the property obtained by the complainants Hadden, under their suit brought in the supreme court of the state of New York.

The circuit court was of opinion that the validity of the notes, of their sale to Pangburn, and of the judgment thereon having been established, there was nothing in the evidence on behalf of the Haddens, as subsequent attaching creditors, which would justify the court in postponing the prior attachments and judgment of Pangburn, in whole or in part; and accordingly, on January 28, 1898, that court rendered a decree on the merits of the case, dismissing the bill of complaint.

[651] As already stated, the court of appeals concurred with the circuit court in holding that the notes and their sale to Pangburn were valid, and that his judgment and attachment of the goods were valid as against the silk company; but, for reasons which we shall presently state and consider, that court was of opinion that while as to some of the goods the attachment and execution of Pangburn could not be disturbed, yet as to certain other parcels of the goods the attachment of the complainants was equitably entitled to preference over that of Pangburn, and accordingly rendered the decree from which both parties have appealed.

The facts upon which the court of appeals proceeded were not in dispute, and were substantially as follows:

The goods in question consisted of 107 cases of silk. They had been shipped at different times, in April, 1895, to D. E. Adams & Company, 77 Greene street, New York. Adams was a silk merchant who occupied a store at that number, and from him the silk company leased a part of the store, where it transacted its New York business, through John H. Thompson, who also was an employee of Adams, its manager. On April 15, 16, 17, and 19, Fenton, the secretary of the silk company, by direction of Chaffee, sent by railroad forty-three cases of silk goods directed to D. E. Adams & Company. On April 22, Chaffee went to Boston and sent all the silk company's goods in the Boston office, being eighteen cases and a package, to Adams & Company. There were forty-five cases of the silk company's goods  
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in the Adams store before these April shipments from Willimantic and Boston. On May 2, 1895, the sixty-two boxes of goods shipped from Willimantic and Boston to Greene street were removed by Mr. Paige, counsel for Dooley, receiver, and were stored in Paige's name in the storehouse of F. C. Linde & Company, in New York city, and on May 18, 1895, were removed by Mr. Paige to the Brooklyn Storage Warehouse Company in Brooklyn, and were there stored in his name. On May 18, Paige, as attorney for Dooley, as receiver, commenced suit against the silk company in the supreme court of New York, and attached the sixty-two cases in the Brooklyn warehouse as the goods of the silk company. On May 25, forty-five boxes of silk goods were removed from the Greene street store \*by Paige's orders, [652] and placed in his name in the Brooklyn warehouse, and soon after were attached by his direction in the Dooley suit. On May 21, Hadden & Company, the complainants, brought suit in the supreme court of New York against the silk company, to recover a debt of some \$23,000. A warrant of attachment was served on Thompson, but the sheriff refused to take the goods in the Greene street store until a bond of indemnity was given to protect him. This was subsequently furnished, but in the meantime, on May 25, the goods went to Brooklyn. On June 6, 1895, the goods in the Brooklyn warehouse were attached by Hadden & Company, who obtained judgment against the silk company on June 26, for \$22,948, and execution therefor was issued and levied on the goods in the Brooklyn warehouse. The Dooley attachment was vacated on June 27, 1895, on the application of Hadden & Company, because the suit of a nonresident against a foreign corporation was forbidden by section 1780 of the Code of Civil Procedure. In the meantime, as previously stated, Pangburn, in his suit against the silk company, had issued an attachment on June 1, 1895, which was levied on June 3 on the goods in Brooklyn, and had obtained on June 25, 1895, a judgment for \$67,116, and an execution was levied upon the attached property.

In this state of facts, Circuit Judge Shipman reasoned as follows:

"The 107 cases which were originally in the care of Thompson in Greene street, as the bank's goods, went to Brooklyn, although the exact number which went there on May 25 is not clearly stated in the record. While creditors were inquiring with a sheriff at Greene street in regard to these goods for the purpose of attachment, they were removed from place to place by the order of Dooley's counsel, were stored in his name, and were attached in the suit of the bank against the silk company by his direction. The attempted attachment by the complainants of the forty-five cases in Greene street was prevented by their removal to Brooklyn. The counsel for Dooley distrusted the validity of the bills of sale [made by the silk company's president and manager to the bank], and desired to secure the \*bank by aid of legal proceedings. The receiver of the bank had  
**[653]**



an equal right with other creditors to take legal steps to secure its debt, but had no right to take unfair steps. The removal of the forty-five cases to Brooklyn and the storage of the property in the name of Mr. Paige, so that it could be in a measure secreted for the purpose of preventing the complainants from completing their attachment of these cases, was an unfair step. Hadden & Company first appeared as attaching creditors on May 21. At this time sixty-two boxes had been attached in the Dooley suit, and forty-five were in Greene street. The removal of these boxes after May 21, to prevent the completion of the Hadden & Company attachment, was an unfair advantage in this race between creditors, and compels a court of equity to declare that the complainants should have a prior lien upon the cases which were in Greene street when the sheriff's bond was being prepared. There is no apparent equity in giving priority to their attachment upon 107 cases, but they are entitled only to a prior lien upon the goods which they attempted to attach,—an attempt the success of which was foiled by a removal of the goods.” [34 C. C. A. 346, 63 U. S. App. 187, 72 Fed. Rep. 282.]

Circuit Judge Wallace filed a concurring opinion, in which occur the following observations:

“The case resolves itself into a question of priority of liens between judgment creditors of the Natchaug Silk Company having executions levied upon 107 boxes of silk in the storehouse of the Brooklyn Storage & Warehouse Company, and its decision depends upon the priority of the liens acquired by the attachments in the actions in which the judgments were recovered. . . . Of these goods forty-five boxes were removed by Dooley, the receiver of the Willimantic bank, and stored in Brooklyn clandestinely, for the purpose of defeating a levy upon them under the attachment in the complainants' action, until Dooley could procure an attachment and levy upon them through the instrumentality of Pangburn. A creditor having property of a debtor in his possession or under his control cannot thus defeat the rights of another creditor who has been in the meantime using proper diligence to attach it. A race of diligence between creditors is legitimate, but it cannot be won \*by [654] the abuse of legal remedies. I cannot doubt that the complainants could recover of Dooley in an action on the case for his acts in frustrating their attempted levy. A court of equity under such circumstances should postpone his lien to theirs. Because the attachment in the Pangburn suit was valid, its lien cannot be displaced in favor of the complainants as respects the goods removed before their attachment was obtained. The theory that the lien of Dooley, as receiver of the bank, should be postponed to that of the complainants, because of a conspiracy between the bank and the silk company to defraud the complainants and other creditors, is too nebulous upon the proofs for practical consideration.” [34 C. C. A. 347, 63 U. S. App. 188, 92 Fed. Rep. 283.]

As the efforts of the complainants to de-

feat the claims of Dooley, receiver, and of Pangburn, on the grounds that the notes of the silk company held by the Willimantic bank were invalid, and that their liens, by attachment or execution or otherwise, were fraudulent and void because of a conspiracy between the bank and the silk company to defraud the complainants and other creditors, wholly failed in both the courts below, we do not consider it necessary to review the voluminous evidence upon which those courts acted, but think it sufficient to say that we perceive no error in their conclusions on those subjects.

It remains for us to consider whether the circuit court of appeals was right in holding that the attachment and levy of Pangburn on the forty-five boxes of silk should be postponed in favor of the subsequent levy of the complainants.

It may well be questioned whether, upon the pleadings, that was an open question.

The only allegation touching the custody of the goods and their removal from one place to another contained in the original bill was as follows:

“That on the 23d day of April Chaffee (the president and manager of the silk company) illegally and fraudulently, and without any authority of the board of directors of said Natchaug Silk Company, and with full knowledge of the insolvency of the company as aforesaid, executed a paper purporting to be a bill of sale of all the goods belonging to the Natchaug Silk Company, in New York city, to said Michael F. Dooley, receiver \*of the First National Bank of Wil-[655] limantic; that said assignment or transfer was wholly without consideration; it was made to hinder, delay, and defraud creditors, and particularly these plaintiffs, and was and is wholly illegal and void.

“That said Dooley, without lawful right or title, took possession of said goods, and secretly removed part thereof, first, to a storehouse in New York city, and later, to the storehouse of the Brooklyn Storage & Warehouse Company in Brooklyn, in the county of Kings: that on the 25th day of May said Dooley secretly removed the remaining boxes of silks to the said storehouse of the Brooklyn Storage & Warehouse Company, where all of said silks, to the number of 107 boxes, were placed in the name of the attorney of said Dooley.”

As those portions of the allegations that assert that there was no consideration for the sale and transfer of the goods to Dooley, receiver, and that it was made to hinder and defraud creditors, have been eliminated from consideration, there remains only the allegation that Dooley took possession of the goods and secretly removed them to the Brooklyn storehouse, and there placed them in the name of his attorney.

As the purpose and theory of the bill was to defeat the Pangburn judgment and execution because without consideration and fraudulent as against creditors, it is evident that the allegations respecting Dooley's possession and removal of the goods had reference to the alleged fraudulent scheme, and cannot be regarded as presenting or raising any



issue of misconduct on the part of Dooley or Pangburn in pursuing lawful remedies against goods of the silk company in the possession of Dooley and his attorney.

[656] The original bill was filed on July 2, 1895. Subsequently, on January 14, 1897, after all the proofs were in, the complainants, with leave of court, filed an amended bill of complaint containing more particular statements as to the alleged fraud and conspiracy between the silk company and the bank, but omitting altogether any allegation as to the removal by Dooley of the goods from New York city to the storehouse in Brooklyn, and containing no allegation of fraud or unfairness on the part of Dooley or his attorney in the management of the Pangburn attachment and execution. Nor does it appear in the several opinions of the circuit court, filed from time to time during the contest in that court, that any specific charge was made or relied on that there had been any unfair or iniquitous practice resorted to on the part of Dooley or Pangburn in the removal of the goods from New York city to Brooklyn, with a view to obtain an unjust advantage.

But, passing by the fact that neither the original nor the amended bill contained apt allegations to make an issue as to unfair or improper conduct by Dooley or Pangburn in the prosecution of the attachment and execution under the Pangburn judgment, and assuming that the complainants had made such allegations, we are unable to concur with the judges of the circuit court of appeals in thinking that the facts shown by this record disclose a case of practice of a character to warrant the courts to displace the priority of the Pangburn attachment and execution in favor of those of the complainants.

The essential facts were that the goods were in the possession of Dooley in the city of New York. They had come into his possession by virtue of a formal sale made by Chaffee, the president and manager of the silk company, to Dooley, as receiver of the Willimantic National Bank. Such sale was, indeed, subsequently, in the proceedings in this suit, held to have been ineffectual to pass title to the goods, not because the bank was not a bona fide creditor of the silk company, but because the circuit court of appeals was of opinion that Chaffee was without authority, as president and manager, to make such sale. Hence, although Dooley's possession could not avail to protect the goods in his possession from attachment and seizure by creditors of the silk company, yet such possession cannot be regarded as fraudulent or collusive in such a sense as to deprive Dooley, as receiver of the bank, of a right to take legal proceedings, like any other creditor, against the goods. Suppose it be conceded that Dooley was aware, or had reason to apprehend, that there were other creditors of the silk company, who would pursue remedies against the goods in his hands. Such knowledge or apprehension

[657] would not devolve upon him, or upon his attorney, any fiduciary relation towards such creditors. It did not become his duty to in-

form them of the whereabouts of the goods, in order that they might precede him in the race of diligence. His primary duty was to the Willimantic National Bank and its creditors; and while the law will not permit him to resort to fraudulent devices or to false representations in order to delay or deceive other creditors, we are unable to agree with the learned judges of the circuit court of appeals in thinking that the removing of these goods from New York city to the Brooklyn warehouse, and there storing them in the name of a third person, while awaiting the maturity of legal proceedings, invalidated Pangburn's attachment and execution. The learned judges, indeed, speak of Dooley's conduct as being "inequitable" and "unfair," as against the complainants. But such epithets are of very uncertain legal significance. Where courts are dealing with parties between whom exists a fiduciary relation, or where, if the parties are on an equal footing, false representations are made by one party in circumstances which give the other a right to rely upon them, the courts may rightfully use their power to promote fair dealing, and to defeat an abuse of legal remedies. It is not pretended, in the present case, that Dooley, Pangburn, or their attorney, had any transactions with the complainants, or made any false representations or statements to them. The utmost that can be said is that Dooley, being in actual possession of the goods under a claim of title to them, which claim was legally unfounded, placed them in the nominal possession of his attorney, in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of the complainants. We do not think that a court of equity in such circumstances should postpone his lien to theirs.

*The decree of the Circuit Court of Appeals, in so far as it reversed the decree of the Circuit Court, is reversed, and the decree of the Circuit Court, dismissing the bill of complaint, is affirmed.*

\*E. M. PATTON, Plff. in Err.,  
v.

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TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 658-665.)

*Master and servant—injury to locomotive fireman—taking case from jury.*

1. A locomotive fireman who, for his own con-

NOTE.—On servant's assumption of risk—see *Pidcock v. Union P. R. Co.* (Utah) 1 L. R. A. 131, and note; *Foley v. Pettee Mach. Works* (Mass.) 4 L. R. A. 51, and note; *Hunter v. New York, O. & W. R. Co.* (N. Y.) 6 L. R. A. 246, and note; *Georgia P. R. Co. v. Dooly* (Ga.) 12 L. R. A. 342, and note. And see notes to *Kehler v. Schwenk* (Pa.) 13 L. R. A. 374; *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 6 L. R. A. 75; *Southern P. Co. v. Seley*, 38 L. ed. U. S. 391; *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

As to when a verdict may be directed by the court—see note to *Grand Chute v. Winegar*, 21 L. ed. U. S. 174.



venience, attempts to discharge his duties of cleaning the engine at the end of his trip without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to do his work after such inspection, cannot hold the company responsible for a defect on account of which he is injured, which would undoubtedly be disclosed by the inspection and then repaired.

2. The fact of an accident to an employee raises no presumption of negligence on the part of the employer.
3. The court properly directs a verdict for defendant, and refuses to leave the question of negligence to the jury, in an action by a locomotive fireman for injuries sustained by the turning of a loose step on a locomotive while he was cleaning it at the end of his trip, where it is admitted that the step, the rod, and the nut were suitable and in good condition, that the inspectors at both ends of the trip were competent, and that the step was securely fastened at the beginning of the trip, while the fireman undertook to clean the engine without waiting for the regular inspection, which would undoubtedly have led to the discovery and repair of the defect.

[No. 123.]

*Argued December 6, 7, 1900. Decided January 7, 1901.*

**I**N ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment on a verdict directed by the judge in an action against a railroad company for personal injuries. *Affirmed.*

See same case below, 37 C. C. A. 56, 95 Fed. Rep. 244.

**Statement by Mr. Justice Brewer:**

Plaintiff in error, plaintiff below, brought his action against the defendant to recover for injuries sustained while in its employ as fireman. A judgment in his favor was reversed on April 10, 1894, by the circuit court of appeals. 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. Rep. 259. On a second trial in the circuit court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the circuit court of appeals (37 C. C. A. 56, 95 Fed. Rep. 244), and thereupon the case was brought here on error.

The facts were that plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made, and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned, and he fell so far under the engine that the wheels passed over his right foot, crushing it so that amputation became necessary. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

Mr. Frank W. Hackett argued the cause, and, with Mr. Millard Patterson, filed a brief for plaintiff in error:

If upon any construction which the jury are authorized to put upon the evidence, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury.

*Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Wrightman v. Washington*, 1 Black, 39, 17 L. ed. 52; *Holladay v. Kennard*, 12 Wall. 254, 20 L. ed. 390; *Randall v. Baltimore & O. R. Co.* 109 U. S. 473, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Dunlap v. Northeastern R. Co.* 130 U. S. 652, 32 L. ed. 1059, 9 Sup. Ct. Rep. 647; *Richmond & D. R. Co. v. Powers*, 149 U. S. 44, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *Grank Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, *sub nom.* *Washington & G. R. Co. v. Tobriner*, 37 L. ed. 234, 13 Sup. Ct. Rep. 557; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Patton v. Southern R. Co.* 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. Rep. 979; *Union P. R. Co. v. Daniels*, 152 U. S. 684, *sub nom.* *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756.

The undisputed testimony shows that a defect existed about the engine of defendant, and that while the plaintiff was engaged upon the same he was injured. And this defect was of such a character as raised a reasonable presumption of negligence on the part of someone connected with the defendant's business and for whose negligence it is liable to the plaintiff.

*Jensen v. The Joseph B. Thomas*, 81 Fed. Rep. 578; *Carroll v. Chicago, B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176; *Cummings v. National Furnace Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Greenleaf v. Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411, 11 Fed. Rep. 438; 1 Shearm. & Redf. Neg. § 58; *McCray v. Galveston, H. & S. A. R. Co.* 89 Tex. 168, 34 S. W. 95.

In view of the testimony of the witness Alexander Mitchell, the case should have been submitted to the jury, because his credibility as a witness was directly in issue, and the plaintiff had the right to have the jury determine that fact; and as his was the only evidence that the step was put back properly after it was taken off at Toyah by the Chinamen, the question of his veracity became an important one.

*Robinson v. New York C. & H. R. R. Co.* 20 Blatchf. 338, 9 Fed. Rep. 877; *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. Rep. 432; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Wohlfahrt v. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406; *Gildersleeve v. Landon*, 73 N. Y. 609; *Tracy v. Phelps*, 23 Blatchf. 71, 22 Fed. Rep. 634.

An employee of a railroad company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection.



*Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

Mr. John F. Dillon argued the cause, and, with Messrs. Winslow S. Pierce and David D. Duncan, filed a brief for defendant in error:

Although questions of negligence are ordinarily for the jury, the court may withdraw a case from them altogether and direct a verdict, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

*Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266.

The fact that the testimony of a witness on the second trial of this cause differed from that given by him on the first trial, on points not material to the decision of the only question assigned for error, does not furnish ground for reversing the judgment herein.

[659] \*Mr. Justice Brewer delivered the opinion of the court:

The plaintiff's contention is that the trial court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury.

That there are times when it is proper for a court to direct a verdict is clear. "It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition

[660] \*to it. *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. ed. 66, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 618, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. ed. 213, 215, 11 Sup. Ct. Rep. 569." See also *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.

It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly sub-

mitted to and determined by them. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.

While it would needlessly prolong this opinion to quote all the testimony, it is proper that its salient features should be noticed. The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly fixed to a rod of iron about 1 inch in diameter and 18 inches in length, which passes up through the iron casting at the rear of the engine, about 6 or 8 inches thick. A shoulder to this rod fits underneath the casting, and the part \*passing[661] through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod, and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown; the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso, and found it secure; and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure fastening of the step by the nut. All of the witnesses, except the superintendent and foreman of defendant, testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified from an experience of twenty years with engines that it might work loose on such trip, but that it was impossible to tell whether it would or not.

It was the duty of the fireman to clean



the cab and all that portion of the engine above the running board, and to keep the oil cans and lubricators filled with oil. It was not necessary for him to attend to this work until eight hours after the engine arrived at El Paso, though it was more convenient to do so while the engine was hot and the oil warm, as it would take less time than when the engine was cooled off. After the engine reached El Paso the fireman and the engineer would get off, and it would be taken charge of by the yardmen, who would detach it from the train, take it to the yard, coal and sand it, and do all things necessary except the matter of repair, then place it in the round house, where it would be cleaned by employees other than the fireman, in all its parts beneath the running board, and inspected by the machinist, and repaired; and after that, the fireman would have ample [662] time for all the duties \*imposed upon him before the engine started on another trip. All this the plaintiff knew, and simply took the time he did for his work for his own convenience. On this particular day he did not commence work until three or four hours after the arrival of the train at El Paso. Prior to that time the engine had been coaled up, the coal being placed in the tender back of the engine. Some of the pieces of coal were from 1 foot to 18 inches in length and from 6 to 8 inches in width, and very heavy, and one of them falling off might strike the step. The engine had not at the time of the accident reached the round house for inspection and repair, and this the plaintiff knew. From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip; and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts, who denied that the ordinary working of the engine would loosen it. We say this notwithstanding the testimony of the plaintiff that the step did not hit anything on the trip, for the step was on the right side of the engine, the side occupied by the engineer, and therefore a striking might have occurred without the knowledge of the plaintiff, whose work did not call him to that side of the engine. It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. We are not insensible of the matter to which the plaintiff calls especial attention, to wit, a conflict between the testimony given by Alexander Mitchell, the round-house foreman at Toyah, at the first trial, and that given by him at the last. At the first trial he testified that the step was not taken off at Toyah. In the last that it was. He also testified that, though taken off, it was securely fastened before the train left. The inference, of

course, sought to be drawn is that the testimony of this witness \*is unreliable; that it is to be believed that he unscrewed the nut, but not to be believed that he screwed it up tightly; and therefore another possibility of the cause of the loosening of the step is introduced into this case. But giving full weight to this suggestion, it still appears that it is a mere matter of conjecture as to how the step became loose.

On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the round house at El Paso, and inspected and repaired before he was called upon to perform any duties upon it, for his own convenience, before such inspection and repair, went on the engine and attempted to discharge his duties of cleaning, etc. If he, knowing that there was to be an inspection and repair, and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair, but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection, and then repaired.

Upon these facts we make these observations: First. That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115; *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 443, 35 L. ed. 458, 463, 11 Sup. Ct. Rep. 859), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the \*jury to guess between these [664] half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the em-



ployee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 218, 25 L. ed. 612, 615; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. ed. 772, 780, 13 Sup. Ct. Rep. 914; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. ed. 624, 630, 15 Sup. Ct. Rep. 491; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. ed. 1188, 1190, 18 Sup. Ct. Rep. 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master \*fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employee or servant."

Tested by these rules we do not feel justified in disturbing the judgment, approved as it was by the trial judge and the several judges of the circuit court of appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury

to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

*The judgment is affirmed.*

ELGIN NATIONAL WATCH COMPANY,  
Appt.,  
v.

ILLINOIS WATCH CASE COMPANY,  
Thomas W. Duncan, and Myer Abraham.

(See S. C. Reporter's ed. 665-678.)

*Trademark—geographical name—use of word "Elgin"—jurisdiction of Federal court.*

1. The geographical name "Elgin" cannot be registered as a lawful trademark, so as to give the Elgin Watch Company an exclusive

NOTE.—*Trademark in geographical name.*

I. *Technical trademark right.*

- a. *In general.*
- b. *Geographical name used in arbitrary or fanciful sense.*
- c. *Right to geographical name as against resident of other localities.*
- d. *Names of mineral springs.*
- e. *Deceptive use of geographical name.*

II. *Unfair competition.*

III. *Summary.*

This note has been strictly confined to cases in which the geographical name has been used as a trademark or portion of one, though it may not have been a valid trademark. Consequently, cases in which protection has been sought for geographical words used as corporate or trade names, or as the name of a factory or place of business, or in signs, advertisements, and the like, have not been included, although the principles involved are analogous to those applied in case of the invasion of a trademark.

I. *Technical trademark right.*

a. *In general.*

As a general rule, geographical terms are common property which all may use, but which none may exclusively appropriate, as a trademark, or acquire as absolute individual property. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Avery v. Meikle*, 81 Ky. 73; *Hygeia Distilled Water Co. v. Hygeia Ice Co.* 72 Conn. 646, 49 L. R. A. 147, 45 Atl. 957; *Pratt's Appeal*, 117 Pa. 401, 11 Atl. 878; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, 94 Fed. 667; *Coffman v. Castner*, 31 C. C. A. 55, 59 U. S. App. 35, 87 Fed. 457.

Thus, the word "Columbla" is not the subject of exclusive appropriation as a trademark for flour, under the general rule that a word or words in common use and designating locality or section of country cannot be appropriated by anyone as his exclusive trademark. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151.

And the right to the exclusive use of the word "Columbla" as a trademark for tissue or toilet paper, the word being in common use to designate locality or section of country, can be acquired by no one. *Morgan Envelope Co. v. Walton*, 30 C. C. A. 383, 58 U. S. App. 30, 86 Fed. 605, Reversing 82 Fed. 469.

But yankee is not a geographical term nor a proper name, but a designation applied by the

right to the use of that word as the name of watches manufactured by it in that place, although the secondary signification acquired by the word in connection with its use on Elgin watches may be sufficient to entitle the Elgin Company to protection against the use of the word by others in such a way as to constitute a fraud.

2. Jurisdiction of a suit for an injunction against infringement of a trademark used in commerce with foreign nations or with the Indian tribes cannot be entertained by a circuit court of the United States, where the parties are citizens of the same state, if the trademark is not one that can be lawfully registered under the act of Congress of March 3, 1881 (21 Stat. at L. 502, chap. 138), and the right to relief must be based on the fact that defendant is using the word as an instrument of fraud.

[No. 121.]

dwellers in one locality to those in another place, and may be a valid trademark as applied to soap. *Williams v. Adams*, 8 Bliss. 452, Fed. Cas. No. 17,711.

And the word "Hoosier" may be adopted, used, and applied as a trademark. *Julian v. Hoosier Drill Co.* 78 Ind. 408.

And the name "Hunyadi," being neither descriptive nor geographical, but purely arbitrary and fanciful, as applied to medicinal waters, is the proper subject of a trademark. *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 9.

The word "Magnolia" will not be expunged from the register on the ground that it is a "geographical name" within the meaning of the trademarks act of 1883, § 64, subs. e, as amended by the act of 1888, although there are places in the United States of that name, where such name was adopted, not as the name of or in connection with any place, but after the flower bearing that name. *Re Magnolia Metal Co.'s Trademarks* [1897] 2 Ch. 371, 76 L. T. N. S. 672, 66 L. J. Ch. N. S. 598.

The words "Maryland Club" were sustained as a trademark for whisky in *Cohn v. Gottschalk*, 16 N. Y. S. R. 818, 2 N. Y. Supp. 13, on the ground that, being the name of an institution and not a place, and being arbitrarily chosen to designate a particular product, the decisions relating to the use of geographical names as trademarks did not apply.

But in *Cahn v. Hoffman House*, 7 Misc. 461, 28 N. Y. Supp. 388, the words "Maryland Club Rye Whisky" were held incapable of exclusive appropriation for the purposes of a trademark on the ground that "Maryland" denoted geographical origin, "club," by usage in the wine and liquor trade, its quality, and "whisky" its kind.

A cab company which paints its cabs in a novel and striking manner, and places upon the panels a fanciful device encircled by a gold band bearing the words "New York Cab Co., Limited," was said in *New York Cab Co. v. Mooney*, 15 Abb. N. C. 152, to have so far established a trademark in the words and colors and device as they are combined and used upon its cabs as to entitle it to call upon a court of equity for protection against imitations designed to mislead the public and to deprive it of its profits. No question of the right to use a geographical name as a trademark seems to have been raised in this case, which seems rather to belong to that class of cases in which protection is sought against the infringement of trade-names, or such analogous business designations

*Argued December 5, 6, 1900. Decided January 7, 1901.*

**A** PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decision reversing a decree of the Circuit Court for an injunction against infringement of a trademark in the word "Elgin." *Affirmed.*

See same case below, 35 C. C. A. 237, 94 Fed. Rep. 667.

Statement by Mr. Chief Justice **Fuller**:

\*This was a bill filed in the circuit court [666] of the United States for the northern district of Illinois by the Elgin National Watch Company, a corporation organized under the laws of the state of Illinois, having its principal place of business at Elgin and its office in Chicago in that state, against the Illinois

as signs, inscriptions on store windows and the like, which are not within the scope of this note.

No objection to the word "German" as geographical seems to have been raised in *Proctor v. McBride*, Cox Manual of Trademark Cases, 382, Fed. Cas. No. 11,441, in which the words "Mottled German Soap" with a circle inclosing a moon and several stars were protected as a trademark, and were held to be infringed by the use of the words "S. W. McBride's German Mottled Soap," in combination with a crescent and single star.

The words "Shaver Wagon, Eldora," consisting of the surname of the maker and the place of manufacture, were assumed without question to be a trademark, in *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188, and the original user of such words was protected against their use by his brothers with so little variation that wagons manufactured by them would be readily taken to be of his manufacture.

Words merely descriptive of the place where an article is manufactured or produced cannot be monopolized as a trademark. *Genesee Salt Co. v. Burnap*, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 818; *Bolander v. Peterson*, 136 Ill. 215, 11 L. R. A. 350, 26 N. E. 603.

And this was said to be the rule in *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 19 Atl. 820; *Osgood v. Allen, Holmes*, 183, Fed. Cas. No. 10,603; *Rose v. McLean Pub. Co.* 24 Ont. App. Rep. 240, *Reversing* 27 Ont. Rep. 325.

No one can apply the name of a district of country to a well-known natural product of that locality, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in a like product coming from the district from truthfully using the same designation. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581; *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415.

Thus, the word "Lackawanna" cannot be exclusively appropriated as a trade mark or name for coal mined in the "Lackawanna valley" so as to preclude other dealers from advertising and selling coal from that region as "Lackawanna coal." *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581.

And the term "Sonman," which has received a geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a town of the same



Watch Case Company, also a corporation of Illinois, with its principal place of business at Elgin, and certain other defendants, citizens of Illinois.

The bill alleged:

“That prior to the 11th day of April, A. D. 1868, your orator was engaged in the business of manufacturing watches at Elgin, Illinois, which was then a small town containing no other manufactory of watches or watch cases; that your orator had built up at said town a very large business in the manufacture of watches and watch movements, and that said watches and watch movements so made by your orator, had become known all over the world, and had been largely sold and used, not only in this, but in foreign, countries.

“ . . . That at and before said 11th day of April, A. D. 1868, your orator had

name, cannot be exclusively appropriated by any one of such persons as a trade mark or name for his coal, although the tract does not present the features of an independent region, and is not extensive, or sharply defined in its natural boundaries, and cannot be considered a separate coal basin or subbasin. *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415.

So, the words “Green Mountain” cannot be appropriated by an individual as a trademark for grape vines and grapes which are the natural product of the Green Mountains, to the exclusion of others who deal in similar articles originating in the same locality. *Hoyt v. J. P. Lovett Co.* 31 L. R. A. 44, 17 C. C. A. 652, 39 U. S. App. 1, 71 Fed. 173.

And the name “Pocahontas” cannot be taken as a trademark for the coal of particular mines, if, at the time of the first shipment, a town of that name was in existence at the place of shipment, and the name indicated in business matters the natural product of all that region. *Coffman v. Castner*, 31 C. C. A. 55, 59 U. S. App. 35, 87 Fed. 457, Affirmed in 178 U. S. 168, 44 L. ed. 1021, 20 Sup. Ct. Rep. 842.

And the use of the name “Pocahontas coal” by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right in such agents to the use of that name as a trademark or name for all the coal from that region, or deprive the mine owners of the right to use the same name. *Castner v. Coffman*, 178 U. S. 168, 44 L. ed. 1021, 20 Sup. Ct. Rep. 842.

Nor does the enhancement of the reputation of coal from a certain field by the careful inspection and grading thereof by the selling agents who sell it under the name of the place where it is mined give them an exclusive right to such name as a trademark. *Ibid.*

One of two importers of lime juice from the island of Montserrat can acquire no exclusive right to the use of the name of that island as a designation for such lime juice, although his importation may have acquired a high reputation for its purity and strength, and that of the other dealer may have been inferior in quality. *Evans v. Von Laer*, 32 Fed. 153.

A distiller can acquire no exclusive right to the words “Loch Katrine” to designate his product, where such words are descriptive of the water used in the distillery, as anyone who uses that water in the manufacture of his whisky is at liberty to state that such is the fact. *Bulloch v. Gray*, 19 Journal of Jurisprudence, 218, Cox Manual of Trade Mark Cases, 255.

A distinction has been recognized in some 179 U. S.

adopted the word ‘Elgin’ as a trademark for its said watches and watch movements; that said trademark was marked upon the watches and watch movements\*made by your[667] orator, both upon those which entered into commerce in this country and those which were exported to and sold in foreign countries; that your orator’s watches became known all over the world as Elgin watches, and their origin and source, as a product of your orator’s manufactory, were distinguished from those of all other watches manufactured in any part of the world by said distinguishing word or trademark, ‘Elgin;’ that from said 11th day of April, A. D. 1868, to the present time, your orator, both in the goods manufactured and sold by it in this country and those exported by it to and sold in foreign countries, has continued to use said trademark upon its watches and

cases in the application of the rule that the name of a place cannot be appropriated as a trademark as against others who may see fit to engage in the same business at the same place, when the product is a natural one of the locality, and where it is a manufactured article. *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; *Metcalf v. Brand*, 86 Ky. 331, 5 S. W. 773.

But the general rule is well settled that there can be no trademark in the name of a place as applied to articles manufactured there, since any person is at liberty to go and manufacture the article there and designate it with the name of the place. *New York & R. Cement Co. v. Coplay Cement Co.* 45 Fed. 212; *Burton v. Stratton*, 12 Fed. 696.

Thus, the words “Worcestershire Sauce,” used to designate a sauce made in Worcestershire, cannot be exclusively appropriated as a trademark. *Lea v. Wolf*, 13 Abb. Pr. N. S. 389.

And a manufacturer and vendor of gin can acquire no exclusive right to the term “Schledam Schnapps” as a designation for the article sold by him, the word “Schledam” being the name of a town in Holland, and the word “Schnapps” being used in Schiedam to designate gin. *Wolfe v. Goulard*, 18 How. Pr. 64.

A manufacturer of plows, whose product has gained celebrity, cannot appropriate to his own use and to the exclusion of another manufacturer of plows in the same place the name of the place of manufacture, and thus prevent the latter from designating his plows as of the place where they are actually made. *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125.

A corporation, by using upon its stationery, in connection with its corporate name of “The Elgin Butter Co.,” the additional words “Proprietor of the Elgin Creamery,” does not acquire such a property in, and monopoly of, the words “Elgin” and “Butter” as to preclude a subsequently formed corporation dealing in butter manufactured at Elgin out of milk and dairy supplies there produced from designating the product as “Elgin Butter,” in the absence of any intent, act, or artifice to mislead dealers or the public. *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 127, 40 N. E. 616.

The word “Durham” being the name of a town where two parties are doing business cannot be exclusively appropriated as a trademark by either. *Blackwell v. Wright*, 73 N. C. 310.

And neither of two equal owners of partnership property has, after dissolution, the exclusive right to appropriate as a trademark for his product the name of the town where the busi-



watch movements, and is still using it, and that said trademark has always served and still serves to distinguish your orator's product from that of all other manufacturers.

" . . . That at the time of its adoption of said trademark no other person, firm, or corporation engaged in the manufacture or sale of watches was using the word 'Elgin' as a trademark or as a designation to designate its goods from those of other manufacturers, and that your orator had the legal right to appropriate and use the said word as its lawful trademark for its watches and watch movements.

" . . . That the watches and watch movements made by your orator have achieved a very great reputation throughout the world, and that such reputation is of great

commercial value to your orator in its business aforesaid."

It was further averred "that, on the 19th day of July, A. D. 1892, under the act of Congress relating to the registration of trademarks, your orator caused said trademark to be duly registered in the Patent Office of the United States according to law, as by the certificate of said registration, or a copy thereof, duly certified by the Commissioner of Patents, here in court to be produced, will more fully and at large appear."

The bill charged that defendants had infringed the rights of complainant by engraving or otherwise affixing the word "Elgin" to the watch cases made and sold by them; that such watch cases were adapted to receiving watch movements \*of different construction [668] from those made by complainant; that infer-

ness was carried on. *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

So, each of two manufacturers of white lead at Brooklyn has the same right to describe it as Brooklyn white lead. *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

To the contrary seems to be *Armstrong v. Raynes*, N. B. Eq. Cas. 144, in which an injunction order, restraining the placing on casks or barrels containing lime the words "Greenhead Lime" or other marks in imitation thereof or only colorably differing therefrom, such words being the plaintiff's trademark, was held to be violated by the use of the words "Extra No. 1 Lime, manufactured by Raynes Brothers at Greenhead," although the lime of both parties was manufactured at that place.

The name of an incorporated borough in which a manufacturer is engaged in carrying on his business cannot be exclusively appropriated by him as a trademark for his product as against another manufacturer of a similar article within the borough limits, notwithstanding the fact that the trademark was adopted prior to the incorporation of the borough and before there was any town in that place. *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599.

But the right to be protected in the use of a word as a trademark which at the time of its adoption did not describe a specific locality or place is not lost because it may have since come to designate a certain locality. *Williams v. Adams*, 8 Biss. 452, Fed. Cas. No. 17,711.

A temporary injunction was granted to restrain the infringement of an alleged trademark in the word "Pocahontas" as applied to coal taken from the locality known by that name, in *Atwater v. Castner*, 32 C. C. A. 77, 50 U. S. App. 394, 88 Fed. 642, rehearing denied in 33 C. C. A. 602, 50 U. S. App. 445, 90 Fed. 828, on the ground that there was a mixed question of law and fact whether at the time the trademark or tradename in question was adopted the word "Pocahontas" was in common use as designating a known locality, or whether the locality gained its name from the use of such trademark, and the public have long acquiesced in the validity of such trademark.

*McAndrew v. Bassett*, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 4 New Rep. 123, 33 L. J. Ch. N. S. 561, 10 L. T. N. S. 442, 12 Week. Rep. 777, is sometimes cited as upholding a doctrine contrary to the rule established by the above cases. In that case manufacturers of licorice, whose product, stamped with the words "Anatolia," the geographical name of a tract of country where licorice root is largely grown, had acquired a reputation in the market, were held entitled to enjoin the use of such word by rival manufacturers who had first used the name at

the request of their customers on licorice made from a sample of the former manufacturer's product, and had thereafter continued to use it for the purpose of competition. Mr. Justice Strong in distinguishing this case in *Delaware & H. Canal Co. v. Clark*, 13 Wall. 811, 20 L. ed. 581, *supra*, says: "It was a clear case of an attempt to imitate the mark previously existing, and to put upon the market the new manufacture as that of the first manufacturers. It does not appear from the report of the case that the juice or roots from which the defendant's article was made came from Anatolia. If not, their mark was false. Of course the Lord Chancellor enjoined them. In answer to the argument that the word Anatolia was in fact the geographical designation of a whole country, a word common to all, and that therefore there could be no property in it, he said: 'Property in the word for all purposes cannot exist; but property in that word as applied by way of stamp upon a stick of licorice does exist the moment a stick of licorice goes into the market so stamped and obtains acceptance and reputation in the market.' It was not merely the use of the word, but its application by way of stamp upon each stick of licorice that was protected. Nothing in this case determines that a right to use the name of a region of country as a trademark for an article may be acquired, to the exclusion of others who produce or sell a similar article coming from the same region."

Even if *McAndrew v. Bassett* be regarded as holding that the geographical expression "Anatolia" which had been used for a short time in connection with licorice was a good trademark, that case must be regarded practically as overruled by the provision of the trademarks act 1883, § 64, subs. e, as amended in 1888, forbidding the registration of a geographical name as a trademark. *Re Sir Titus Salt, Bart., Sous, & Co.'s Application* [1894] 3 Ch. 166, 63 L. J. Ch. N. S. 756, 8 Rep. 682, 71 L. T. N. S. 386, 42 Week. Rep. 666.

The prohibition against the registration of a geographical name as a trademark, contained in trademarks act 1883, § 64, subs. e, as amended in 1888, is not confined to the use of the noun substantive, but extends to the adjective and to the name of the place to which an ordinary English suffix has been added so as to impart to it an adjectival form. *Ibid.*

The word "Eboline," being the name of an Italian town with the addition of the English suffix "ne" is a geographical name within the meaning of the trademarks act 1883, § 64, subs. e, as amended in 1888, providing for the registration of a word having no reference to the character or quality of the goods, and not being a geographical name. *Ibid.*



for watch movements were liable to be and often were incased in them; and that when so incased the entire watch, including both movement and case, appeared upon the market with the word "Elgin" upon it, thereby leading the public to believe that the watch as an entirety was made by the complainant, and enabling parties wrongfully using complainant's trademark to profit by the great reputation of complainant, to palm off other and inferior goods as goods made by complainant, to injure the reputation of complainant as a watchmaker, and to deprive it of a portion of the business and patronage which it would otherwise receive from the public, to the irreparable damage of complainant.

The prayer was for damages and for an injunction to restrain defendants "from directly or indirectly making or selling any watch

case or watch cases marked with your orator's said trademark, and from using your orator's said trademark in any way upon watches or watch cases or in the defendants' printed advertisements, circulars, labels, or the boxes or packages in which their said watch cases are put or exposed for sale."

A demurrer having been overruled, defendants answered denying the legality of the registration of the alleged trademark, and any attempt on their part to deceive the public, or the doing of anything they did not have the legal right to do; and asserting that they had never manufactured or offered for sale watches or watch movements; that they manufactured at Elgin watch cases only; that complainant had never manufactured or sold watch cases with the word "Elgin" on them; that the business of the two companies was separate and distinct; and that when-

The fact that a word adopted as a trademark has an eastern sound, and conveys the idea of the east generally, is not sufficient to require it to be expunged from the register as geographical, where it describes no place in fact. *Re Densham's Trademark* [1895] 2 Ch. 176, 12 Rep. 283, 64 L. J. Ch. N. S. 286, 634, 72 L. T. N. S. 614, 43 Week. Rep. 515.

The word "Mazawattee," registered as a trademark for tea and other articles of food, will not be expunged from the register as a geographical name on the ground that "wattee" means in Cingalese an estate or garden, and refers more or less to Ceylon, where there is no such place known, and no estate in Ceylon of that name. *Ibid.*

The right to register a geographical name as a trademark has been the subject of numerous adjudications in the United States Patent Office.

The words "The Roman" were refused registration, in *Ex parte Rome Textile Co.* 91 Off. Gaz. 820, as a trademark for underwear manufactured by a corporation having its principal office at Rome, New York.

So, the word "Yucatan" cannot be registered as a trademark for leather and leather goods by persons carrying on a business at Chicago, as anyone importing hides from Yucatan, or purchasing hides exported from that place, would be entitled to call or mark skins and tanned leathers having such origin by that name. *Ex parte Well*, 83 Off. Gaz. 1802.

The words "Cherry Street Mills," and "Market Street Mills" combined with a masonic emblem were refused registration as trademarks for flour, in *Re Tolle*, 2 Off. Gaz. 415.

The words "Durham Smoking Tobacco" cannot be registered as a trademark, and the addition of the name and place of business of the manufacturer will not entitle it to registry as such. *Armistead v. Blackwell*, 1 Off. Gaz. 603.

The words "Pittsburgh Pump" cannot be registered as a trademark for pumps by a manufacturer at Pittsburgh, Pa., and the insertion of hyphens between the letters does not change the essential feature of the trademark to such a degree as will warrant registration. *Ex parte Pittsburgh Pump Co.* 84 Off. Gaz. 309.

A geographical name which, taken by itself, is not registerable as a trademark, is not made so by placing it within a square figure. *Ex parte Well*, 83 Off. Gaz. 1802.

A combination label of a surname and geographical descriptive word is not registerable as a trademark. *Ex parte Buffalo Pltts Co.* 89 Off. Gaz. 2069.

The following additional instances in which geographical names were refused registration as

trademarks in the United States Patent Office are cited on the authority of Newton's Digest of Patent Office Trademark Decisions: "Brandywine" for flour (*Re Becker & Co.* 18 MS. D. 296, Newton's Digest, 229); "Plymouth" (*Re Ward*, March 22, 1878, Newton's Digest, 231); "Woodberry" for cotton duck (*Re Hooper & Sons*, 24 MS. D. 124, Newton's Digest, 239); "The Boston" for hair nets (*Re Jennings & Sons*, 26 MS. D. 327, Newton's Digest, 240); "Mexican" for silverware (*Re Holmes & E. Silver Co.* 36 MS. D. 11, Newton's Digest, 241); "Turkish" for a veterinary remedy (*Re Nau*, 55 MS. D. 125, Newton's Digest, 252); "New England" for biscuits, crackers, etc. (*Re William Schmidt Baking Co.* 55 MS. D. 139, Newton's Digest, 253); "Columbia" for water wheels (*Re James Leffel Co.* 55 MS. D. 231, Newton's Digest, 254); "Bay State" (*Re Bay State Optical Co.* 57 MS. D. 315, Newton's Digest, 255); "Crawford" (*Re Crawford Mfg. Co.* 57 MS. D. 380, Newton's Digest, 256); "Cedar Valley" (*Re Bowman*, 57 MS. D. 478, Newton's Digest, 259); "Argyle" (*Re Brunswick*, 58 MS. D. 65, Newton's Digest, 260); "Formosa Doubly Woven Finger Tips" for gloves (*Re Lord & Taylor*, 58 MS. D. 78, Newton's Digest, 261); "Berkeley" for whisky (*Re Nicholas*, 58 MS. D. 233, Newton's Digest, 264); "Florence" for knit goods (*Re Camden Knitting Co.* 58 MS. D. 416, Newton's Digest, 265); "Cachemire Milano" for silks (*Re Warburg & Co.* August 25, 1877, Newton's Digest, 250).

Mr. Browne in the supplement to the second edition of his work on Trademarks, § 918, is authority for the proposition that the words "Old Yorkshire Mills" were refused registration for paper, in *Ex parte George C. Gill Paper Co.* (Greeley, acting Com., September 11, 1897).

But a word symbol to be refused registration because of its geographical character must refer to some specific locality. *Ex parte Tietgens & Robertson*, 87 Off. Gaz. 2117.

The word "Hansa" has no such geographical character as referring to a trading confederacy consisting of the cities of Hamburg, Lubeck, and Bremen, as forbids its registration as a trademark for lard, sausages, and bacon, although such towns are known as Hanse towns, such designation denoting their independence, and not their union. *Ibid.*

*Re Homer & Masheter*, 23 MS. D. 277, as digested in Newton's Digest of Patent Office Trademark Decisions, No. 238, holds that "Poole's Island," being the name of an island distant from the main land at least 1 mile, and being owned by the applicants except a small



ever the defendant company had used the word "Elgin" it had usually, if not invariably, been done in connection with some other word, as "Elgin Giant" or "Elgin Commander" or "Elgin Tiger," or some other word in combination with the word "Elgin;" that defendant company had never used the word "Elgin" alone, or separately, as registered by complainant, upon goods exported to foreign nations or used in foreign commerce, but only in domestic commerce, and to inform the public of the place where watch cases of the defendant company were manufactured; that such watches were sold upon a guaranty running for a number of years, so that it was necessary to indicate the name of the location where defendant company was carrying on its business, that purchasers might be able to find the company in case it became necessary to call upon it to make good

its guaranties; "and that owing to the distinct lines of business in which the complainant and the defendant company are engaged, no misunderstanding or confusion has arisen or can arise, as these defendants are informed and believe."

It was further alleged "that the word 'Elgin,' being a geographical name or word indicating the name of a prominent manufacturing city in which any manufacturer of watches, watch movements, or watch cases is at liberty to locate and carry on his business, is not appropriable by any single manufacturing person, firm, or corporation, but is open as of common right to the use of any person, firm, or corporation carrying on business at the city of Elgin."

Replication was filed, proofs taken, and a hearing had. By leave of court complainant amended its bill, alleging that the watch

portion used for a lighthouse, may be registered as a trademark.

For other Patent Office Decisions, see I. b, *infra*, *Geographical name used in arbitrary or fanciful sense*; I. e, *Deceptive use of geographical name*.

b. *Geographical name used in arbitrary or fanciful sense.*

The rule that there can be no trademark in a geographical name is not applicable where the name was arbitrarily or fancifully selected to indicate origin and ownership, and not the place of production.

Thus, the word "Vienna" may be exclusively appropriated as a trademark for a particular kind of bread, as it is a purely arbitrary designation, and is in no manner descriptive either of the ingredients or quality of the article. *Fleischmann v. Schuckmann*, 62 How. Pr. 92.

And the word "Alderney" may be exclusively appropriated as a trademark for oleomargarine, as such use is entirely arbitrary and in no respect descriptive of the article. *Lauferey v. Wheeler*, 63 How. Pr. 488.

So, the word "German," when not used in a geographical sense, it being the name of an individual adopted as an arbitrary or fancy name, may be appropriated as a tradename for sweet chocolate, so as to make the use of the word "Germania" as applied to sweet chocolate an infringement. *Walter Baker & Co. v. Baker*, 77 Fed. 181.

The word "Alpine" as applied to cotton embroidery was held in *Re Trademark "Alpine"*, L. R. 29 Ch. Div. 877, 54 L. J. Ch. N. S. 727, 53 L. T. N. S. 79, 33 Week. Rep. 725, if not a "fancy word," to be used in a novel or fanciful sense, and therefore registerable under the English trademark act of 1883, § 64, subs. 1 (c), permitting the registration of "a fancy word or words not in common use." With reference to this decision, *Cotton, L. J.*, in *Re Van Duzer's Trademark*, L. R. 34 Ch. Div. 623, 56 L. J. Ch. N. S. 370, 56 L. T. N. S. 286, 34 Week. Rep. 294, says that he should certainly have come to a different conclusion from that which was reached by the judge who decided that case, because he knew that in former days, if not at present, there was considerable embroidery made in Switzerland at the foot of the Alps, if not in what may be called the Alps, and he should have supposed that the term would have been calculated to express, with regard to the goods to which it was to be applied, the place where the goods were made.

The geographical name "Melrose" is not, as applied to a preparation for the hair, "a fancy

word or words not in common use," within the meaning of the English trademarks act of 1883, § 64, subs. 1 (c) so as to be registerable as a trademark. *Re Van Duzer's Trademark*, L. R. 34 Ch. Div. 623, 56 L. J. Ch. N. S. 370, 56 L. T. N. S. 286, 34 Week. Rep. 294.

And the word "Britannia", not being a "fancy word not in common use" within the meaning of the English trademarks act of 1883, § 64, subs. 1 (c), cannot be employed as a trademark. *Hodgson v. Sinclair*, 9 Rep. Pat. Cas. 22.

This principle may well be regarded as the ground for decision in the following cases in which geographical names have been protected as trademarks: "Ethiopian" for black cotton stockings (*Hine v. Lart*, 10 Jur. 106); "Indian Pond" and "Green Mountain" for scythe stones (*A. F. Pike Mfg. Co. v. Cleveland Stone Co.* 35 Fed. 896); "Quinnbog," "Western Red Ends," and "Lake Huron" for scythe stones taken from quarries situated at and near Grindstone City, Mich. (*Cleveland Stone Co. v. Wallace*, 52 Fed. 431); "Taylor's Persian Thread" for thread manufactured in England (*Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Taylor v. Taylor*, 23 L. J. Ch. N. S. 255, 2 Eq. Rep. 290; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114, Affirmed in 2 Sandf. Ch. 603); "American Cold Japan" for roofing paint (*Reeder v. Brodt*, 4 Ohio N. P. 265); "Turin," "Sefton," "Leopold" and "Liverpool" for patterns of cloth manufactured at Huddersfield, England (*Hirst v. Denham*, L. R. 14 Eq. 542, 41 L. J. Ch. N. S. 752, 27 L. T. N. S. 56).

See also *Cohn v. Gottschalk*, 16 N. Y. S. R. 818, 2 N. Y. Supp. 13; *Cahn v. Hoffman House*, 7 Misc. 461, 28 N. Y. Supp. 388,—I. a, *supra*.

One using a geographical name as an arbitrary or fanciful name for an article generally known not to be of such place or country and not represented to be such was said, in *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66, 50 N. Y. Supp. 437, to be entitled to restrain another from using it in the same way, but not from using it truthfully.

In the following decisions in the United States Patent Office geographical names were registered as trademarks as wholly fanciful or arbitrary in their signification: "Dublin" for soap made in this country (*Re Cornwall*, 12 Off. Gaz. 312); "German Syrup" for a medicated compound, not a German product (*Re Green*, 8 Off. Gaz. 729); "Dover" as applied to household goods manufactured by a Massachusetts corporation with its factory in Cambridge and its place of business in Boston (*Ex parte Dover Stamping Co.* 51 Off. Gaz. 1784); "Vienna" for flour



cases so manufactured and marked by defendants in violation of complainant's rights were intended by defendants to be sold in foreign countries, and were in fact exported to and sold in foreign countries.

The circuit court decreed that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of complainant's exclusive rights in the premises, and that an injunction issue restraining the use of the word alone or in connection with other words or devices, upon watches, or watch cases, or packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchasers or others to mistake said watches or the watch movements incased in said watch cases for watches or watch movements manufactured by com-

plainant. 89 Fed. Rep. 487. The case having been carried to the court of appeals, that court reversed the decree of the circuit court, and remanded the cause, with instructions to dismiss the bill. 35 C. C. A. 237, 94 Fed. Rep. 667.

Mr. Lysander Hill argued the cause, and, with Mr. George S. Prindle, filed a brief for appellant:

Although geographical names are not universally, or even generally, appropriable as trademarks, yet where such a name has acquired a secondary signification denoting the goods of a particular manufacturer or dealer it becomes for him a valid trademark for such goods.

*Thompson v. Montgomery*, L. R. 41 Ch. Div. 35; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *McAndrew v. Bassett*, 10 Jur. N. S.

manufactured at Pittsburgh, Pa. (*Ex parte Jenkins*, 53 Off. Gaz. 759); "Florentine" for rolled plate glass (*Ex parte Mississippi Glass Co.* 64 Off. Gaz. 713); "Waverly" for bicycles (*Ex parte Indiana Bicycle Co.* 72 Off. Gaz. 1654); "Menlo Park" for time-keeping instruments made at Canton, Ohio (*Ex parte Hampden Watch Co.* 81 Off. Gaz. 1282).

The following unpublished decisions are cited on the authority of Newton's Digest of Patent Office Trademark Decisions as instances in which registration was granted for geographical names used in an arbitrary sense: "Bom-bay" (*Re Bence*, 20 MS. D. 18, Newton's Digest, 234); "Washington" (*Re Coffin, A. & Co.* 23 MS. D. 49, 417, Newton's Digest, 237); "Concord" (*Re Proctor & Gamble*, 38 MS. D. 136, Newton's Digest, 242); "Atlanta" (*Re Rogers & Irvin*, 39 MS. D. 23, Newton's Digest, 243); "Berlin" for cotton goods known as silesia (*Re Hyde & Sons*, 45 MS. D. 246, Newton's Digest, 248); "Kearney" for thread (*Re Marshall & Co.* 47 MS. D. 412, Newton's Digest, 249); "Runy-mede" for distilled liquors (*Re Mellwood Distillery Co.* 58 MS. D. 205, Newton's Digest, 262); "Como" (*Re Rumsey Mfg. Co.* 58 MS. D. 218, Newton's Digest, 263); "Alpine" (*Re Havlland*, 59 MS. D. 154, Newton's Digest, 266).

Mr. Bröwne in his work on Trademarks, §193, cites the following instances in which geographical names were registered in the United States patent office as arbitrary symbols: "Marieland" for merchandise manufactured in Maryland (Malcolm Crichton, No. 925); "Monticello," for whisky (Malcolm Crichton, No. 877); "Kentucky Pioneer" (Adams & Taylor, No. 692); "Bay State" (Bay State Iron Co. No. 875); "Vleille Montagne" for green paint (Walter & Fielding, No. 494); "Wisconsin Wood Chopper" for axes (Biddle Hardware Co. No. 923); "Scioto" for fire brick made at Sciotoville, Scioto county (McConnell, Porter & Co. No. 510); "Angostura" for bitters (*Re W. H. Knoepfel*, Cert. No. 580).

But in the following instances the primary meaning of the word was thought to be geographical and registration therefore refused: "French" for bronze paints (*Re J. Marsching & Co.* 15 Off. Gaz. 294); "Lancaster," although accompanied by the symbolical representation of a rose, for ticking manufactured at Philadelphia (*Ex parte Farnum*, 18 Off. Gaz. 412, Disapproving *Re Cornwall*, 12 Off. Gaz. 312); "Raleigh" for manufactured tobacco, whether accompanied by a portrait of Sir Walter Raleigh or not (*Ex parte Oliver*, 18 Off. Gaz. 923); "Cromarty" for cured fish, it being the name of a town in Scotland famous for its herring fisheries (*Ex parte Proctor*, 51 Off. Gaz. 1785); "Trenton" for tools

and devices (*Ex parte American Saw Co.* 58 Off. Gaz. 521); "Cloverdale" for canned fruits and vegetables (*Ex parte Hendley*, 72 Off. Gaz. 1654); "Aurora" for boots and shoes manufactured at Lynn, Mass. (*Ex parte Little*, 85 Off. Gaz. 1221); "Gibraltar" for lamp chimneys (*Ex parte Nave & McC. Mercantile Co.* 86 Off. Gaz. 1985).

See also Patent Office decisions cited in I. a, *supra*.

### c. Right to geographical name as against resident of other localities.

There are a number of cases in which it has been declared that a geographical name may be so appropriated by a resident of that locality, or for a product of that locality, as to entitle it to protection as a trademark against its use by a resident of another place, or upon a product not of such locality.

The leading case is *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588. Here manufacturers who had exclusively used the word "Akron" as a trademark to designate cement or water lime manufactured by them from stone quarried near a village of that name in Erie county, New York, were held entitled to enjoin the use of the word "Akron" by a rival manufacturer to designate cement manufactured by him in Onondaga county from stone not taken from the Akron quarry, irrespective of the question whether any other owners of quarries near Akron could manufacture cement under that name. Earl, C., in delivering the opinion of the court, after stating that he could see no reason why the word "Akron" could not be adopted and used as a trademark simply because it was the name of a place, continued: "It is sometimes said in the cases to which our attention has been called that the claimant of a trademark must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate. The right must be exclusive as against the defendant. It is generally sufficient in such cases if the plaintiff has the right and the defendant has not the right to use it. The principle upon which the relief is granted is that the defendant shall not be permitted, by the adoption of a trademark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public. Here the plaintiffs had given a reputation to the Akron cement in market. They had always been its principal manufacturers and sellers, and at the time of the commencement of the suit the sole parties who could be injured by the fraudulent use of the trademark by the defendants, and, hence, they are clearly entitled to the protection which they seek."



550; *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. 213; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; *American Waltham Watch Co. v. Sandham*, 96 Fed. 330; *Lea v. Wolf*, 13 Abb. Pr. N. S. 389; *Manitowoc Pca-Packing Co. v. Numsen*, 35 C. C. A. 267, 93 Fed. 196; *Gebbie v. Stitt*, 82 Hun, 93, 31 N. Y. Supp. 102; *Hirst v. Denham*, L. R. 14 Eq. 542; *Powell v. McNulty*, Cox Manual of Trademark Cases, 294; *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Metcalf v. Brand*, 86 Ky. 331, 5 S. W. 773; *Carlsbad v. W. T. Thackeray & Co.* 57 Fed. 18; *Carlsbad v. Kutnow*, 68 Fed. 794; *La Republique Francaise v. Schultz*, 57 Fed. 37; *Action-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. 381, Fed. Cas. No. 496.

In other cases where they retain only their

A prior appropriation of the name of a place or country as a trademark for a product or ware of that locality was said in *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66, 50 N. Y. Supp. 437, to be good as against one using the name for a product or ware not of such place or country.

The owner of the exclusive right of exporting crude rock salt called "Kainit" from the mines at Leopoldshail, Prussia, which is known in the English market as "Leopoldshail Kainit," has such a right to these words as a trademark as entitles him to enjoin the use of such words or an imitation thereof by rival tradesmen who fail to show that the salt which they offer for sale by that name was the genuine, or was bought by them under circumstances which led them so to believe. *Radde v. Norman*, L. R. 14 Eq. 348, 41 L. J. Ch. N. S. 525, 26 L. T. N. S. 788, 20 Week. Rep. 766.

Manufacturers of sauce at Worcestershire, England, long sold by them under the name "Worcestershire Sauce" have such a right to that name as a trademark as entitles them to enjoin the use of such words by a rival manufacturer to designate a sauce not manufactured in Worcestershire, coupled with such an imitation of the former's labels and wrappers as to deceive the public into the belief that his preparation was the original Worcestershire sauce. *Lea v. Wolf*, 15 Abb. Pr. N. S. 1, Modifying 13 Abb. Pr. N. S. 389.

The word "Durham" in connection with a picture of a Durham bull was protected as a trademark for smoking tobacco manufactured at Durham, N. C., which town owed its chief growth to the business and the exclusive right to its use decreed in the manufacturers there as against manufacturers of similar tobacco elsewhere. *Blackwell v. Dibrell*, 3 Hughes, 151, Fed. Cas. No. 1,475.

And a similar ruling was made in *Blackwell v. Armistead*, 3 Hughes, 163, Fed. Cas. No. 1,474, in which a label for smoking tobacco consisting of the words "Genuine Durham Smoking Tobacco" in connection with the portrait of a Durham bull was protected as a trademark.

The use by a manufacturer of dental vulcanite in Ft. Wayne, Ind., of the words "Akron Dental Rubber" on his labels in stating that his goods were made according to his analysis of that product, was enjoined in *Keller v. B. F. Goodrich Co.* 117 Ind. 556, 19 N. E. 196, as an infringement of a trademark of a rival manufacturer of Akron, Ohio, in those words, where they were so prominently displayed as to be calculated to mislead dealers as to the identity of the products.

geographical signification, and are therefore not protectable as trademarks, they may still, on the ground of unfair competition, be protectable as against certain users, though not as against others. Thus, where a particular town or district has acquired so enviable a reputation for one of its natural or manufactured products as to induce unscrupulous persons residing elsewhere to use the name falsely upon their competing goods, such false use will be enjoined on the ground of unfair competition, at the instance of a resident producer.

*Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588; *Southern White Lead Co. v. Cary*, 25 Fed. 125.

An honest manufacturer or dealer, who lawfully uses a geographical name merely to indicate where his business is situated and his goods to be obtained, must so use it as

A Holland manufacturer of gin was protected in the use of the words "Wolfe's Schiedam Aromatic Schnapps," as a trademark for his gin, in *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

A manufacturer of cigars at Key West, who uses the name of that place in combination with other words as a trademark to designate his goods, is entitled to enjoin the use of such name by a rival manufacturer upon goods manufactured by him at another and different place. *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 7 So. 23.

Other cases, however, expressly deny that any trademark right exists under such circumstances, although they agree that such an untruthful use of a geographical name should be enjoined.

Thus, although the names "Minneapolis" and "Minnesota" cannot be trademarks for flour, yet the owners of flouring mills in Minneapolis, Minn., having established a high reputation for flour bearing the names "Minneapolis" and "Minnesota," may have an injunction against the use of such names on inferior flour which is made in Milwaukee from wheat of different grade. *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, Reversing 82 Fed. 816.

So, causing companies in California, canning pears grown in that state, who label their product "California Pears," by which designation such product has become well and favorably known, though they can acquire no exclusive right to use as a private trademark "California Pears" or "California" as a label on canned pears, are entitled to enjoin persons engaged in the canning business elsewhere from labeling pears not grown in California so as to assert that they are California pears canned in that state. *California Fruit Cannery Assn. v. Myer*, 104 Fed. 82.

It would seem that the rule laid down by these cases is the correct one, and that the other cases present sufficient *indicia* of unfair competition to warrant equitable relief irrespective of the question whether any technical trademark could exist or not. And this is the view taken by a number of the courts which have decided on a similar state of facts that a technical trademark is not a prerequisite to equitable relief.

Thus, in *Anheuser-Busch Brewing Assn. v. Piza*, 23 Blatchf. 245, 24 Fed. 149, a brewer in St. Louis, Mo., is held entitled to protection against any diversion of his trade by the acts of an exporter of beer in New York city in falsely representing that his beer is made at St. Louis and that his firm are the sole agents of



to show unmistakably that he does not claim it as his trademark for the goods of another manufacturer or dealer.

*Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Seixo v. Provezende*, 12 Jur. N. S. 215.

A merely descriptive term may become a valid trademark by acquiring a secondary signification denoting the goods of a particular manufacturer.

*Reddaway v. Banham* [1896] A. C. 199.

Mr. Thomas A. Banning argued the cause, and, with Mr. Ephraim Banning, filed a brief for appellees:

A person cannot begin to manufacture a product at a town already in existence, and appropriate the name of such town as a trademark, to the exclusion of others afterwards doing business at that town.

*Pillsbury-Washburn Flour Mills Co. v.*

the "St. Louis Lager Beer" at New York, whether the former had or could have a technical trademark in the name "St. Louis" or not.

And a manufacturer of pure white lead in St. Louis, Mo., who branded on the head of its keg the words "Southern Company, St. Louis," was protected, in *Southern White Lead Co. v. Cary*, 25 Fed. 125, against the use by manufacturers of an inferior quality of white lead at Chicago of the words "Southwestern St. Louis" upon the heads of their kegs, irrespective of the question whether or not the former manufacturer had a valid trademark in those words, on the ground that purchasers would naturally be induced to believe they were securing his product, when in fact they were getting an inferior article.

So, a manufacturer of plows at Fairfield, Ohio, whose product is well and favorably known as the "Fairfield Plow" or "New Fairfield Plow," is entitled to enjoin the use of such words by a manufacturer of plows at Shelby, Ohio, for the purpose of misleading the public and trading upon the former's reputation, even if a geographical name may not be used and treated as a trademark, as against a person not living in the locality who intends to use it. *Harvey v. Lamoreaux*, 7 Ohio Dec. 455, 5 Ohio N. P. 473.

And, assuming that a manufacturer of scythe stones can have no valid trademark in the geographical terms "Lamoile" and "Willoughby Lake," he will be protected in their use as against a rival manufacturer whose stones are quarried some 200 miles from the localities in question. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.* 35 Fed. 896.

See also II. *infra*, *Unfair competition*.

A manufacturer of gin at Schiedam, Holland, is not entitled to be protected in the use of the words "Wolfe's Aromatic Schiedam Schnapps" as a trademark except as to the word "Wolfe," even as against one manufacturing gin elsewhere, where there are other manufacturers of gin at Schiedam, and the word has long been used to denote quality or kind. *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204.

So, in *Lea v. Deakin*, 11 Biss. 23, Fed. Cas. No. 8,154, plaintiffs, who were manufacturers in England of a table sauce which they called Worcestershire sauce, were denied an injunction to restrain the sale by a resident of Wisconsin of a similar sauce called Worcestershire sauce imported from its London maker, on the ground that the term seemed to be a generic one given to this kind of sauce from the fact that it was originally manufactured in Worcestershire, and that it could hardly be claimed that the plaintiffs, simply because they reside in that place  
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*Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 50 U. S. App. 490, 86 Fed. 608; *Delaware & H. Canal Co. v. Clark*, 13 Wall. 323, 20 L. ed. 583; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 547, 34 L. ed. 1003, 11 Sup. Ct. Rep. 396; *Brown Chemical Co. v. Meyer*, 139 U. S. 542, 35 L. ed. 248, 11 Sup. Ct. Rep. 625; *Columbia Mill Co. v. Alcorn*, 150 U. S. 464, 37 L. ed. 1146, 14 Sup. Ct. Rep. 151; *Evans v. Von Laer*, 32 Fed. 154; *New York & R. Cement Co. v. Coplay Cement Co.* 45 Fed. 213; *Genesee Salt Co. v. Burnap*, 67 Fed. 535, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 821; *Hoyt v. J. T. Lovett Co.* 31 L. R. A. 44, 17 C. C. A. 652, 39 U. S. App. 1, 71 Fed. 177; *Elgin Butter Co. v. Elgin Creamery Co.* 51 Ill. App. 232, 155 Ill. 136, 40 N. E. 616; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125.

To entitle appellant to relief on the

and manufacture a sauce under that name, have the sole right to the application of the term to that species of sauce.

The use of the geographical designation of a locality from which the principal material of a manufactured article comes will not be enjoined where the great element of value of the manufactured article consists in the locality of the principal material of which it is composed. *Gabriel v. Sicilian Asphalt Paving Co.* 23 Misc. 534, 52 N. Y. Supp. 722.

Thus, an importer of "Asphalt Mastic" mined and manufactured in the duchy of Brunswick, Germany, cannot appropriate the word "Brunswick" as a trademark so as to enjoin a manufacturer of asphalt from crude asphalt rock which comes from that locality from designating his product as "Brunswick Rock Asphalt." *Gabriel v. Sicilian Asphalt Paving Co.* 44 App. Div. 633, 56 N. Y. Supp. 30.

And a manufacturer of a pigment near Clinton, N. Y., from iron ore mined in that vicinity, cannot exclusively appropriate the word "Clinton" as a trademark as against a manufacturer of a similar pigment in Brooklyn from iron ore also mined in the Clinton district. *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66, 50 N. Y. Supp. 437.

In *New York & R. Cement Co. v. Coplay Cement Co.* 10 L. R. A. 833, 44 Fed. 277, the rule that as against a person using a geographical name on goods actually made elsewhere protection will be given to one who can truthfully use such name was limited to cases in which the latter's right to use such name is exclusive. The court said: "Though it be conceded that the name 'Rosendale Cement' is understood by the public as designating the place where it is made and comes from, and that the defendants truly call their cement by that name, the question still remains whether they can be prosecuted therefor at the suit of a private party, who is only one of the many who manufacture cement at Rosendale, and truly denominate their cement 'Rosendale Cement.' Would not the allowance of such an action be carrying the doctrine of liability for unfair competition in business too far? The counsel for the complainants frankly concedes that the principle for which he contends would enable any crockery merchant of Dresden or elsewhere, interested in the particular trade, to sue a dealer of New York or Philadelphia who should sell an article as Dresden china when it is not Dresden china. It seems to us that this would open a Pandora's box of vexatious litigation. . . . No doubt the sale of spurious goods, or holding them out to be different from what they are,



ground of false and fraudulent conduct on the part of the appellees, the evidence must be convincing that the latter were endeavoring to palm off their goods as those of the former. Such evidence cannot arise out of the use by the appellees of words, marks, or other indicia which they had the right to use, unless they are so used as to amount to a false representation that their goods are the goods of appellant.

*Laurence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 551, 34 L. ed. 1005, 11 Sup. Ct. Rep. 396; *Brown Chemical Co. v. Meyer*, 139 U. S. 544, 35 L. ed. 249, 11 Sup. Ct. Rep. 625.

If any fraud is committed, it is committed by the purchasers at their own instance and without any instigation on the part of the appellees. They alone are liable for such fraud or false representation.

is a great evil, and an immoral, if not an illegal, act; but unless there is an invasion of some trademark, or tradename or peculiarity of style, in which some person has a right of property, the only persons legally entitled to judicial redress would seem to be those who are imposed upon by such pretenses."

None of the other cases appear to recognize this limitation. In *criticizing this rule*, Putnam, J., in *Carlsbad v. Tibbetts*, 51 Fed. 852, says that whatever difficulties there might be in a suit at law for damages in behalf of one manufacturer among many, there is no more inconvenience in proceeding in equity in such cases than on bills in behalf of parishioners to establish a general *modus*, or commoners respecting rights of common, or of one taxpayer in behalf of all others in the town,—all of which are well-recognized subjects of equity jurisdiction.

Corporations doing business in the same city and having a common interest may unite in a suit in equity to prevent the deceptive use of the name of such city on products made elsewhere to the damage of their business. *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, *Reversing* 82 Fed. 816.

#### d. Names of mineral springs.

The names of mineral springs are geographical, but are almost uniformly protected as trademarks for the water or salts therefrom when claimed by the exclusive owner of the spring or of the right to the sale of its products.

Thus, the owner of the Congress spring in Saratoga Springs, which is the only spring to which the name "Congress" is applied, is entitled to be protected in the exclusive use of that word as a trademark in the sale of the water of such spring, which is possessed of medicinal qualities peculiar to itself. *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82.

And the owner of a mineral spring, who has adopted and applied the name "Bethesda" to such spring to mark or distinguish the waters thereof in the market, has such a right to its exclusive use as a trademark as will entitle her to enjoin the owner of an adjoining spring from the sale of the water therefrom as being "Bethesda Mineral Water" or the water dealt in or sold by the former, whether so represented by way of trademark, label, or other simulated device. *Dunbar v. Glenn*, 42 Wls. 118, 24 Am. Rep. 395.

And the owners respectively of the upper and

*American Cereal Co. v. Eli Pettijohn Cereal Co.* 72 Fed. 907.

The reputation of Elgin as a manufacturing point—even its reputation as a point where watches were manufactured—was a proper and legitimate consideration for the appellees to act upon.

*Wotherspoon v. Currie*, 42 L. J. Ch. N. S. 130.

\*Mr. Chief Justice Fuller delivered the [670] opinion of the court:

The circuit court of appeals held that the bill must be dismissed for want of jurisdiction. The parties to the suit were all citizens of Illinois, and the court was of opinion that it could not be maintained under the act of March 3, 1881 (21 Stat. at L. 592, chap. 138).

In the *Trademark Cases*, 100 U. S. 82, *sub*

lower *Blue Lick Springs* in Nicholas county, Ky., who have long used the words "Blue Lick Water" as a trademark for the waters of such springs without objection on the part of either, may maintain a joint action to enjoin the use of the words "Blue Lick" as a trademark in connection with the advertisement and sale of water from an artesian well in Campbell county, or elsewhere. *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21.

So, the city of Carlsbad, being the exclusive owner of the mineral springs situated there, has the right to indicate by that name the origin of the natural salts prepared by it by evaporation of the waters of such springs, and is entitled to the aid of a court of equity to prevent the use of the word "Carlsbad" so as to induce the public to accept as genuine artificial salts not the product of the Carlsbad springs. *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167, *Affirming* 68 Fed. 794.

And the fact that skilled chemists can combine the constituents of the genuine salts so as to make a more or less perfect imitation, and will on mention of the name of such salts know their constituent elements, does not justify the manufacturer of such artificial salts in affixing the name "Carlsbad" thereto, although their product may contain, so far as chemistry can determine, the same chemical constituents. *Carlsbad v. W. T. Thackeray & Co.* 57 Fed. 18.

And the inconspicuous addition of the word "artificial" to the labels on such salts will not defeat the right of the city of Carlsbad to equitable relief, although the artificial salts may be superior to the natural product. *Ibid.*

So, in *Carlsbad v. Schultze*, 78 Fed. 469, the city of Carlsbad was held entitled to enjoin the use of the word "Carlsbad" to designate an artificial water, unless such word were accompanied with others plainly indicating that the water was manufactured in this country and was not the product of the Carlsbad spring, even though the person so using that word had for thirty-four years been engaged in the manufacture and sale of such water without protest of any kind, having commenced the business five years before a bottle of the natural Carlsbad had been seen in this country, and twelve years before it was imported for sale except in small quantities.

Allegations in the complaint of the purchaser of a mineral spring called "Clysmic" that she entered into a contract with a dealer to sell him the water from such spring at the same price as her vendors, giving him the exclusive right to sell the same for twenty years, and that under such contract the water was shipped, sold,



*nom. United States v. Steffens*, 25 L. ed. 550, this court held that the act of July 8, 1870, carried forward into §§ 4937 to 4947 of the Revised Statutes, was void for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to that which was subject to the control of Congress. The cases involved certain indictments under the act of August 14, 1876, "to punish the counterfeiting of trademark goods and the sale or dealing in of counterfeited trademark goods," and the opinion treated chiefly of the act of 1870 and the civil remedy which that act provided, because, as Mr. Justice Miller observed, "the criminal offenses described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trademarks which were registered under the provisions of the

former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it."

In its opinion the court, adhering to the settled rule to decide no more than is necessary to the case in hand, was careful to say that the question "whether the trademark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the \*present case, we propose to leave undecided." And, further: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trademarks and of the duty of Congress to pass any laws necessary to carry treaties into effect."

and advertised as "Clysmic Water" and that name registered as a trademark, show such exclusive right to the use of the word "Clysmic" as justifies the granting of a preliminary injunction to restrain the sale by such dealer of water from an adjoining well as "Clysmic Water." *Hill v. Lockwood*, 62 Wis. 507, 22 N. W. 581.

In a subsequent case between the same parties in a circuit court of the United States, the purchaser of the "Clysmic" spring, by acquiring the spring, property, and business, and entering into a contract with the person who had first adopted and used the name "Clysmic" in developing the spring and selling the water, giving him the exclusive right for twenty years to sell water from such spring, was held, in *Hill v. Lockwood*, 32 Fed. 389, to have acquired such an interest in the word "Clysmic" as a name or quasi trademark when applied to the spring and the waters taken therefrom as forbade its use by the other contracting party during the term specified in the contract in the designation of rival waters.

In *Apollinaris Co. v. Scherer*, 23 Blatchf. 459, 27 Fed. 18, the court said that no doubt could be entertained that the name "Hunyadi Janos" when applied to the water of a spring christened by that name was a valid trademark, and that the owner should be protected against its unauthorized use by another.

And the use on labels and bottles of the word "Apollinis" in connection with the representation of a bow and arrow or anchor was restrained by preliminary injunction in *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. 380, Fed. Cas. No. 496, on account of the similarity between them and the word "Apollinaris" and the representation of an anchor previously used by the orator.

The lessees of the lower Blue Lick Springs, who handle the water of such springs as an article of commerce, and have for many years used the words "Blue Lick Water" as their trademark, are entitled to be protected in the exclusive use of such words as against persons engaged in selling water from an artesian well as Blue Lick Water. *Parkland Hills Blue Lick Water Co. v. Hawkins*, 95 Ky. 502, 26 S. W. 389.

The lessee of the Apollinaris mineral spring engaged in the sale of the water therefrom was, in *Apollinaris Co. v. Moore* (U. S. C. C. E. D. Pa.) *Cox Manual of Trade Mark Cases*, 419, granted an injunction to restrain the use of the word "Apollinaris" in connection with the sale of an artificial water.

Under the English trademark act of 1883, 179 U. S.

the names of well-known mineral springs, such as Apollinaris, Hunyadi Janos, Friedrichshall, being geographical, cannot be registered as "fancy words not in common use" within the meaning of § 64, nor as "invented words" or "words having no reference to the character or quality of the goods and not being a geographical name" within the same section, as amended by the act of 1888, whether sought to be registered with respect to the waters of the springs or the product of such waters. *Re Apollinaris Co.'s Trademarks* [1891] 2 Ch. 186, 61 L. J. Ch. N. S. 625, 65 L. T. N. S. 6.

But the exclusive importers of Apollinaris water into England, under agreement with the owners of the Apollinaris spring in Germany, are entitled to restrain the use of the word "Apollinaris" in connection with waters other than the genuine. *Apollinaris Co. v. Edwards*, *Seton*, 4th ed. 237, *Cox, Manual of Trade Mark Cases*, 285; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

And the owner of a mineral spring, the water from which has always been sold and dealt in either under the name of "Hunyadi Janos" water, or under some abbreviation thereof, has the exclusive right to the use of the word "Hunyadi," and is therefore entitled to enjoin the owner of a spring in that vicinity from selling the water therefrom under any name or description of which the word "Hunyadi" forms a part without clearly distinguishing such water from that of the other spring. *Saxlehner v. Apollinaris Co.* [1897] 1 Ch. 893, 66 L. J. Ch. N. S. 533, 76 L. T. N. S. 617.

See also II. *infra*, *Unfair competition*.

#### e. Deceptive use of geographical name.

The rule that equity will not interfere to protect an alleged trademark which is untruthfully used has been applied to cases where the trademark sought to be protected consists of, or contains, a geographical name.

Thus, in a number of instances a false representation in the alleged trademark as to the place of origin or manufacture of the article to which it is attached has been held to defeat the right to equitable relief.

Such are cases where the trademark seeks to convey the false impression that the product is an imported article. *Raymond v. Royal Baking-Powder Co.* 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231; *Alban B. Wrisley Co. v. Iowa Soap Co.* 104 Fed. 548; *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 557; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556; *Leather-Cloth Co. v. American Leather-Cloth Co.* 4 De G. J. & S. 137, 3 New Rep. 264, 33 L. J. Ch. N. S.



The act of March 3, 1881, followed. By its 1st section it was provided that "owners of trademarks used in commerce with foreign nations or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes, which by treaty, convention, or law, afford similar privileges to citizens of the United States, may obtain registration of such trademarks by complying with" certain specified requirements.

By the 2d section the application prescribed by the 1st "must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration" "that such party has at the time a right to the use of the trademark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such

near resemblance thereto as might be calculated to deceive; that such trademark is used in commerce with foreign nations or Indian tribes, as above indicated; . . ."

The 3d section provided that "no alleged trademark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as before mentioned, or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trademark owned by another and appropriate to the same class of merchandise; or which so nearly resembles some other person's lawful trademark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

199, 10 Jur. N. S. 81, 9 L. T. N. S. 558, 12 Week. Rep. 289, Affirmed on other grounds in 11 H. L. Cas. 533, 35 L. J. Ch. N. S. 53, 11 Jur. N. S. 513, 12 L. T. N. S. 742, 13 Week. Rep. 873.

Or falsely represents that the article is manufactured in a particular place by a person whose manufacture there had acquired a great reputation. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436.

Or that the goods sold under such trademark are manufactured at a place which has a reputation for making fine goods. *Coleman, B. & W. Co. v. Dannenberg Co.* 103 Ga. 784, 41 L. R. A. 470, 30 S. E. 639.

Or contains a false representation calculated to deceive the public as to the manufacture of the article and the place where it is manufactured. *Joseph v. Macowsky*, 96 Cal. 518, 19 L. R. A. 53, 31 Pac. 914; *Pepper v. Labrot*, 8 Fed. 29.

The use of the words "East Indian" in connection with the word "remedy" or "remedies" as a trademark for medicine, falsely to denote that the medicines were used in the East Indies and that the formula for them was obtained there, defeats the right to equitable protection against infringement. *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397.

The owner of several mills, who has ceased to manufacture at one of such mills, and supplies the customers of that mill with the product of his mills situated in another state, cannot enjoin the violation of a trademark which assumes that the mill is still running. *American Cereal Co. v. Eli Pettijohn Cereal Co.* 72 Fed. 903.

But the use of the word "Mazawattee," consisting of the Hindustani word "maza" and the Cingalese word "wattce," as a trademark for tea, is not calculated to deceive the public into believing that it means an estate in Ceylon, or that the tea to which its name is attached comes from some particular estate there, although the word "wattce" means an estate or garden, where the compound word is meaningless in either Hindustani or Cingalese, and there is no place or estate of that name. *Re Densham's Trade-mark* [1895] 2 Ch. 176, 12 Rep. 283, 64 L. J. Ch. N. S. 286, 634, 72 L. T. N. S. 614, 43 Week. Rep. 515.

And the fact that the city of Carlsbad sells "Carlsbad Sprudel Lozenges," which contain but 10 per cent of the ingredients which are found in Carlsbad water and 90 per cent of cane sugar, is not such fraud or misrepresentation as will defeat its right to restrain the use of the word "Carlsbad" on artificial salts not the product of the Carlsbad spring. *Carlsbad v.*

*Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167, Affirming 68 Fed. 794.

And that one of the mills of manufacturers who seek an injunction against the deceptive use of the name of a city on a product made elsewhere is situated outside the city limits will not preclude relief when that mill is, for all practical purposes, a part of the owners' plant within the city. *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, Reversing 82 Fed. 816.

And that a manufacturer's label states that his factory is in New York, when in fact it is at Newark, is not such a false representation as to the place of origin as to deprive him of his right to enjoin an infringement. *Tarrant & Co. v. Hoff*, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959.

And the use of the word "Vienna" by a manufacturer of bread in this country to designate a particular kind of bread was held to constitute no deception, in *Fleischmann v. Schuckmann*, 62 How. Pr. 92, as the place of its manufacture was given, and it was known that bread could not be imported from abroad for use here.

See also I. b. *supra*, *Geographical name used in arbitrary or fanciful sense*.

The misrepresentation need not be in express words, but may be implied from the words used. *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990, Reversing 39 N. Y. S. R. 488, 15 N. Y. Supp. 240.

Registration in the following instances was denied on this ground: "Lancaster" for tickling manufactured at Philadelphia, Pa. (*Ex parte Farnum*, 18 Off. Gaz. 412. Disapproving *Re Cornwall*, 12 Off. Gaz. 312); "American Sardines" for Menhaden or Moss Bunker (*Re American Sardine Co.* 3 Off. Gaz. 495); "London" on food for animals as calculated to convey the impression that the food was manufactured in London (*Ex parte Knapp*, 16 Off. Gaz. 318); "Boston Dental Association" in connection with a business in Chicago as deceptive (*Re Snyder*, 14 MS. D. 412, as digested in *Newton's Digest of Patent Office Trademark Decisions*, No. 206); "Mexican" for silver ware, as creating the presumption that the ware was manufactured in Mexico (*Re Holmes & Edwards Silver Co.* 36 MS. D. 11, as digested in *Newton's Digest of Patent Office Trademark Decisions* No. 215).

See also Patent Office Decisions cited in I. a. b. *supra*.

So, the fraudulent use of the word "Habana" on a label for cigars manufactured in Mexico continued up to the time of making an applica-



By the 4th section certificates of registration of trademarks were to be issued, copies of which and of trademarks and declarations filed therewith should be evidence "in any suit in which such trademarks shall be brought in controversy;" and by § 5 it was provided that the certificate of registry [672] "should remain in force for thirty years from its date, and might be renewed for a like period. By the 11th section nothing in the act was to be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trademark in controversy is used on goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe." The 7th section was as follows:

"That registration of a trademark shall

tion for its registration as a trademark defeats the manufacturer's right to register as a new mark this label with the true place of origin substituted for "Habana." *Re Fuente's Trademarks* [1891] 2 Ch. 166, 60 L. J. Ch. N. S. 308, 64 L. T. N. S. 196, 39 Week. Rep. 489.

There are also a number of cases in which equitable relief was denied because of misrepresentation as to place of origin, not in the trademark itself, but collateral thereto. Examples of such cases are: *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101; *Kenny v. Gillet*, 70 Md. 574, 17 Atl. 499; *Hobbs v. Francais*, 19 How. Pr. 567; *Hilson Co. v. Foster*, 80 Fed. 896; *Pidding v. How*, 8 Sim. 477, 6 L. J. Ch. N. S. 345; *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Pinto*, 57 L. T. N. S. 31; *Wood v. Lambert*, L. R. 32 Ch. Div. 247, 55 L. J. Ch. N. S. 377, 54 L. T. N. S. 314.

## II. Unfair competition.

The importance of the general rule denying the right to a trademark in a geographical name, is, of course, materially affected by the equally well-settled principle that, independently of the existence of a technical trademark, no one shall be permitted so to dress up his goods as to induce a purchaser to believe he is buying those of another. In a number of cases a court of equity has restrained the use of geographical words when adopted for the purpose of defrauding the public and trading upon the reputation of a rival dealer or manufacturer, although the person asking the intervention of the court may not have had the exclusive right to the use of those words.

Thus, independently of the question whether the words "German household" can be appropriated as a trademark for dyes manufactured in Germany, an importer of such dyes is entitled to restrain a rival dealer from so using such words upon his packages, labels, and circulars as will, in connection with other similarities in labels and style of package, amount to a fraudulent imitation, and be likely to deceive purchasers into the belief that the dyes sold by him are in fact the same as those sold by the former dealer. *Oppermann v. Waterman*, 94 Wis. 583, 69 N. W. 569.

So, an exclusive property in the geographical name "Portland" as applied by a dealer in Newark to stoves sold by him is not an indispensable prerequisite to relief against the use of this name by rival dealers as an imitative device for the purpose of inducing the public to buy their stoves under the belief that they were buying the stove of the former dealer. *Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 728.

And an exclusive or proprietary right in the

be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy, or colorably imitate any trademark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trademark at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trademark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and ap-

names "Minneapolis" or "Minnesota" as brands for flour is not necessary in order to obtain an injunction against unfair competition in trade by the deceptive use of such words. *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608.

And, whether a manufacturer is entitled to the exclusive use of the words "American Cold Japan" as a trademark for roofing paint or not, he is entitled to the lawful protection of his property and business from unlawful competition in trade by means of simulated circulars, advertisements and general line of business. *Reeder v. Brodt*, 4 Ohio N. P. 265.

And the right to use the name "Vichy" in connection with the sale of the waters of a mineral spring at or near Vichy, France, which belongs to the person having title to such spring and the exclusive right to the sale of the waters thereof, whether a trademark, or not, will be protected against the use of that word by other persons to designate waters obtained from the same locality. *La Republique Francaise v. Schultz*, 57 Fed. 37.

The name "Vichy" as applied by the owners of mineral springs at or near Vichy, France, to designate the locality of origin and indicate the general characteristics of the waters, is not a trademark or tradename in the strict legal sense, and a suit to restrain the application of such name to an artificial mineral water can only be maintained upon the theory of unfair competition. *La Republique Francaise v. Schultz*, 94 Fed. 500, Affirmed in 42 C. C. A. 233, 102 Fed. 153.

A manufacturer of cigarettes will be enjoined from the use of the words "St. James" on his labels, where such labels were adopted for the purpose of inducing the public, when buying his cigarettes, to believe that they were made by a rival manufacturer, although the cigarettes of both manufacturers were made of tobacco from the St. James parish in Louisiana, which, being a geographical name, could not be appropriated as a trademark. *Kinney v. Basch* (N. Y.) 16 Am. L. Reg. N. S. 596.

And although a manufacturer of salt in Genesee county, N. Y., can acquire no trademark property in those words, he is entitled to enjoin a vendor of salt made in that county from so using the words as to represent his salt to be that of the former maker. *Genesee Salt Co. v. Burnap*, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 818.

So, the long and exclusive use by an American brewer of the geographical name "Budweiser" to designate a brand of beer made according to a distinctive process used in Budweis, Austria,



pellate jurisdiction in such cases, without regard to the amount in controversy."

Thus it is seen that under the act registration is prima facie evidence of ownership; that the certificate is evidence in any suit or action in which the registered trademark is brought in controversy; that the act practically enables treaty stipulations to be carried out, and affords the basis for judicial redress for infringement in foreign countries, where such redress cannot ordinarily be had without registration, as well as in the courts of the United States, when jurisdiction would not otherwise exist. For it is the assertion of rights derived under the act which gives cognizance to courts of the United States when the controversy is between citizens of the same state, though the benefits of the act cannot be availed of if the alleged trademark is not susceptible of

exclusive ownership as such, and not, therefore, of registration.

Trademarks are not, defined by the act, which assumes their \*existence and owner- [673] ship, and provides for a verified declaration by applicants for registration, that they have the exclusive right to the particular trademark sought to be registered.

The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark

though it confers no property right or monopoly in such name as a trademark, entitles him to enjoin the use of such name by a rival to designate a brand not made according to such process but adopted for the purpose of availing himself of the former's reputation. *Anheuser-Busch Brewing Assn. v. Fred Miller Brewing Co.* 87 Fed. 864.

And the sale of the products of one manufacturer of bluing under the representation that they are "American Ball Blue" or "American Wash Blue," by which name the products of another manufacturer are well known to the trade and public, comes within the definition of unfair competition, and will be restrained, although the latter manufacturer may have no strict right to a trademark in such words by reason of the fact that the word "American" is a geographical name. *Heller & M. Co. v. Shaver*, 102 Fed. 882.

In *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884, the court said that while it is the right of any producer, or manufacturer to show by some form of statement or legend upon the label or brand of his articles where it was made, the names of places being to that extent common property and incapable of appropriation as trademarks, yet he may not use the name in a manner and with the intent to make it appear that his article is the same as another still on the market, which theretofore had been made at the same place, and had been known by the same or by a similar name.

Thus the fact that the vineyards of rival wine growers are situated in the same district will not justify one of such growers in using as a trademark for his wine the name of such district so combined with other words or devices as to form a colorable imitation of the other's trademark, and to mislead the public. *Seixo v. Provezende*, L. R. 1 Ch. 191, 12 Jur. N. S. 215, 14 L. T. N. S. 514, 14 Week. Rep. 357.

So, although a manufacturer of a pigment from red iron ore mined near Clinton, N. Y., cannot be enjoined from designating his product as "Clinton Hematite Red" or "Metallic Clinton Paint," he will be restrained from so using such words as to constitute a close imitation of the label or trademark previously used by another manufacturer of pigments from ore mined in the Clinton district. *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66, 50 N. Y. Supp. 437.

And a packing company will be enjoined from using as a trademark for its goods the words "Clipper," "Clipper Brand" or "Clipper City Brand," although the city in which it is located is to some extent known as the "Clipper city,"

where such use tends to induce the public to purchase its goods as those of another manufacturer who has long used the words "Clipper Brand" in connection with a clipper ship under full sail as a designation for similar goods. *Manitowoc Pea-Packing Co. v. Numsen*, 35 C. C. A. 267, 93 Fed. 196.

So, in *Compania General de Tabacos v. Rehde*, 5 Rep. Pat. Cas. 61, the lessees from the Spanish government of the cigar factories in the Philippines, whose product was sold under a label which was virtually identical with that used by the government and included the word "Cavite," were held entitled to enjoin the sale of cigars with a label including the word "Cavite" by manufacturers whose only justification offered was a general statement that somewhere or other in Cavite they were manufacturing the cigars. This was held not to be satisfactory evidence, and the inference was declared to be that the defendants were attempting by the use of the word "Cavite" to pass off their goods as those of the plaintiffs.

And although one can have no property in the title "Old London Dock Gin," he may restrain the use of a bottle and label which have a general resemblance of form, symbols, and accompaniments to his own, and are therefore calculated to mislead the public. *Bininger v. Wattles*, 28 How. Pr. 206.

And this seems to be the principle involved in *Hiram Walker & Sons v. Hockstaeder*, 85 Fed. 776, and *Hiram Walker & Sons v. Mikolas*, 25 C. C. A. 235, 51 U. S. App. 133, 79 Fed. 955, in which the manufacturers of "Canadian Club Whiskey" were protected against the use of the words "Canadian Rye Whiskey" in connection with other devices so as to clearly resemble the former distillers' trademarks, brands, and labels, although in the latter case the court seems to regard the words "Canadian Club Whiskey" as a trademark. See also *Cohn v. Gottschalk*, 16 N. Y. S. R. 818, 2 N. Y. Supp. 13; *Cahn v. Hoffman House*, 7 Misc. 461, 28 N. Y. Supp. 388, 1 a, *supra*.

And the same principle may well be regarded as the ground for decision in *Wheeler v. Johnston*. Ir. L. R. 3 Eq. 298, in which the maker of aerated water in the Cromac district in Belfast, though held entitled to state, if true, that his water is manufactured from a Cromac spring on his premises, was enjoined at the instance of rival manufacturers in the same locality, who have adopted the designation "Cromac Springs" as the name of their establishment, from so using such words as to represent that his waters are manufactured or sold by them at their works, or from using such words as the



which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.

And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trademark. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; and cases cited.

The word "Elgin" is and has been for very many years the name of a well-known manufacturing city in Illinois. The factory and

business of appellees were located at Elgin, and in describing their watch cases as made there it is not denied that they told the literal truth so far as that fact was concerned, and this they were entitled to do according to the general rule. Obviously, to hold that appellant had obtained the exclusive right to use the name "Elgin" would be to disregard the doctrine characterized by Mr. Justice Strong in *Delaware & H. Canal Co. v. Clark*, as sound doctrine, "that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation."

But it is contended that the name "Elgin" had acquired a \*secondary signification in [674]

name of his place of business. The court said that the name of a place so adopted as the name of a factory or place of business, not containing a false representation and not copied from anyone else, became a good trademark, and that when known to the trade as the place of the manufacturer adopting it the court will protect his property in it,—but this ruling was clearly not necessary to the decision, and in making it the court has apparently used the term "trademark" for "trade-name."

Manufacturers of bitters from a secret recipe, which have become widely known as "Angostura Bitters" from the name of the town where first manufactured, who have removed their business elsewhere, though they can have no exclusive right to such words because anyone who discovers the secret of manufacture and makes and sells the same article may so designate it, are entitled to enjoin the use of the word "Angostura" upon a different bitters made at Ciudad Bolivar, formerly Angostura, by a rival manufacturer, who removed to that place after the change in name, where such use was calculated to deceive the public. *Siebert v. Findlater*, 7 Ch. Div. 801, 47 L. J. Ch. N. S. 233, 38 L. T. N. S. 349, 26 Week. Rep. 459.

So, one who has long manufactured and sold under the name "Yorkshire Relish" a sauce made according to a secret recipe is entitled to restrain the use of such words by a rival tradesman in connection with the manufacture and sale of a similar, but not identical, sauce without clearly distinguishing his product from the original. *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 710, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792, Affirming [1896] 2 Ch. 54, 65 L. J. Ch. N. S. 563, 74 L. T. N. S. 509; *Powell v. Birmingham Vinegar Brewing Co.* [1894] 3 Ch. 449, 13 Rep. 153, 71 L. T. N. S. 393; *Powell v. McNulty*, Cox Manual of Trademark Cases, 294.

The use of the word "Plymouth" upon packages containing gin not in fact made in Plymouth was enjoined in *Collinsplatt v. Finlayson*, 88 Fed. 693, as tending to promote unfair competition, and to induce the sale of spurious goods.

And a manufacturer of white lead in St. Louis is entitled to enjoin the use of the words "Southern or Southwestern White Lead, St. Louis," or "Southern White Lead Company, St. Louis," or "St. Louis," to designate an inferior quality of white lead manufactured in Chicago, as such use tends to deceive and defraud the public and complainant. *Southern White Lead Co. v. Coit*, 39 Fed. 492.

And the University of Oxford, England, 179 U. S.

which has so long used the name "Oxford" on Bibles published by it that it has come to be a means of showing their origin, is entitled to restrain the use of that name as a designation for Bibles by a publisher who has no connection with the place or name. *Oxford University v. Wilmore-Andrews Pub. Co.* 101 Fed. 443.

And the exclusive use of the word "Chicago" as applied to corset waists by a manufacturer in that city entitles him to enjoin others from using such name upon waists manufactured elsewhere for the purpose of availing themselves of the reputation which the goods thus branded have acquired. *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. 213.

So, the words "Vichy (Grand Grille)" upon labels on bottles of artificial mineral water imply that the water which the bottles contain is Vichy water from the Grand Grille spring, and their use will be enjoined as unfair competition with the right of the owner and lessee of that spring to sell the natural water under that name. *La Republique Francaise v. Schultz*, 42 C. C. A. 233, 102 Fed. 153.

And the owner of the mineral springs in Vichy, France, the waters from which have long been sold as "Vichy," is entitled to enjoin the use of a label on bottles containing water from the Saratoga Vichy spring on which the word "Vichy" is so prominently displayed as to represent to purchasers not accustomed to the article that the water was the product of the French wells. *La Republique Francaise v. Saratoga Vichy Springs Co.* 107 Fed. 459.

So, in *Lochgelly, I. etc. Co. v. Lumphinnans I. Co.* 6 Ct. Sess. Cas. 4th series, 482, the lessees of the minerals in the estate of Lumphinnans, under which there was a seam of coal known as the "Lochgelly splint seam," were enjoined from using the name Lochgelly, by which term coal mined from the Lochgelly collieries had long and exclusively been known, to designate any coal wrought by them excepting coal mined from their part of the Lochgelly splint seam, and then only under the designation "Lumphinnans splint coal, Lochgelly's seam."

This principle furnishes the ground for the decision in *Dennachle v. Young*, 10 Ct. Sess. Cas. 4th series, 874, in which a manufacturer of fire bricks at Glenborg, whose product had acquired a high reputation owing to the peculiarly fine quality of the seam of clay from which they were manufactured, was held entitled to restrain other manufacturers of bricks at Heathfield, 2 miles distant, from stamping the words "Young's Glenborg" on bricks made by them out of a clay on their own land identical with that at Glenborg and which they claimed was part



connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.

In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods; and protection is accorded against unfair dealing, whether there be a technical trademark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.

of the same seam. The court was of the opinion that such acts were intended to induce their customers to believe that their goods were manufactured at Glenborg; that the circumstance which influenced them was the high reputation which the Glenborg bricks had attained, and that the addition of the word "Young's" was clearly colorable. It also appeared that the word "Glenborg" was a registered trademark, and the decision was in part rested upon the fact that the acts of the defendant amounted to an infringement of such trademark, but the case presents sufficient grounds for the relief granted, irrespective of the question whether a technical trademark existed or not.

See also *I. c.*, *Right to geographical name as against residents of other localities.*

This doctrine of unfair competition seems to be the real ground for decision in those cases which protect the user of a geographical name, because from long use in connection with an article the name has acquired a secondary meaning, so that, instead of designating the place where the article is made, it indicates its origin, or that it is the product of a particular manufacturer or made according to his method.

Such is the case of *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 27 L. T. N. S. 393, 42 L. J. Ch. N. S. 130, in which a manufacturer of starch at Paisley, whose works were formerly located at a small settlement called "Glenfield," and whose product had long been known as "Glenfield Starch," was held entitled to restrain a starch manufacturer who subsequently set up his works in Glenfield from using the word "Glenfield" on his labels, and from representing his starch as "Glenfield Starch."

So, purchasers of a plow foundry at Deer River, New York, who removed the plant to another village but continued to stamp their plows "Deer River," by which designation they had become generally known, were granted a preliminary injunction, in *Gebble v. Stitt*, 82 Hun, 93, 31 N. Y. Supp. 102, Affirmed in 148 N. Y. 732, 42 N. E. 723, to restrain the use of such words by the purchaser of the original foundry for a blacksmith and general repair shop as a designation of plows manufactured there, where such words were not in good faith used by him to indicate the place of manufacture, but for the purpose of deceiving customers.

The name "Waltham" by its continued use for nearly fifty years by a manufacturer of watches at Waltham, Mass., as applied to watch movements, has acquired a secondary meaning as a designation of watches of a particular class, and its use by another manufacturer of watches at that place upon the plates of his watches will

If a plaintiff has the absolute right to the use of a particular word or words as a trademark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trademark is not in itself a good trademark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act com-

be enjoined unless accompanied by some statement which shall clearly designate such watches from those manufactured by the former. *American Waltham Watch Co. v. Sandman*, 96 Fed. 330; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141.

A brewer at Stone, England, whose ales have become known to the market and to the public under the terms "Stone Ales" or "Stone Ale," is entitled to restrain a brewer who has recently established a brewery at that place from selling or causing to be sold any ale or beer not of the former's manufacture, under the term "Stone Ale" or "Stone Ales," or in any way so as to induce the belief that such ale or beer is of the former's manufacture. *Montgomery v. Thompson* [1891] A. C. 217, 64 L. T. N. S. 749.

In *Huntley v. Reading Biscuit Co.* (1893) 10 Rep. Pat. Cas. 277, a biscuit manufacturer at Reading, whose biscuits had gained such a world-wide reputation under the name "Reading Biscuits" that that term denoted biscuits of his manufacture in the market, and any one asking to be supplied with Reading biscuits expected to get those manufactured by him, was held entitled to restrain other manufacturers in Reading from using the word "Reading" as descriptive of, or in connection with, the biscuits manufactured by them, without clearly distinguishing such biscuits from those of the former's manufacture.

It is true that the court in *Metcalf v. Brand*, 86 Ky. 331, 5 S. W. 773, said that when the name of a place has acquired such a secondary meaning it becomes a valid trademark, and that another manufacturer of the same article at the same place cannot use it as the name of the article, though he will not under such circumstances be hindered from using the name of the place geographically or to show his place of business or as his address. And Lord Westbury in *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 27 L. T. N. S. 393, 42 L. J. Ch. N. S. 130, *supra*, in pointing out that the term "Glenfield" has acquired in the trade a secondary signification in connection with a particular manufacture, declared that it had become the trade denomination of the starch made by the appellants. It is wholly taken out of its original meaning and in connection with starch had become the property of appellants. It is their right and title in connection with the starch. But the principle underlying all these cases is that manufacturers, though entitled to use the name of the place where they reside in connection with their goods, will be restrained from so using it as to represent their goods as those of another. And in considering what may induce purchasers



plained of. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 549, 34 L. ed. 1004, 11 Sup. Ct. Rep. 396; *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

[675] In *Singer Mfg. Co. v. June Mfg. Co.* the Singer machines were covered by patents, whereby there was given to them a distinctive character and form, which caused them to be known as the Singer machines, as differing from the form and character of machines made by others. The word "Singer" was adopted by the Singer Company as designative of their distinctive style of machines, rather than as solely indicative of the origin of manufacture. That word constituted the generic description of the type and class of machines made by that company, and on the

expiration of the patent, the right to make the patented article and to use the generic name necessarily passed to the public. But, nevertheless, this court held that those who availed themselves of this public dedication to make the machines and use the generic designation did so on condition that the name should be so used as not to deprive others of their rights or to deceive the public. Mr. Justice White, delivering the opinion, said:

"It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a two-fold significance, one generic and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine upon which the name is marked is made by him, then the right to use the name

to believe that their goods are those of another manufacturer the fact that the name of the place has become so associated with the latter's goods as to designate origin and ownership rather than the place of manufacture must be taken into account.

A manufacturer who first uses a geographical name for his goods may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting his custom. *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141.

But a manufacturer of plows has a right to select Moline, Ill., as a place of manufacture, because plows previously manufactured at that place have obtained a great reputation, and may go there with impunity and establish his plow factories there, and brand on his plows his own name and the name of the town. *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125.

And if a person has no exclusive right to a geographical name as a trademark, fraud cannot be predicated upon its use by another. *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66, 50 N. Y. Supp. 437.

The truthful use of a geographical name does not become actionable because it may proceed from a malicious motive. *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599.

But the rule that geographical names cannot be protected as trademarks was said, in *Lea v. Wolf*, 15 Abb. Pr. N. S. 1, not to apply where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trademark.

That the use by a second producer in describing truthfully his product of the name of a district of country already in use by another producer may have the effect of causing the public to mistake the origin or ownership of such product is no ground for enjoining such use. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581; *Evans v. Von Laer*, 32 Fed. 153.

And that confusion may result and a purchaser be induced to purchase the goods of one manufacturer when he desires those of another is no reason for enjoining the use by the former of the name of the town in which his manufactory is situated to designate his goods, which has long been so used by the earlier manufacturer, unless coupled with fraud on the part of the later manufacturer or those acting for and under him. *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, 94 Fed. 667.

To the contrary apparently is *Armstrong v.* 179 U. S.

*Raynes*, N. B. Eq. Cas. 144, in which the truthful use of the words "Extra No. 1 Lime, manufactured by Raynes Brothers at Greenhead," was held to be a breach of an injunction restraining the placing on casks or barrels containing lime the words "Greenhead Lime" or other marks in imitation thereof or only colorably differing therefrom.

### III. Summary.

Exceptions to the rule that there can be no trademark in a geographical name are more apparent than real. Save in the case of a geographical word arbitrarily or fancifully selected or used to designate a natural product by the exclusive owner of the locality, *e. g.*, a mineral spring, nearly, if not quite, all of the cases in which geographical names have been protected as trademarks present sufficient indicia of unfair competition to have warranted relief on that ground, whether any technical trademark could exist or not.

The dressing up of his goods by one manufacturer or dealer so as to represent them to be those of another is the gravamen of unfair competition, in cases of the character included in this note. And to constitute unfair competition by the use of a geographical name as the designation of a commodity it would seem that where it is not untruthfully used, as by a resident of another place or upon a product not of such locality, such use must include the simulation of other distinguishing features of the "dress" of the complaining manufacturer's goods, the mere use of the name alone in such cases, it is submitted, not being sufficient to satisfy the requirement which all the cases make that it be so used as to misrepresent the origin of the product. Where from long use in connection with an article the geographical name has acquired a secondary meaning, so that it indicates origin and ownership rather than the place of manufacture, this fact may be considered in determining whether the use complained of is intended and calculated to deceive the public as to the identity of the products. But the confusion naturally resulting from the truthful use of a geographical name by a second producer to designate a natural or manufactured product of that locality furnishes no ground for equitable relief, since to hold otherwise would be to uphold an exclusive right to the use of a name which is not the subject of exclusive appropriation. The resulting injury to the first appropriator is a penalty which he ought to suffer for choosing as his trademark a word which it is well settled cannot be appropriated as such.



because of its generic signification would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another."

In *Reddaway v. Banham* [1896] A. C. 199, much relied on by appellant's counsel, Reddaway was a manufacturer of belting from camel hair, which belting he had called "camel-hair belting" for many years, so that it had become known in the trade as belting of his manufacture. Banham, long after, made belting from the same material, which he sold and advertised as Arabian belting, but subsequently he, or a company he had formed, began to call it "camel-hair belting." Reddaway and Reddaway's company brought an action for injunction, which was tried before Collins, J. (now Lord Justice Collins), and a special jury. The jury answered certain questions to the effect that "camel-hair belting" meant belting made by plaintiffs as distinguished from belting made by other manufacturers; that the words did not mean belting of a particular kind without reference to any particular maker; that the defendants so "described their belting as to be likely to mislead purchasers and to lead them to buy defendants' belting as and for plaintiffs' belting; and that defendants endeavored to pass off their goods as and for plaintiffs' goods, so as to be likely to deceive purchasers. On the findings of the jury, Collins, J., entered a decree for plaintiffs, and granted an injunction restraining defendants "from continuing to use the words 'camel hair' in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture." The case having gone to the court of appeal, the decree was reversed, and judgment entered for defendants ([1895] Q. B. 286); and plaintiffs thereupon prosecuted an appeal to the House of Lords, which reversed the court of appeal, and reinstated the decision of Collins, J., with a slight modification. The case was held to fall within the principle, as put by the Lord Chancellor, "that nobody has any right to represent his goods as the goods of somebody else."

Lord Herschell, referring to *Wotherspoon v. Currie*, L. R. 5 H. L. 508, said:

"The name 'Glenfield' had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it *prima facie* means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as 'camel hair' is descriptive of the material of which the plaintiffs' belting is made. Lord Westbury pointed out that the term 'Glenfield' had ac-

quired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff."

And Lord Herschell further said that he demurred to the view—

"That the defendants in this case were telling the simple truth when they sold their belting as camel-hair belting. I think the fallacy lies in overlooking the fact that a word may \*acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true."

These and like cases do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, can lawfully be withdrawn from common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts.

In the instance of a lawfully registered trademark, the fact of its use by another creates a cause of action. In the instance of the use in bad faith of a sign not in itself susceptible of being a valid trademark, but so employed as to have acquired a secondary meaning, the whole matter lies *in pais*.

It is to be observed, however, that the question we are considering is not whether this record makes out a case of false representation, or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word "Elgin" as against all the world. Was it a lawfully registered trademark? If the absolute right to the word as a trademark belonged to appellant, then the circuit court had jurisdiction under the statute to award relief for infringement; but if it were not a lawfully registered trademark, then the circuit court of appeals correctly held that jurisdiction could not be maintained.

And since, while the secondary signification attributed to its use of the word might entitle appellant to relief, the fact that, primarily, it simply described the place of manufacture, and that appellees had the right to use it in that sense, though not the right to use it without explanation or qualification, if such use would be an instrument of fraud, we are of opinion that the general rule applied, and that this geographical name could not be employed as a trademark, and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such.

In view of this conclusion, and of the fact that the question \*of the constitutionality of the act of Congress was not passed on by the court below, we have refrained from any discussion of that subject.

The Circuit Court of Appeals was right, and its decree is affirmed.



# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

- [679] \*FRANCIS C. WATSON, *Plaintiff in Error*, v. STATE OF RHODE ISLAND. [No. 10.]  
In Error to the Supreme Court of the State of Rhode Island.  
*Mr. David A. Gourick* for plaintiff in error.  
No appearance for defendant in error.  
October 15, 1900. Judgment *affirmed*, with costs, on the authority of *Murphy v. Massachusetts*, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.
- JOSIAH A. GOULD *et al.*, *Petitioners*, v. ASA S. HUGHES, Owner, etc. [No. 41.]  
On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.  
*Messrs. Eugene P. Carver and Henry R. Edmunds* for petitioners.  
*Messrs. Horace L. Cheyney and John F. Lewis* for respondent.  
October 22, 1900. Decree *affirmed*, with costs, by a divided court, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania.
- V. B. ARCHER *et al.*, *Appellants*, v. BALTIMORE BUILDING & LOAN ASSOCIATION *et al.* [No. 55.]  
Appeal from the Circuit Court of the United States for the District of West Virginia.  
*Mr. V. B. Archer* for appellants.  
*Messrs. Wm. Hepburn Russell, Wm. Beverly Winslow, and F. C. Slingluff* for appellees.  
November 5, 1900. Decree *affirmed*, with costs, on the authority of *Forsyth v. Hammond*, 166 U. S. 517, 41 L. ed. 1099, 17 Sup. Ct. Rep. 1004; *Central Trust Co. v. Seasingood*, 130 U. S. 491, 32 L. ed. 988, 9 Sup. Ct. Rep. 575; *Remington Paper Co. v. Watson*, 173 U. S. 451, 43 L. ed. 764, 19 Sup. Ct. Rep. 456; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 443, 494. and cases cited.  
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- WILLIAM DAY, *Appellant*, v. CONLEY & MCTAGUE, Keepers of the State Prison of the State of Montana, etc. [No. 57.]  
Appeal from the Circuit \*Court of the United States for the District of Montana.  
*Messrs. James W. Forbis and Chapin Brown* for appellant.  
*Mr. C. B. Nolan* for appellees.  
November 5, 1900. Final order *affirmed*, with costs, on the authority of *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; *Bergemann v. Backer*, 157 U. S. 653, 39 L. ed. 845, 15 Sup. Ct. Rep. 717; *Re Wilson*, 140 U. S. 585, 35 L. ed. 517, 11 Sup. Ct. Rep. 870; and see *State ex rel. Nolan v. Brantly*, 20 Mont. 173, 50 Pac. 410; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267.
- JAMES M. DAUGHERTY, *Plaintiff in Error*, v. THOMAS G. HOOD *et al.* [No. 233.]  
In Error to the Circuit Court of the United States for the District of Nebraska.  
*Mr. Joel W. West* for plaintiff in error.  
*Mr. Carroll S. Montgomery* for defendants in error.  
November 5, 1900. Writ of error *dismissed* for want of jurisdiction on the authority of *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.
- JOHN D. MCGILVERAY, *Plaintiff in Error*, v. JANE KNOTT. [No. 61.]  
In Error to the Supreme Court of the State of California.  
*Messrs. J. H. Ralston and C. H. Wilson* for plaintiff in error.  
No appearance for defendant in error.  
November 12, 1900. Judgment *affirmed*, with costs, on the authority of *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248.

**EMIL STEVENS, Appellant, v. STATE OF OHIO.** [No. 75.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

*Mr. J. B. Handlan* for appellant.

*Mr. Addison C. Lewis* for appellee.

November 12, 1900. Final order affirmed, with costs, on the authority of *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30, and cases cited; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323.

[681]\***CHARLES H. HART, Plaintiff in Error, v. STATE OF UTAH.** [No. 124.]

In Error to the Supreme Court for the State of Utah.

*Mr. Orlando W. Powers* for plaintiff in error.

*Mr. Alex. C. Bishop* for defendant in error.

November 12, 1900. Writ of error dismissed for want of jurisdiction, on the authority of *Long v. Converse*, 91 U. S. 105, 23 L. ed. 233; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

**BALTIMORE, CHESAPEAKE, & ATLANTIC RAILWAY COMPANY, Plaintiff in Error, v. MAYOR & CITY COUNCIL OF OCEAN CITY.** [No. 107.]

In Error to the Court of Appeals of the State of Maryland.

*Mr. N. P. Bond* for plaintiff in error.

*Mr. James E. Ellegood* for defendants in error.

November 19, 1900. Writ of error dismissed for the want of jurisdiction on the authority of *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *F. G. Ooley Stone Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725; *Amsbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

**SCHUYLER NATIONAL BANK et al., Plaintiffs in Error, v. JAMES GADSDEN et al.** [No. 111.]

In Error to the Supreme Court of the State of Nebraska.

*Mr. C. J. Phelps* for plaintiffs in error.

*Messrs. George Thrush and Mattie N. Thrush* (two of the defendants in error).

November 19, 1900. Writ of error dismissed for want of jurisdiction, on the authority of *Rutherford v. Fisher*, 4 Dall. 22, 1 L. ed. 724; *Winn v. Jackson*, 12 Wheat. 135, 6 L. ed. 577; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Johnson v. Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669.

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**CALIFORNIA REDWOOD COMPANY, Appellant, v. ALBERT L. JOHNSON, Substituted for BENJAMIN S. LITTLE, Deceased** [No. 53]; and **CALIFORNIA REDWOOD COMPANY, Appellant, v. WILLIAM MAHAN.** [No. 54.]

Appeals from the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. Charles Page* for appellant.

*Mr. Barclay Henley* for appellees.

\*December 10, 1900. Decrees affirmed, with [682] costs, on the authority of *Hauley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986, and causes remanded to the Circuit Court of the United States for the Northern District of California.

**AGNES A. NIVER, Plaintiff in Error, v. GEORGE E. FIELDS et al.** [No. 98.]

In Error to the Circuit Court of the United States for the District of South Carolina.

*Messrs. W. S. Monteith and Leroy F. Youmans* for plaintiff in error.

*The Attorney General, Solicitor General Richards, and Mr. Robert A. Howard* for defendants in error.

December 17, 1900. Judgment affirmed, with costs, on the authority of *Malony v. Adsit*, 175 U. S. 281, 44 L. ed. 163, 20 Sup. Ct. Rep. 115.

**GEORGE W. REED, Administrator, etc., et al., Petitioners, v. JOHN A. STANLEY, Trustee, etc., et al.** [No. 293.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. A. B. Browne and Alex. Britton* for petitioners.

*Messrs. T. H. Hubbard, E. S. Pillsbury, and Wm. A. Maury* for respondents.

October 15, 1900. Denied. Announced by Mr. Justice Harlan. The CHIEF JUSTICE took no part in the consideration and disposition of this application.

**JOSHUA C. SAUNDERS, Petitioner, v. FERDINAND W. PECK et al.** [No. 188.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. W. A. Foster* for petitioner.

*Mr. A. M. Pence* for respondents.

October 15, 1900. Denied.

**ALFRED S. WOODWORTH, Petitioner, v. ALBERT H. NUTE et al.** [No. 285.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. Frederic Dodge* for petitioner.

*Messrs. Eugene P. Carver and E. E. Blodgett* for respondents.

October 15, 1900. Denied.

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**RODMAN FRANCIS MASTERS**, Claimant, etc.,  
*Petitioner*, v. **HORACE M. SARGENT et al.**  
[No. 292.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the First Circuit.

*Messrs. Frederic Cunningham and Lewis  
S. Dabney* for petitioner.

*Mr. Eugene P. Carver* for respondents.  
October 15, 1900. *Denied*.

[683] **DAVE H. MORRIS et al.**, *Petitioners*, v. **NEW  
YORK & WESTCHESTER WATER Co.** [No.  
294.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Second Circuit.

*Mr. Chas. E. Coddington* for petitioners.

*Mr. Allan McCulloh* for respondents.  
October 15, 1900. *Denied*.

**BLUFORD WILSON et al.**, *Petitioners*, v.  
**GEORGE W. DUNSETH et al.** [No. 295.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Seventh Circuit.

*Messrs. Bluford Wilson and Philip Bar-  
ton Warren* for petitioners.

*Mr. Burke Vaneil* for respondent.  
October 15, 1900. *Denied*.

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**STEAMSHIP STYRIA, ETC.**, *Petitioner*, v.  
**JAMES L. MORGAN et al.** [No. 300];  
**STEAMSHIP STYRIA, ETC.**, *Petitioner*, v.  
**SCHUYLER L. PARSONS** [No. 301]; **STEAM-  
SHIP STYRIA, ETC.**, *Petitioner*, v. **ALFRED  
S. MALCOMSON** [No. 302]; and **STEAM-  
SHIP STYRIA, ETC.**, *Petitioner*, v. **JOHN  
MUNROE et al.** [No. 303].

Petition for Writs of Certiorari to the  
United States Circuit Court of Appeals for  
the Second Circuit.

October 15, 1900. *Granted*.

**WILLIAM S. JEWETT**, *Petitioner*, v. **UNITED  
STATES.** [No. 309.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the First Circuit.

*Mr. M. F. Dickinson, Jr., and Hollis R.  
Jiley* for petitioner.

*Solicitor General Richards* for respondent.  
October 15, 1900. *Denied*.

**UNITED STATES LIFE INSURANCE COMPANY,**  
*Petitioner*, v. **J. E. ROSS**, Administrator,  
etc. [No. 345.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Fifth Circuit.

*Messrs. Chas. E. Patterson and George  
Clark* for petitioner.

*Mr. Walter S. Baker* for respondent.  
October 15, 1900. *Denied*.

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**GEORGE H. TOMPKINS**, *Petitioner*, v. **PACIFIC  
MUTUAL LIFE INSURANCE COMPANY.**  
[No. 382.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Fourth Circuit.

*Mr. F. B. Enslow* for petitioner.

No appearance for respondent.

October 15, 1900. *Denied*.

**FRANK W. FUNK**, *Petitioner*, v. **UNITED  
STATES.** [No. 319.]

Petition for a Writ of Certiorari to the  
Court of Appeals of the District of Colum-  
bia.

*Messrs. D. W. \*Baker and Alex Wolf* for [684]  
petitioner.

*Solicitor General Richards* for respondent.

October 22, 1900. *Denied*.

**MUTUAL LIFE INSURANCE COMPANY, Peti-  
tioner**, v. **FRANK E. DINGLEY**, Administra-  
tor, etc. [No. 342.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Ninth Circuit.

October 22, 1900. *Granted*.

**WILLIAM B. DINSMORE et al.**, *Petitioners*, v.  
**SOUTHERN EXPRESS COMPANY et al.** [No.  
390.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Fifth Circuit.

October 22, 1900. *Granted*.

**GRAND ISLAND & WYOMING CENTRAL RAIL-  
ROAD COMPANY et al.**, *Petitioners*, v.  
**THOMAS SWEENEY.** [Nos. 432, 433, 434,  
435.]

Petition for Writs of Certiorari to the  
United States Circuit Court of Appeals for  
the Eighth Circuit.

*Messrs. Chas F. Manderson and N. K.  
Griggs*, for petitioners.

*Mr. Chas. W. Brown* for respondent.

October 22, 1900. *Denied*.

**CARBORUNDUM COMPANY, Petitioner**, v.  
**ELECTRIC SMELTING & ALUMINUM COM-  
PANY.** [No. 446.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Third Circuit.

*Messrs. Geo. H. Christy, Thos. W. Bake-  
well, and Francis Lynde Stetson* for peti-  
tioner.

*Mr. Chas. M. Vorce* for respondent.

October 22, 1900. *Denied*.

**FLORA J. BURT**, *Petitioner*, v. **C. GOTZIAN &  
Co.** [No. 444.]

Petition for a Writ of Certiorari to the  
United States Circuit Court of Appeals for  
the Eighth Circuit.

*Messrs U. M. Rose and G. B. Rose* for peti-  
tioner.

No appearance for respondents.

October 29, 1900. *Denied*.

ATLAS GLASS COMPANY, *Petitioner, v.* SIMONDS MANUFACTURING COMPANY *et al.* [No. 451.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Wm. L. Pierce for petitioner.

Messrs. James I. Kay and J. N. Cooke for respondents.

October 29, 1900. *Denied.*

[685]\*FIDELITY & DEPOSIT COMPANY, *Petitioner, v.* R. H. COURTNEY, Receiver. [No. 454.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

October 29, 1900. *Granted.*

J. N. ELLIOTT, Constable, *et al., Petitioners, v.* MURPHY L. ANDERSON *et al.* [No. 431.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

November 12, 1900. *Granted.*

JAMES L. MORGAN *et al., Petitioners, v.* AUSTRO-AMERICANA STEAMSHIP COMPANY [No. 474]; SCHUYLER L. PARSONS, *Petitioner, v.* AUSTRO-AMERICANA STEAMSHIP COMPANY [No. 475]; ALFRED S. MALCOMSON, *Petitioner, v.* AUSTRO-AMERICANA STEAMSHIP COMPANY [No. 476]; and JOHN MUNROE *et al., Petitioners, v.* AUSTRO-AMERICANA STEAMSHIP COMPANY [No. 477].

Mr. Harrington Putnam for Morgan *et al.*

Mr. Jno. M. Bowers for Parsons.

Mr. Wm. J. Curtis for Malcomson.

Mr. M. H. Regensburger for Munroe *et al.* No opposition.

November 12, 1900. Ordered that petition for cross writs of certiorari herein be filed in Nos. 300, 301, 302, and 303, and petition granted; and that Nos. 474, 475, 476, and 477 be stricken from the docket.

CREW-LEVICK COMPANY, *Petitioner, v.* BRITISH & FOREIGN MARINE INSURANCE COMPANY. [No. 375.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Theodore F. Jenkins and Thos. R. Elecock for petitioner.

Messrs. Wilhelmus Mynderse and Joseph O. Fraley for respondent.

November 19, 1900. *Denied.*

FARMERS' LOAN & TRUST COMPANY, Trustee, *Petitioner, v.* PENN PLATE GLASS COMPANY *et al.* [No. 457.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

November 19, 1900. *Granted.*

JOSEPH BENEDICT, *Petitioner, v.* CITY OF NEW YORK. [No. 458.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Richard L. Sweazy for petitioner.

Mr. Geo. L. Sterling for respondent.

November 19, 1900. *Denied.*

\*McSHERRY MANUFACTURING COMPANY *et al., Petitioners, v.* DOWAGIAC MANUFACTURING COMPANY. [No. 459.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Chas M. Peck for petitioners.

Mr. Fred L. Chappell for respondent.

November 19, 1900. *Denied.*

EDWARD S. RICHARDS, *Petitioner, v.* MICHIGAN CENTRAL RAILROAD COMPANY. [No. 479.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John C. Cheney and Alphonso Hart for petitioner.

Mr. Geo. S. Payson for respondent.

November 19, 1900. *Denied.*

CLINTON E. WORDEN & Co., *Petitioner, v.* CALIFORNIA FIG SYRUP COMPANY. [No. 482.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

November 19, 1900. *Granted.*

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, *Petitioner, v.* SUSAN E. HADLEY. [No. 473.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Robert M. Morse for petitioner.

Messrs. Alfred Hemenway and Arthur J. Selfridge for respondent.

December 10, 1900. *Denied.*

FIRST NATIONAL BANK OF HOUSTON, *Petitioner, v.* PRESLEY K. EWING *et al.* [No. 481.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. M. F. Mott and L. B. Moody for petitioner.

Messrs. Presley K. Ewing and Henry F. Ring for respondents.

December 10, 1900. *Denied.*

PETER HAGEN *et al., Petitioners, v.* SCOTTISH UNION & NATIONAL INSURANCE COMPANY. [No. 500.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

December 17, 1900. *Granted.*



ROBERT CHIPPS and ALEXANDER MCKENZIE, | *Severance, M. S. Gunn, \*John B. Clayberg,* [687]  
Receiver, *Petitioners, v. JAFET LINDBERG* | and *Thomas J. Geary* for petitioners.  
*et al.* [No. 462.] | *Messrs. Wm. A. Maury, E. S. Pillsbury, J.*  
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Writ of Certiorari to the United States Cir- | *Charles Page, E. J. McCutchen, and A. B.*  
cuit Court of Appeals for the Ninth Circuit. | *Browne* for respondents.  
*Messrs. C. K. Davis, F. B. Kellogg, C. A.* | December 24, 1900. *Discharged and denied.*  
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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1900.

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# THE DECISIONS

## OF THE

# Supreme Court of the United States

AT  
OCTOBER TERM, 1900.

**[1]** \*YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Pliffs. in Err.*,  
v.  
WIRT ADAMS.

(See S. C. Reporter's ed. 1-25.)

*Error to state court—Federal question—when raised—impliedly raised in state court—impairing obligation of contract—exemption from taxation—effect of consolidation of corporations.*

1. A Federal question is not set up in a state court soon enough to sustain a writ of error from the Supreme Court of the United States to the state court, when it is not presented until after the case has been decided by the supreme court of the state and remanded to the lower court for new trial,—especially when it is raised by new pleas filed without the leave of court, which the state practice requires.
2. A Federal question as to the impairment of the obligation of a contract was sufficiently raised in a state court for the purpose of a writ of error from the Supreme Court of the United States, although the contract clause of the Federal Constitution was not discussed, where the case turned upon the existence of such a contract and no question seems to have been made that, if there had been a contract, it was impaired by the state legislation.

**NOTE.**—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 584.

On the effect of consolidation of corporations—see notes to *Louisville, N. A. & C. R. Co. v. Boney* (Ind.) 3 L. R. A. 435, and *Shields v. Ohio*, 24 L. ed. U. S. 357.

As to exemption of consolidated corporations from taxation—see *Missouri ex rel. Wine v. Keokuk & W. R. Co. (Mo.)* 6 L. R. A. 222, and note.

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3. A new grant of corporate franchises, with in the meaning of Miss. Const. 1890, § 180, making such grants subject to constitutional provisions which require the property of corporations to be taxed like that of individuals, is made by a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new Constitution, but which, by articles of consolidation, agree to merge and consolidate their properties, immunities, and privileges, and substitute for their shares, shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate existence of one of the old companies "or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement," where the effect of the consolidation is to surrender the entire administration of the functions of the constituent companies to a new corporation with a new corps of officers.

[No. 35.]

*Argued October 22, 23, 1900. Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of Mississippi to review a decision affirming a judgment for taxes against a railroad company claiming an exemption. *Affirmed.*

See same case below, 77 Miss. 194, 24 So. 200, 317.

Statement by Mr. Justice **Brown**:

\*This case originated in an action at law [2] begun December 7, 1893, in the circuit court for the first district of Mississippi, by Wirt Adams, revenue agent, suing for the use of the state and of the counties through which the defendant railways pass, against the Yazoo & Mississippi Valley Railroad Company, incorporated under an act of the legislature of Mississippi of February 17, 1882, and also against the Illinois Central Railroad Company, as successors in interest, by consoli-

dation, of a number of other railways, to recover taxes assessed by the railroad commission of that state for the year 1892.

Exhibits annexed to the declaration showed that the Yazoo & Mississippi Valley Railroad Company, as now constituted, was the result of a consolidation made October 24, 1892, between a company of the same name, chartered as above stated, February 17, 1882, and the Louisville, New Orleans, & Texas Railway Company, which latter company was itself formed by a consolidation made August 12, 1884, of the Tennessee Southern Railroad Company, the Memphis & Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg, & Memphis Railroad Company, and the New Orleans & Mississippi Valley Railroad Company.

On December 27, 1893, a plea was filed by the Illinois Central Railroad Company, denying certain of the allegations in the declaration; and a separate plea was filed by the Yazoo & Mississippi Valley Railroad Company, claiming in its own favor the benefit of the charter of the Louisville, New Orleans, & Texas Railroad Company exempting such company from the assessment of these taxes by reason of the payment of the same in the construction of its road, and also denying material allegations of the declaration. No Federal question appeared in either of these pleas. A demurrer to these pleas having been overruled, replications were filed.

On December 18, 1894, another action was begun against the same defendants for the taxes of 1893 and 1894, and on January 1, 1896, another for the taxes of 1895. An order was made consolidating these actions.

The three cases thus consolidated came on for trial before a jury, and resulted in a verdict and judgment July 25, 1896, in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893, and 1894. Both parties moved for a new trial, which was denied. Both parties appealed to the supreme court, but neither assigned a ruling upon a Federal question as error. The supreme court reversed the judgment of the court below, and remanded the case for a new trial. 77 Miss. 194, 24 So. 200. The court June 20, 1898, filed a summary of its holdings to the effect, first, that the case of the *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, which apparently had been set up as *res judicata*, was an estoppel only as to taxes for the year 1892 on property originally belonging to the Natchez, Jackson, & Columbus Railroad Company in Adams county, but not upon other property, or as to the taxes for other years; second, that the Yazoo & Mississippi Valley Railroad Company was a new corporation taking its life from the date of the consolidation, and overruling the *Lambert Case* to the contrary; third, that the 21st section of the Mobile & Northwestern Railroad Company's charter was an effort to secure an irrevocable grant of exemption, was in violation of the Constitution of 1869, and that it would have been a violation even if it had not been irrevocable, and the case of

*Mississippi Mills v. Cook*, 56 Miss. 40, to the contrary was overruled. 77 Miss. 305, 24 So. 318. \*A motion to strike out this "summary of holdings" was denied November 28, 1898. 77 Miss. 302, 24 So. 317.

Meantime two new actions had been begun in the circuit court for the taxes of 1896 and 1897, which were also consolidated with the others.

On July 4, 1898, the mandate of the supreme court reversing the judgment of the court below was filed in the circuit court. Meantime, however, and on June 27, 1898, defendants filed a petition and bond for a removal of the cause to the circuit court of the United States upon the ground that the case arose under the Constitution and laws of the United States. This petition was also denied July 4, upon the day the mandate was filed.

Thereupon each of the defendants July 6, 1898, filed special pleas to the declaration, setting forth at great length the exemption claimed under the charters of their constituent companies, and alleging that such exemption constituted a contract which had been impaired by the action of the state. Motion was made by the plaintiff to strike out certain of these pleas, viz., the 3d, 4th, 5th, 6th, and 7th, as constituting no defense to the action, which was granted by the court; and all of such pleas, except the 7th, which was withdrawn, were stricken from the files. Whereupon the defendants, "to meet the new aspect put upon the case by the decision of the supreme court herein rendered on June 20, 1898," withdrew "their joint plea filed by them prior to such decision, and all other pleas filed before that decision," and also withdrew the two pleas filed by them respectively at this term (No. 2), and declined to plead further herein. They did not, however, withdraw the pleas which had been stricken out by the court. A judgment was entered the same day *nil dicit* against the defendants for the amount sued for in said consolidated case, amounting in all to \$548,676.99. The case was again appealed to the supreme court and a new opinion rendered February 20, 1899, reiterating its former views and affirming the judgment of the court below. 77 Miss. 315, 28 So. 956. Whereupon defendants sued out this writ of error.

Messrs. William D. Guthrie and Edward Mayes argued the cause, and, with Messrs. Noel Gale, James Fentress, and J. M. Dickinson, filed a brief for plaintiffs in error:

A contract right of a railroad company to apply taxes levied upon its property during a limited period to the payment of its construction debt can be transferred, and will vest in the consolidated company.

*Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33; *Louisville, N. O. & T. R. Co. v. Taylor*, 68 Miss. 361, 8 So. 675; *Louisville, N. O. & T. R. Co. v. Blythe*, 69 Miss. 939, 16 L. R. A. 251, 11 So. 111.

Upon a consolidation of corporations the contracts, property rights, privileges, and advantages of each of the constituent compa-



nies are possessed by the new company to the extent of the road each constituent company has before occupied.

*Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Branch v. Charleston*, 92 U. S. 677, 23 L. ed. 750; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081.

The right to receive taxes voted in aid of a railroad passes by consolidation to the consolidated company, whether or not the proceedings have resulted in the dissolution of the corporation for whose benefit the appropriation was originally made.

*Scott v. Hansheer*, 94 Ind. 1; *Pittsburgh, C. O. & St. L. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324.

Lands granted by the government to one of the constituent companies have been held to pass.

*Tarpey v. Deseret Salt Co.* 5 Utah; 494, 17 Pac. 631.

Even an apparently personal exemption of employees from military, road, and jury duty has been decided to pass as a privilege to the consolidated company.

*Zimmer v. State*, 30 Ark. 677.

So, in the case of statutes authorizing subscriptions by municipalities to the stock of railroad companies, this court has uniformly held that the interest of the corporation in the subscription, and its right to receive and benefit by it, are not forfeited by, but survive, a consolidation, and become part of the rights and privileges of the consolidated company.

*Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 32 L. ed. 359, 9 Sup. Ct. Rep. 18; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. ed. 88; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Empire v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Tipton County v. Rogers Locomotive & Mach. Works*, 103 U. S. 523, 26 L. ed. 340; *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *New Buffalo v. Cambria Iron Co.* 105 U. S. 73, 26 L. ed. 1024; *Denison v. Columbus*, 62 Fed. Rep. 775, Affirmed in 16 C. C. A. 125, 30 U. S. App. 295, 69 Fed. Rep. 58.

Where the act authorizing the consolidation does not expressly declare that the rights, privileges, and franchises of the consolidating company shall pass over to the company with which it may become consoli-

dated, but only that it may consolidate with any other company upon such terms as may be deemed just and proper, the new company, nevertheless, acquires the right to receive subscriptions belonging to the consolidating company.

*Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69.

So it has been held in the state courts as to subscriptions.

*Musgrove v. Vicksburg & N. R. Co.* 50 Miss. 677; *Hanna v. Cincinnati & Ft. W. R. Co.* 20 Ind. 30; *Cantillon v. Dubuque & N. W. R. Co.* 78 Iowa, 48, 5 L. R. A. 726, 42 N. W. 613; *Chicago, K. & W. R. Co. v. Stafford County Comrs.* 36 Kan. 121, 12 Pac. 593; *John Hancock Mut. L. Ins. Co. v. Worcester, N. & R. R. Co.* 149 Mass. 214, 21 N. E. 364; *Day v. Worcester, N. & R. R. Co.* 151 Mass. 302, 23 N. E. 824; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Hamilton v. Clarion, M. & P. R. Co.* 144 Pa. 34, 13 L. R. A. 779, 23 Atl. 53.

In every case in this court where it has been held that the exemption from taxation did not accrue to a consolidated company, there was an intervening constitutional or statutory provision which either forbade a present grant of exemption, or rendered the corporation subject to a general legislative power of amendment or repeal of charters, by which the subsequent imposition of taxes and implied repeal of the exemption could be supported and maintained in its application to the corporation newly created.

*Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, sub nom. *Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413.

*Messrs. William D. Guthrie, Edward Mayes, James Fentress, and Noel Gale* filed a brief for plaintiffs in error in opposition to the motion to dismiss or affirm:

The state court could not have held the plaintiffs in error liable for the taxes in suit without deciding either (1) that the provision of Miss. Laws 1870, chap. 104, § 21, did not constitute a contract, or that that contract had been waived, surrendered, or abrogated; or (2) that the subsequent tax legislation of the state did not impair the obligation of that contract.

*Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Harris v. Dennie*, 3 Pet. 292, 7 L. ed. 458; *Harris v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Fisher v. Cockerell*, 5 Pet. 248, 8 L. ed. 114; *Crowell*



*v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; *Chapman v. Goodnow*, 123 U. S. 540, sub nom. *Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

This question as to the existence of a contract, as well as its true construction, has been in all cases determined by this court independently of the decisions of the state courts and, in some cases, in direct opposition to the ruling of those tribunals.

*Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Louisville & N. R. Co. v. Palmer*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Given v. Wright*, 117 U. S. 648, sub nom. *New Jersey, Given, Prosecutor, v. Wright*, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Bryan v. Kentucky Annual Conference M. E. Church, South, Bd. of Edu.* 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Columbia Water Power Co. v. Columbia Electric Street Railway Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

Where the validity of a statute, or an au-

thority exercised under a statute, of any state, is drawn in question on the ground of its being repugnant to the Federal Constitution, it is not necessary that the Federal question be specially set up or claimed, in order to give this court jurisdiction, but it is sufficient if it appears that the Federal question is involved in the case, and that the case could not have been determined without deciding it.

*Columbia Water Power Co. v. Columbia Electric Street Railway, Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Even were this not a case of the second class, and were it a case within the third class,—that is, involving a right, title, privilege, or immunity under the Constitution,—the court would nevertheless hold that the Federal question had been duly raised, and that the right, title, privilege, or immunity had been specially set up or claimed in a proper way and in ample time.

*Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

Messrs. William D. Guthrie, Edward Mayes, and Noel Gale also filed a supplemental reply brief in behalf of plaintiffs in error:

The language used in the plea filed in the state court was sufficient to raise the Federal question, and to entitle the defendant railroad companies to the protection of the contract clause of the Constitution of the United States.

*Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Columbia Water Power Co. v. Columbia Electric Street Railway, Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

In addition to the wording of the plea, the certificate of the chief justice of Mississippi shows that the exact constitutional point was raised, considered, and decided.

*Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

It is submitted that the rule as to *res judicata* on second trials does not go so far as to prevent the making of new defenses on the new trial, on points which were not decided on the first appeal, particularly in a case where a new trial on the merits is ordered, and the court below is left with ample power to permit parties to make amendments of their pleadings.

*McComb v. Knox County Comrs.* 91 U. S. 1, 23 L. ed. 185; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.



Even if the supreme court of Mississippi had decided that it was too late to raise the Federal question because the decision on the first appeal constituted *res judicata* as to that defense, it is doubtful whether such a ruling would prevent a party from securing a review of the case by this court and under the present writ of error, which brings up the whole record.

*Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

**Mr. R. C. Beckett** argued the cause, and, with **Mr. Frank A. Critz**, filed a brief for defendant in error:

It is only the rulings and judgment on the last appeal from which the writ of error is sued out, and it is the settled doctrine of this court, and of all other courts proceeding according to the course of common law, that what has been decided and settled in one appeal is *res judicata*, and not open to review on a second or any subsequent appeal.

*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 343, 40 L. ed. 993, 16 Sup. Ct. Rep. 850; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Stewart v. Stebbins*, 30 Miss. 66; *Smith v. Elder*, 14 Smedes & M. 100; *McKinney v. State ex rel. Nixon*, 117 Ind. 27, 19 N. E. 613; *Agne v. Seitsinger*, 104 Iowa, 485, 73 N. W. 1048; *Long v. Perine*, 44 W. Va. 243, 28 S. E. 701; 2 Enc. Pl. & Pr. pp. 373-380, and notes.

This court has no more extended jurisdiction than the supreme court of the state, for it is the action of the state supreme court only that this court is called on to review.

May, U. S. Sup. Ct. Prac. pp. 91, 92; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Miller v. Texas*, 153 U. S. 538, 38 L. ed. 813, 14 Sup. Ct. Rep. 874.

The supreme court of Mississippi has decided that under its rules of practice and procedure these pleas were properly stricken out, and that is conclusive on this court, and raises no Federal question. It matters not whether its decision was right or wrong.

*Stevens v. Nichols*, 157 U. S. 370, *sub nom. Carr v. Nichols*, 39 L. ed. 736, 15 Sup. Ct. Rep. 640; *Chemical Nat. Bank v. City Bank*, 160 U. S. 653, 40 L. ed. 570, 16 Sup. Ct. Rep. 417.

This court, moreover, has expressly held that the denial by the trial court of leave to amend the pleadings, after the pleading term, so as to raise a Federal question, is a question of state practice and raises no Federal question, and that ought to be decisive of this case.

*Stevens v. Nichols*, 157 U. S. 370, *sub nom. Carr v. Nichols*, 39 L. ed. 736, 15 Sup. Ct. Rep. 640. To the same effect are: *Iowa C. R. Co. v. Iowa*, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 344; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. ed. 1166, 17 Sup. Ct. Rep. 718; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 180 U. S.

699, 13 Sup. Ct. Rep. 859; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591; *Beville v. Cox*, 109 N. C. 265, 13 S. E. 800; *Newburg Petroleum Co. v. Wcare*, 44 Ohio St. 604, 9 N. E. 845; *Mason v. Roll*, 130 Ind. 260, 29 N. E. 1135.

If the Federal questions were really sufficiently raised under the pleadings as they stood, they are not raised now, for all those pleadings have been voluntarily withdrawn, and it is too late to raise them by any new pleadings.

*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; *Miller v. Cornwall R. Co.* 168 U. S. 133, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Northern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 643, 43 L. ed. 843, 19 Sup. Ct. Rep. 530.

If the pleas had been stricken out because they presented no defense to this action, we would still claim that no Federal question was raised; and, even if there was, there were so many non-Federal reasons for the court's action, even on the merits, that this court could not say that a Federal question was necessarily involved, and that is requisite to give it jurisdiction.

*Iowa C. R. Co. v. Iowa*, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 344.

When a party desires to file pleadings out of time, it is necessary to make some excuse for the delay,—which was not even attempted here,—and also to present the pleadings with the application, or at least before they are filed, so that the court can judge whether they are to be filed for delay only, or whether on their face they present evidences of good faith and fairly amount to a *prima facie* defense.

*Hunt v. Walker*, 40 Miss. 590; 18 Am. & Eng. Enc. Law, 1st ed. p. 505 and note 5.

This class of tax cases comes under the third class of § 709 of the Revised Statutes, where the "immunity" must be specially set up and claimed, and it was never done or thought of in this case till the suggestion of errors.

*Louisville & N. R. Co. v. Louisville*, 166 U. S. 714, 41 L. ed. 1175, 17 Sup. Ct. Rep. 725. See also May, U. S. Sup. Ct. Prac. pp. 99, 100.

**Mr. R. C. Beckett** also filed a separate brief in support of the motion to dismiss or affirm:

No Federal question was at any time raised until after the decision in the supreme court, and then for the first time in the suggestion of errors.

*Miller v. Cornwall R. Co.* 168 U. S. 133, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep.

771; *Schuyler Nat. Bank v. Bollong*, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24; *Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

This is a writ of error from a second appeal to the state supreme court; and in Mississippi, as in this court, and we suppose generally in courts of last resort, the rule is that what has been examined and decided, or could have been examined and decided, on the first appeal, is *res judicata*, and cannot be re-examined on a second appeal unless it is left open by the decision.

*McKinney v. State ex rel. Nixon*, 117 Ind. 27, 19 N. E. 613; *Bridgeforth v. Gray*, 39 Miss. 136; *Henderson v. Winchester*, 31 Miss. 290; *Stewart v. Stebbins*, 30 Miss. 66; *Smith v. Elder*, 14 Smedes & M. 100; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *The Lady Pike*, 96 U. S. 461, *sub nom. Pearce v. Germania Ins. Co.* 24 L. ed. 672; *Sizer v. Many*, 16 How. 98, 14 L. ed. 861; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 343, 40 L. ed. 993, 16 Sup. Ct. Rep. 850; *Northern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724.

A Federal question cannot be raised for the first time after the principles of the case have been settled by the Supreme Court, and the case reversed and remanded.

*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

If a party wishes to file pleas out of time he must present them with his application, so that the court may judge whether they are such pleadings as ought to be filed.

*Hunt v. Walker*, 40 Miss. 590; 18 Am. & Eng. Enc. Law, p. 505, note 5.

And even if leave had been asked to file them, it was a matter of discretion with the trial court, and pertains to the state practice and modes of procedure, and raises no Federal question.

*Stevens v. Nichols*, 157 U. S. 370, *sub nom. Carr v. Nichols*, 39 L. ed. 736, 15 Sup. Ct. Rep. 640; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 199, 37 L. ed. 701, 13 Sup. Ct. Rep. 859; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. ed. 1166, 17 Sup. Ct. Rep. 718; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Hagar v. California*, 154 U. S. 639, 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; *Sheets v. Selden*, 7 Wall. 416, 19 L. ed. 166; *Wright v. Hollingsworth*, 1 Pet. 165, 7 L. ed. 96; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. ed. 474; *Walden ex dem. Denn v. Craig*, 9 Wheat. 576, 6 L. ed. 164; *Beville v. Cox*, 109 N. C. 265, 13 S. E. 800; *Agne v. Seitsinger*, 104 Iowa, 485, 73 N. W. 1048.

The decision of the state court, that the effect of the statutes under which the consolidation was made was to create a new corporation, and that the alleged exemption did not pass to the consolidated company, is merely a construction by the state court of its own local laws, and raises no Federal question.

*Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. ed. 1166, 17 Sup. Ct.

Rep. 718; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

Neither the doctrine of *res judicata*, nor that of *stare decisis*, raises any Federal question in this court.

*Central Land Co. v. Laidley*, 159 U. S. 109, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 184, 40 L. ed. 664, 16 Sup. Ct. Rep. 471. See also *Wood v. Brady*, 150 U. S. 20, 37 L. ed. 982, 14 Sup. Ct. Rep. 6.

*Mr. J. A. P. Campbell* also filed a brief for defendant in error:

The power to consolidate is a corporate franchise, and where it was not exercised so as to effect organization before the adoption of the Constitution, its subsequent exercise was subject to the provision for the taxation of all the property of private corporations for pecuniary gain, in view of which there cannot be an exemption of the property of such corporations, except when like exemption is extended to individuals.

1 Thomp. Corp. § 365; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, *sub nom. Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

The Constitution preserved the *statu quo* of existing exemptions, but does not apply to the exemption in a new organization effected by the exercise of a corporate franchise after the adoption of the Constitution. The organization resulting from the consolidation was subject to a provision that the property shall be taxed.

*Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

Messrs. S. S. Calhoun and Marcellus Green also filed a brief for defendant in error.

\*Mr. Justice **Brown** delivered the opinion [5] of the court:

Motion was made to dismiss this writ of error upon the grounds: First, that the Federal question was not raised until after the decision of the supreme court on June 20, 1898. Second, that the action of the defendants in withdrawing their pleas and permitting a judgment *nil dicit* to go against them, because the circuit court had struck from the files their additional pleas attempting to set up a Federal question, was an admission that they had no defense upon the facts of the case, and deprived them of any right to insist upon a Federal question. Third, that the petition for removal was not made until after the case had been tried in the state supreme court, and reversed and remanded. No claim of error in the action of the state court in this last particular was made in this court. Indeed, the point seems to have been abandoned. Fourth, that the decision of the state supreme court on the first appeal, that the alleged exemption, if it existed at all, was lost by the consolidation



of October 24, 1892, raised no Federal question. Several other reasons are assigned for the motion, but they are either addressed to the merits of the case, or become immaterial in the view we have taken of those herein specified.

[6] 1. Was the Federal question raised too late? The special pleas setting up distinctly the Federal question were filed after the case had been decided by the supreme court, its mandate had gone down to the circuit court, and the case was ready for a new trial. As already stated, certain of these pleas were stricken out upon motion of the plaintiff as constituting no defense to the action, and all the pleas, except such as had been stricken out by the court, were then withdrawn, and a judgment *\*nil dicit* entered. On the case being again carried to the supreme court, that court held that the action of the court below "in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of the court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no sort of comment. These and all the other matters of practice and procedure assigned for error were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to." 77 Miss. 315, 28 So. 956.

It is very evident that the circuit court, in striking out these pleas, took the view that the supreme court had, upon the first hearing, settled the law to be that no valid contract of exemption existed, and that if such contract existed in favor of the Louisville, New Orleans, & Texas Railway Company (hereinafter styled the Louisville Company) it had been lost by the consolidation of October 24, 1892, and that the only effect of the special pleas was to inject a claim under the Federal Constitution as an argument for reversing its ruling. These pleas evidently raised precisely the same questions that had been settled in a slightly different form. The circuit court treated this as an attempt to induce it to overrule the action of the supreme court, which, of course, was impossible. The supreme court not only held that the circuit court was correct in this view, but that, the issues having already been settled, it would itself treat them as *res judicata*. This accords with what seems to be the uniform practice of the Mississippi courts. Thus, in *Smith v. Elder*, 14 Smedes & M. 100, it was held that where a demurrer to a plea, which had been sustained in the court below, was overruled by the supreme court, all the legal questions raised by the demurrer would be considered as having been settled by the decision overruling it; and that such decision would not only be binding upon the inferior, but also upon the *\*appellate*, court. So also in *Bridgeforth v. Gray*, 39 Miss. 136, it was held that, where the [7] 180 U. S.

construction of a will had been settled upon demurrer to a bill in chancery, the court would not permit that question to be reopened upon a hearing upon the merits, notwithstanding the chancery court of Tennessee in the meantime had placed a different construction upon the will. This is also the rule in this court. *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *The Lady Pike*, 96 U. S. 461, *sub nom. Pearce v. Germania Ins. Co.* 24 L. ed. 672; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121. See also *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *Brooklyn v. Orthwein*, 140 Ill. 620, 31 N. E. 111; *McKinney v. State ex rel. Nixon*, 117 Ind. 27, 19 N. E. 613.

In this aspect the case is much like that of *Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260. In that case the insurance company had loaned money to Kirchoff, and had filed a bill to foreclose the trust deed. Pending this bill an agreement was entered into for the release to Kirchoff of two of the lots embraced in the foreclosure proceedings, but it was agreed that these proceedings should be prosecuted, and, as soon as the company obtained a deed from the master, it would convey to Kirchoff. No defense was made to the foreclosure, and the case went to a decree, and the property was sold. The case went to the supreme court of Illinois, which found the agreement between Mrs. Kirchoff and the insurance company as claimed by her, determined that she was entitled to the release sought, and remanded the case for the purpose of an accounting. As stated by the Chief Justice: "The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the supreme court of Illinois prior to the decision of the latter court on the first appeal. . . . The errors there assigned nowhere in terms raised a Federal question. And in affirming the judgment of the appellate court the supreme court did not consider or discuss any Federal question as such in its opinion." It appears to have turned upon questions of fact. "It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and the master's deed obtained thereunder, and hence that the title was claimed under *\*an authority exercised* [8] under the United States; that a Federal question was thereby raised on the record; that the decision of the case necessarily involved passing on the claim of title." Upon the second appeal it was assigned as a Federal question that the circuit court erred in entering a decree which would in effect nullify the decree of foreclosure of the circuit court of the United States, and in refusing to the defendant leave to file the proposed amendment to its answer. "The appellate court on the second appeal held itself bound by the previous decision, and declined to enter on matters of defense which might have been availed of. The supreme court was of the same opinion, for it ruled that where a



case had once been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment." This court dismissed the writ of error, holding that, as the supreme court did not reopen the case as to matters previously adjudicated, and as the Federal question was not set up upon the first appeal, there was no action of that court in relation to it which we were called upon to revise. See also *Northwestern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

It is true that in the suit under consideration the case was not formally sent back for an accounting, but it was practically so, since all the questions of law had been settled upon the first appeal, beyond the power of the circuit court to reopen, and upon the remand that court could do nothing else than enter judgment for the taxes of 1892, 1893, and 1894, as well as for the taxes of 1895. The supreme court, in deciding that it would not reopen the question involved upon the first hearing, to let in the Federal defense presented by the new pleas, merely settled a question of practice which we cannot review.

By another process of reasoning we are led to the same conclusion. No leave was applied for or granted to file these additional pleas after the issues had been made up, as seems to be required by the practice in Mississippi, where it is said that all such pleas must be presented, with the application to file them, to the court, that it may judge of [9] the propriety of the proposed action (*Hunt v. Walker*, 40 Miss. 590; *Pool v. Hill*, 44 Miss. 306; *Pfeifer v. Chamberlain*, 52 Miss. 90); and even if leave had been asked to file them, it was a matter of discretion with the trial court to permit it, and a matter of state practice which cannot be inquired into here. *Stevens v. Nichols*, 157 U. S. 370, *sub nom. Carr v. Nichols*, 39 L. ed. 736, 15 Sup. Ct. Rep. 640; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 199, 37 L. ed. 701, 13 Sup. Ct. Rep. 859; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. ed. 1166, 17 Sup. Ct. Rep. 718. We are therefore of opinion that the Federal question was "specially set up and claimed" too late to be of any avail to the plaintiffs in error.

2. But the very arguments urged upon us by the defendant in error for holding that the Federal question was set up too late, as well as the reasons given for affirming the decree of the court in striking out the additional pleas, furnish a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing. This argument is in substance that the pleas were properly stricken out, because they presented no defense as the case then stood, by reason of the decision of the supreme court on the first appeal. 77 Miss. 194, 237, 24 So. 200.

In order to ascertain exactly what was in

issue and what was decided by the supreme court, it is necessary to set forth the facts at some length. The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties; and the refusal to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidations.

Underlying all the questions in the case are the following provisions of the Constitution of 1869:

"Art. 12, sec. 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

"Sec. 20. Taxation shall be equal and uniform throughout the state. All property shall be taxed according to its value, to be ascertained as directed by law."

By the 21st section of an act to incorporate the Mobile \* & Northwestern Railroad Company, approved July 20, 1870, the state [10] "hereby agrees with said company (and which agreement is irrevocable) that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same. . . . *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of 8 per cent upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

By an act of August 8, 1870, the provisions of this section were extended to the Memphis & Vicksburg Railroad, the Natchez & Jackson Railroad, and a number of others not necessary here to be mentioned.

The Memphis & Vicksburg Railroad Company was incorporated the same day, August 8, 1870. The 16th section of this act enacted "that said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this state, at any time the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company."

By an act to incorporate the New Orleans, Baton Rouge, Vicksburg, & Memphis Short Line Railroad Company (hereinafter called the Baton Rouge Company), approved March 9, 1882, it was enacted (§ 25) "that the company shall have power and authority to purchase and hold any connecting railroad, and to operate the same, or to consolidate the company with any other company under the



name of one or both; but when such purchase is made, or consolidation is effected, the said company shall be entitled to all the [11] benefits, rights, franchises, \*lands, and property of every description belonging to said road or roads so sold or consolidated."

Both these two last-mentioned companies were consolidated by an agreement made August 12, 1884, into the Louisville, New Orleans, & Texas Railway Company.

By an act approved March 3, 1882, and an act amendatory thereto of March 15, 1884, the Memphis & Vicksburg Road was authorized to consolidate with any other company or companies, "whether such company or companies have been incorporated under the laws of this state or of any other state, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this state, and shall have, enjoy, and possess all the rights, ways, privileges, franchises, property, grants, and immunities which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act." Another section (5) applied the 21st section of the Mobile & Northwestern charter to the company so consolidated.

By a further act of February 17, 1882, the Yazoo & Mississippi Valley Railway Company (hereinafter called the Yazoo Company), was authorized "to consolidate with any other railroad company in or out of Mississippi, upon such terms as the consolidating companies might agree upon, . . . and upon any such consolidation the said consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidated company." Finally by the act of February 19, 1890, the Louisville, New Orleans, & Texas Company, and the Natchez, Jackson, & Columbus Company were authorized to consolidate with each other under the name of the Louisville, New Orleans, & Texas Company, and upon such terms as might be agreed upon by the companies. [12]

In 1890 the state adopted a new Constitution, the following clauses of which only are pertinent:

"Sec. 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article," etc.

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals. Exemptions from taxation, to which corporations are le-

gally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general laws, unless sooner repealed by the legislature."

On October 24, 1892, articles of consolidation were entered into between the Louisville Company and the Yazoo Company, the effect of which will hereafter be considered.

By the Code of Mississippi of 1892, § 3875, a system of taxing the property of railroad companies by the railroad commission was put in force. This article provided for a complete schedule of the property of the company, the total amount of its capital stock, its par value, and the value of its franchise; and by a law subsequently enacted, February 7, 1894, a state revenue agent was provided for, whose duty it was to enforce the payment of taxes by all classes of property owners. It was under the provisions of the laws of 1892 that this action was begun.

The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the supreme court of Mississippi. In the first one (*Mississippi Mills v. Cook*, 56 Miss. 40) that court held the constitutional provision that "the property of all corporations for pecuniary profits shall be subject to taxation" did not require that such corporations must always be subjected to taxation, but that their property could not be placed beyond the reach of the taxing power; and that the legislature might exempt property of a particular class, whether the owners were corporations or natural persons; "in other words, that the provision was mandatory as to the liability of such property to be taxed, but permissive to the legislature to tax it or exempt it, as might seem proper. It further held that the provision of § 20, that "all property shall be taxed in proportion to its value," did not require that all property should be taxed, or deny to the legislature the right to exempt any; that the legislature might exempt property of a certain class, or property used for a certain purpose; that it had the power to select such objects of taxation as it might deem appropriate; but when any article of property was selected for taxation it must be taxed in proportion to its value, and not specifically. [13]

In the second case (*Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33) that court held the exemption in the 21st section of the charter of the Mobile & Northwestern Railroad was one which the legislature had power to confer, but not to make irrevocable; that under the acts of August 8, 1870, and March 5, 1878, this immunity from taxation was extended and confirmed to the Natchez, Jackson, & Columbus Railroad Company, and by the act of February 19, 1890, authorizing a consolidation with the New Orleans, Louisville, & Texas Company, the latter company by its consolidation acquired the immunities of the former company, and was entitled to the same exemption from taxation; also, that after the con-



solidation of the Louisville Company with the Yazoo Company the latter succeeded to the same immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson, & Columbus Railroad. In short, these cases cover practically every point involved in the case under consideration, and counsel evidently acted upon the theory that it was unnecessary to specifically set up and claim that there was a contract for exemption which the legislature had subsequently impaired.

[14] But upon the hearing of the case under consideration the court (now differently constituted) overruled both of these cases, and held, first, that the legislature could not grant an exemption to a railway company under the Constitution of 1869; second, that it could not grant an irrevocable exemption under that Constitution; third, that a new company was formed by \*the consolidation of October 24, 1892, and no exemption passed into it; fourth, that if the consolidation were a technical merger, still, § 180 of the Constitution of 1890 prevented any exemption from passing into it; fifth, that any such exemption was repealed by the acts of 1884, 1886, and 1890. Manifestly, that court could not have held the railways liable for the taxes in suit without deciding either that the provision of § 21 did not constitute a legal contract in view of the Constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the state of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

In short, the case is one of those frequently arising under the 2d clause of Rev. Stat. § 709, in which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and, the decision of the state court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the 3d clause of the section, where a right, title, privilege, or immunity is claimed, that the Federal question must be specially set up. The cases are collected in *Columbia Water Power Co. v. Electric Street Railway, Light & Power Co.* 172 U. S. 475, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247. Thus, in *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412, the record did not show that the constitutionality of an act of a state legislature was drawn in question; "but," said the Chief Justice, "we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court." So, in *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458, it was said that, if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the Constitution of the United States was drawn in

question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; \**Eureka Lake* [15] & *Y. Canal Co. v. Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173. And the fact that the supreme court of the state did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in *Chapman v. Goodnow*, 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211, 215: "If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The decision of the supreme court that the exemption in the Mobile & Northwestern Railroad Company's charter of 1870 was void under the Constitution of 1869 was practically a decision that the contract of the state was beyond the power of the legislature, and void, and hence there was no contract to be impaired. But, conceding this contract to have been valid, another distinct question arose, whether that contract inured to the benefit of the plaintiffs in error by the successive consolidations; in other words, whether, as to the plaintiffs in error, there was any contract ever existing which the taxing legislation of Mississippi could impair. Both these questions were ruled against the railroads; and, while the contract clause of the Federal Constitution was not discussed, the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the taxing legislation of 1892. As we have often held that where an impairment of a contract by state legislation is charged, the existence or non-existence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a Federal question, and the fact that the supreme court did not in terms discuss the contract clause of the Constitution does not oust our jurisdiction. In view of this record and the opinions \*of the supreme court, the certificate of the Chief Justice, that the validity of the state statutes was actually drawn in question under the contract clause of the Constitution, was but a further assurance of a



fact already appearing. The motion to dismiss must therefore be denied.

3. At the foundation of the right to a reversal of this case is the question whether, conceding the validity of the exemption or commutation provision contained in the 21st section of the Mobile Company's charter of July 21, 1870, such exemption enured to the plaintiffs in error under their successive consolidations. It will be borne in mind that the existing Constitution of Mississippi was adopted November 1, 1890; that the present Yazoo Company was formed October 24, 1892 (nearly two years after the adoption of the Constitution), by the consolidation of the original Yazoo Company with the Louisville Company. By the act of August 8, 1870, the exemption contained in the 21st section of the Mobile charter was extended to the Memphis & Vicksburg Railroad, which was chartered the same day. This charter gave it power to consolidate its stock, property, and franchise with any other road upon such terms as might be consistent with the powers conferred upon the company. Twelve years thereafter, March 9, 1882, the Baton Rouge Company was incorporated with power to consolidate with any other company, and on March 3, 1882, the Memphis & Vicksburg Company was also authorized to consolidate. The same power had already been extended, February 17, 1882, to the Yazoo Company.

It is unnecessary to discuss the terms of the first consolidation of August 12, 1884, between the Tennessee Southern, the Memphis Company, the Baton Rouge Company, and the New Orleans Company, forming the Louisville, New Orleans, & Texas Company, since this was made prior to the adoption of the new Constitution of 1890. We are specially concerned with the articles of consolidation between the Louisville Company so organized, and the Yazoo Company, which were adopted October 24, 1892, and subsequent to the new Constitution. The question in that connection is whether such consolidation created a new corporation; or, in [17] the language of § 180 of the Constitution of 1890, whether it was a "grant of corporate franchises," in which case, by the express language of that section, such new corporation became subject to the provision of the new Constitution. In their articles of consolidation these companies agreed "to and with each other, to unite, merge, and consolidate their several capital stocks, corporate rights, franchises, immunities, and privileges, and properties of every kind, real, personal, and mixed." The first article provided that "such consolidation shall be effected by uniting or merging the stock, property, and franchises of the party of the first part (the Louisville Company) with and into the stock, property, and franchises of the said the Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but, whatever may be the legal consequence of the consolidation U. S. Book 45.

idation herein provided for, this agreement is to stand and be effective." This article was evidently drawn in view of the decisions of this court upon the subject of merger and consolidation, and evinces a desire to avoid the legal results following from a consolidation of the two constituent companies into a new corporation, but, at the same time, expresses a doubt whether the agreement would not after all be construed to create a new corporation. These doubts were unquestionably well founded, and, if the effect of the agreement be in law the creation of a new corporation, the expression of a wish that it should not be so construed is of course entitled to no weight. The final clause, that in any event the agreement shall stand and be effective, shows that effect should be given to all its stipulations, whatever be its legal consequences.

Subsequent articles provided that the corporate name should be the Yazoo & Mississippi Valley Railway Company; that the capital stock should be \$15,000,000; that the stockholders of either of the constituent companies should "have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and, in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable \*at par for the now outstanding shares of each of the constituent companies;" that all the rights, powers, privileges, immunities, and franchises of the constituent companies should pass to the consolidated company, which should be managed by a board of directors, whose names, for the purpose of the organization, were given. [18]

Reading this agreement in connection with the charters of the several companies, and especially with that of the Memphis & Vicksburg Railroad Company of March 3, 1882, providing that "all of the companies so consolidating shall be merged into and become one company, and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this state," it is impossible to escape the conclusion that a new corporation was created with a capital stock of \$15,000,000, and that the stockholders of the constituent companies were to become stockholders of the new company, share for share, "as fully as if new shares of the consolidated company had been issued and exchanged therefor." Some question was made in the state courts whether the shares were actually issued in the new company. But the supreme court having found that they were; we accept that finding as conclusive. Power was expressly given to issue new shares, and the usual course of business would justify us in inferring that that was the method adopted. A new name was taken, which was none the less a new one by reason of the fact that it was the name of one of the constituent companies.

It cannot be doubted that under this agreement it was contemplated that the constituent companies should go out of exist- 28 405



ence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should [19] be surrendered to the "new corporation. In short, nothing was left of the constituent companies but the memory of their existence,—the mere shadow of a name. But the new company which took its place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road.

While, as stated in *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson v. Branch*, one road loses its identity and is merged in another, the latter preserving its identity and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation, but an enlargement of the old one. In such case it was held that where the company which had preserved its identity held as to its own property a perpetual exemption from taxation, it would not be extended to the property of the merged company without express words to that effect.

In the earliest of these cases (*Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461) it was held that a Maryland railroad whose charter contained no exemption from taxation did not acquire such exemption by consolidation with the Delaware & Maryland Railroad Company, whose charter exempted the road from taxation, except upon that portion of the permanent and fixed works which might be in the state of Maryland.

In *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757, an act of the legislature authorized the Central Railroad and the Macon Railroad to unite and consolidate their stock and all their rights, privileges, immunities, and franchises under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon Road should be entitled to receive an equal number of shares of the stock of the consolidated companies. "Whether,"

[20] said Mr. Justice \*Strong, "such be the effect [consolidation or amalgamation] or not, must depend upon the statute under which

the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created." It was held that the act did not work a dissolution of the existing corporations and the creation of a new company, since there was no provision for a surrender of the stock of the shareholders of the Central, and none for the issue of other certificates to them. In that case the road whose charter contained the exemption from taxation was preserved intact by the consolidation, and it was held that its exemption continued, while the other road was to go out of existence. As already stated, in the act authorizing the consolidation, in this case, of the Memphis & Vicksburg Railroad Company, there is an express provision that all the companies so consolidated shall be merged into and become *one company*, and held to be a corporation created by the laws of the state.

Other cases to the same effect, holding that the consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69, and *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 645.

It may be observed that all these cases turn upon the question whether the new company inherited by consolidation certain privileges and immunities belonging to the constituent companies, or one of them, and that no question arose as to the applicability of a new constitutional inhibition intervening before the consolidation took place. This question, however, did arise in *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, where it was held that a consolidation, under a statute of Ohio, of two or more railroad companies worked their dissolution, and that the powers and franchises of the new company thereby formed were subject to "be altered, revoked, or repealed by the general assembly" under a constitutional provision which took effect prior to the consolidation. The statute in that case expressly provided that the consolidated company should be a new corporation and subject to the constitutional provision. A like ruling was made \*under a similar statute of Maine in *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836. In *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185, two railroad companies were consolidated by an act of the legislature, which authorized the consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. We held in that case that a new corporation was created, which became subject to the provisions of a statutory code adopted January 1, 1863, permitting the charters of private corporations to be changed, modified, or destroyed at the will of the legislature. The case was distinguished from *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757, as being a

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consolidation, instead of a merger. "Nor was it," said Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making them one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." To the same effect is *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529.

The latest declaration of this court upon the subject is found in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592. In that case, a railroad corporation chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri; and in 1886 the consolidated road was sold under a deed of foreclosure to purchasers, who conveyed it to an Iowa corporation. It was held that the act of the legislature of Missouri authorizing the consolidation, making one company of the two, whose stock should be consolidated upon such terms as might be mutually agreed upon, authorizing the adoption of a new corporate name, and for the exchange of the stock of the constituent companies for stock in the new company, and providing for the filing with the secretary of state of a copy of the consolidation agreement, which should be conclusive evidence of the consolidation and of the corporate name of the new company, was in effect the extinguishment of the prior companies and the formation of a new one; and that an intervening constitutional provision, adopted in 1865, prohibiting exemptions from taxation, was thereby let in and to be read as a part of the charter of the new company.

In view of the terms of the consolidating agreement, to which reference has already been made, and of the several acts of the general assembly of Mississippi authorizing these consolidations, we are of opinion that a new corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided, with legislative sanction, for the formation of a new association. Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational, and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. 180 U. S.

Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies. In cases arising under the Mississippi Constitution of 1869, the method adopted in the charter of the Mobile & Northwestern Company, of commuting the taxes, was originally sustained under the theory that the provision of that Constitution declaring "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," did not mean that it should be necessarily subjected to taxation, but that it might be exempted altogether by the legislature. *Mississippi Mills v. Cook*, 56 Miss. 40. But by the Constitution of 1890, "all existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article," one of which was (§ 181) that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals."

It is true that in the act of March 9, 1882, authorizing the Baton Rouge Company to consolidate, in the act of March 3, 1892, authorizing the Memphis & Vicksburg Company to consolidate, and in the act of February 17, 1882, authorizing consolidations by the Yazoo Company, there were provisions that the consolidated companies should be entitled to the rights, privileges, franchises, property grants and immunities belonging to constituent companies, among which, under the name of immunities, might pass an exemption from taxation, as has been sometimes held by this court; and had not the constitutional provision of 1890 taken effect before the final consolidation of 1892, we might have been obliged to hold that the consolidated company was entitled to the commutation of taxes provided for in the 21st section of the charter of the Mobile & Northwestern Company. But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the Constitution of 1890, with the disabilities attaching thereto, among which is the provision that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals." Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the Constitution would be interpreted as nullifying it to that extent.

A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing at the time of the consolidation. It could never have been the intention of the legislature, and if it were it would be vain, to permit



[24] these companies to adopt such terms as they chose, if such terms were inconsistent with existing laws. The language indicated evidently refers to the \*method adopted for the consolidation, whether it was to be anything more than a simple merger, or whether it was to provide for a surrender of the stock of the constituent companies, the issue of new stock, the adoption of a new name, and the choice of a new board of directors. Under no circumstances would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer.

Great stress is laid by the railroad companies upon the fact that at the time these companies were incorporated the state was without credit, the treasury without money, the issue of state bonds in aid of public improvements forbidden by the Constitution, the levy of general taxes to assist in the building of the roads fruitless, the resources of the state having been exhausted by the civil war, which had left the community so poor that it was with difficulty the inhabitants could raise the taxes necessary for carrying on the government; that millions of acres of land were being abandoned and forfeited to the state for nonpayment of taxes and subsequently sold at incredibly low figures; that the paramount necessity was clearly the building of railroads to develop the resources of the state, and yet that the topography of the country was such that both the construction and the maintenance of the roads was difficult and expensive, and railroad enterprises promised very doubtful profits; that the lands along the river bottoms were waste and swamp, uncultivated and unexplored, and subject to annual inundations from the Mississippi; that the levees had been swept away again and again, and Congress asked for aid to rebuild them upon the ground of the impossibility of the state to do the work; that in this condition of affairs the best that could be done was to offer as a remuneration to vote taxes as a consideration for building the road; that these proposals were accepted and carried out in good faith; that the result has been to increase the value of property in portions of the state fully one hundred fold, and to immensely increase the revenues of the state and counties, and that under these circumstances the present repudiation of these contracts by the state, by pleading a technical incapacity to contract, is a gross breach of public faith, and should be discountenanced by the courts.

[25] \*Potent as these considerations are, they address themselves to the legislative, rather than to the judicial, department of the government. The legislature is the proper guardian of the public faith, and in its action with respect to its own obligations we are bound to assume that it will be guided, not only by its present necessity for revenue, but by consideration of its possible future needs. But whatever policy the state may choose to adopt with respect to encouraging or discouraging the investment of capital from abroad, the duty of the courts is to declare

the law as they find it, and avoid the discussion of questions of policy, which are clearly beyond their province. Certainly this court is not the keeper of the state's conscience. We have not thought it proper to inquire what was the answer to these charges. Doubtless they are sufficient, or at least are such as the legislature deemed to be sufficient, or it would not have passed the taxing acts of 1892 and 1894. While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature, or opposite party, had power to make under the Constitution, and that the other party was chargeable with knowledge of all its provisions in that connection. To enforce a performance, the plaintiff must also bring himself within the letter and spirit of the contract, and thus provide against any change in public sentiment which may render its performance obnoxious or unpopular.

Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this Constitution, was a new grant of corporate franchises within the meaning of § 180, it follows that it became subject to the provisions of § 191.

The question how far the case of *Natchez, J. & O. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, is applicable as *res judicata* upon the taxes involved in this case is a local question, upon which we are not called upon to express an opinion. We do not understand it to be pressed as ground for reversal.

*The judgment of the Supreme Court is therefore affirmed.*

\*YAZOO & MISSISSIPPI VALLEY RAIL- [26]  
WAY COMPANY *et al.*, *Plffs. in Err.*,

v.

WIRT ADAMS.

(See S. C. Reporter's ed. 26-28.)

*Error to state court—Federal question—consolidation of corporations—effect on exemption from taxes.*

1. The effect of a decision as to liability to taxes for a certain year, as an estoppel in a case respecting taxes of a different year, is not a Federal question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Klpley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the effect of consolidation of corporations—see notes to *Louisville, N. A. & C. R. Co. v. Boney* (Ind.) 3 L. R. A. 435, and *Shields v. Ohio*, 24 L. ed. U. S. 357.

As to exemption of consolidated corporations from taxation—see *Missouri ex rel. Wine v. Keokuk & W. R. Co.* (Mo.) 6 L. R. A. 222, and note.

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2. A new grant of corporate franchises, within the meaning of Miss. Const. 1890, § 180, making such grants subject to constitutional provisions which require the property of corporations to be taxed like that of individuals, is made by a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new Constitution, but which, by articles of consolidation, agree to merge and consolidate their properties, immunities, and privileges, and substitute for their shares, shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate existence of one of the old companies, "or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement," where the effect of the consolidation was to surrender the entire administration of the functions of the constituent companies to a new corporation with a new corps of officers.

[Nos. 355, 356.]

*Argued October 22, 23, 1900. Decided January 7, 1901.*

IN ERROR to the Supreme Court of the State of Mississippi to review a decision against a railroad company in an action for taxes from which an exemption was claimed. *Affirmed.*

See same case below, 77 Miss. 780.

**Statement by Mr. Justice Brown:**

This was an action against the Yazoo Company and the Illinois Central Company for state, county, municipal, and privilege taxes for the year 1898, upon the property of the Louisville, New Orleans, & Texas Company, which became the property of the Yazoo Company by virtue of the consolidation of October 24, 1892, and has since been operated by the defendants.

*Messrs. William D. Guthrie and Edward Mayes* argued the cause, and, with *Messrs. J. M. Dickinson and Noel Gale*, filed a brief for plaintiffs in error.

*Mr. R. C. Beckett* argued the cause, and, with *Mr. F. A. Critz*, filed a brief for defendant in error.

\*Mr. Justice Brown delivered the opinion of the court:

This case does not differ materially from the one just decided (*ante*, 395), except as to the year for which the taxes were assessed. A joint plea was filed by the defendants setting up a claim to exemption under the charter of the former Louisville Company, which for twenty-five years from March 3, 1882, appropriated all taxes to its construction debts, with a proviso that this appropriation should cease when the profits were sufficient 180 U. S.

to enable it to declare and pay an annual dividend of 8 per cent upon the capital stock, over and above the payment of its debts and liabilities. But this plea did not allege that the railroad was built under this charter, nor that the profits had not been \*sufficient [27] to pay the dividends; and a demurrer was interposed for these reasons, which was sustained by the court.

Defendants then, under leave to answer over, filed two pleas, of which the first, called the amended or second plea, rectified the two foregoing omissions, and set up that this exemption was an irrevocable contract of appropriation of the taxes, and protected by the contract clause of the 14th Amendment.

The third plea set up the record and decision in *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, as *res judicata*, and alleged that the contrary decision of June 20, 1898, in the case of *Adams v. Yazoo & M. Valley R. Co.* was violative of the contract clause. Then followed a maze of replications, rejoinders, and demurrers, into which it would be wholly unprofitable to enter. Suffice it to say that from this "labyrinth of special pleadings," as it was termed by the supreme court (77 Miss. 780), three questions were evolved:

First. Whether the provisions of § 21 of the charter of the Mobile & Northwestern Company constituted a valid and irrevocable contract between the state and the railroad company under the Mississippi Constitution of 1869.

Second. Whether, conceding its validity, the consolidation of 1892 operated to terminate this contract.

Third. Whether the decision in the *Lambert Case* operated as an estoppel against the prosecution of this action.

It is sufficient to say of the third question that it is not Federal in its character. What weight shall be given as an estoppel to a prior judgment of the same court is not a matter which can be reviewed here. We do not understand this point to be pressed.

The second question we have already disposed of in the main case. The immunity from taxation, contained in the charters of the constituent companies, did not inure to the new company formed by the consolidation of 1892.

In the view we have taken of the second question the first becomes immaterial, as we have held in the prior case.

It is stipulated that another case (No. 356) brought against these companies for the taxes of 1898 upon the property of the Natchez, Jackson, & Columbus division of the Louisville Company, \*now owned and operated by the Yazoo Company, shall abide the result of this. [28]

*The judgment of the Supreme Court of Mississippi in these cases is therefore affirmed.*

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,

v.

WIRT ADAMS.

SAME v. SAME.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO., *Appt.*,

v.

WIRT ADAMS.

(See S. C. Reporter's ed. 28-41.)

*Appeal—suit for injunction against taxes—effect of collection of taxes upon question of jurisdiction—right to sue for corporation—questions of jurisdiction distinguished from defenses—motion to dismiss—jurisdictional amount.*

1. An appeal from a decree of the circuit court refusing an injunction against the collection of taxes under state laws will not be dismissed on the ground that the appeal is abortive and improper because, before the appeal was taken, the taxes had been held lawful by a state court and had been collected, and therefore the very things the bill was filed to prevent are accomplished facts, and the remedy, if any, should be sought by writ of error to the state court, since the decision of the state court does not affect the jurisdiction on appeal from the Federal court, even if it could be held to be *res judicata* on the merits.
2. The objection that plaintiff in a suit for an injunction against the taxation of the property of a corporation has not complied with the 94th Equity Rule so as to show his right to maintain the suit does not go to the jurisdiction of the court over the action, although it might be raised as a defense by demurrer.
3. A Federal question is presented by a bill which alleges contract exemptions of a railroad company from taxation, existing and recognized for many years, which the state statutes are now attempting to impair and destroy.
4. A motion to dismiss a suit in the Supreme Court of the United States on the ground that a suit against a state officer is in effect a suit against the state will not be sustained, since the objection goes to the merits of the case, and, even if it goes to the jurisdiction, should not be raised by motion, but by demurrer or other pleadings in the regular progress of the cause.
5. A bill for injunction against taxes, brought by a railroad company against a revenue agent who represents all the parties interested, sufficiently states the jurisdictional amount when it alleges that the taxes assessed amount to a specified sum, much larger than the jurisdictional limit; and a question not arising on the face of the bill, as to how the taxes, when collected, would be disposed of, and in what proportions and amounts they

NOTE.—As to Federal questions as conferring jurisdiction on United States courts—see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 7.

On the jurisdiction of the United States circuit court as dependent upon amount—see notes to *Auer v. Lombard*, 19 C. C. A. 72, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455.

would be parceled out to interested municipalities, is immaterial.

[Nos. 77, 78, 79.]

*Argued October 24, 1900. Decided January 7, 1901.*

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a decision dismissing a bill for injunction against taxes on a railroad. *Reversed.*

Statement by Mr. Justice Brown:

\*This was a bill in equity filed by the railroad company, an Illinois corporation, against Wirt Adams, revenue agent, a citizen of the state of Mississippi, the railroad commission of that state, and the Canton, Aberdeen, & Nashville Railroad Company, a corporation of the state of Mississippi, to enjoin the railroad commission from approving and certifying an assessment for taxes on the Canton, Aberdeen, & Nashville Railroad for any of the years from 1886 to 1897 inclusive; also to enjoin the revenue agent from beginning any suit, or advising any of the counties or towns along the line of such road to bring suit for the recovery of such taxes, and for a decree adjudging such railroad to be exempt from state and county taxation for the years aforesaid. [29]

A temporary injunction, issued upon the filing of the bill, was subsequently discharged, an appeal taken to the court of appeals, which was dismissed for the want of jurisdiction, and a final decree subsequently entered in the circuit court dismissing the bill, with the following certificate upon the questions of jurisdiction:

"1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen, & Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen, & Nashville Railroad Company a party defendant in the cause."

"2. That the complainant by its original bill showed no jurisdiction \*in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question." [30]

3. That there was no jurisdiction in this matter, because the bill was a suit against the state of Mississippi and in violation of the 11th Amendment to the Constitution of the United States.

Mr. William D. Guthrie argued the cause, and, with Messrs. James Fentress and Edward Mayes filed a brief for appellant in opposition to the motion to dismiss.

Messrs. William D. Guthrie, Edward Mayes, Noel Gale, James Fentress, and J. M. Dickinson filed a brief for appellant on the merits.

Mr. F. A. Critz argued the cause, and, with Mr. R. C. Beckett, filed a brief for appellee.

Mr. Marcellus Green also argued the cause.



cause, and, with *Mr. S. S. Oalhoun*, filed a brief for appellee.

*Messrs. Marcellus Green and Garner Wynn Green* filed an additional brief for appellee in support of motion to dismiss or affirm.

Contentions of counsel sufficiently appear in the opinion.

[30] \*Mr. Justice **Brown** delivered the opinion of the court:

1. Motion was made to dismiss this bill upon the ground that the purpose and object of the original injunction bill have failed by reason of the fact that (as appears from an affidavit filed by Adams in this court since the case was docketed here) after the injunction was refused, and before the bill was finally dismissed or an appeal taken to this court, he filed a bill in equity in the chancery court of Clay county, Mississippi, against the Illinois Central Railroad Company and the Canton, Aberdeen, & Nashville Company to collect the same taxes involved here, and, in addition thereto, the taxes for the year 1898; that the defendants in their answer set up the same defenses relied upon here, which were overruled by the chancery court, and a final judgment given against the property as a paramount lien, June 16, 1899, from which decree an appeal is now pending and undetermined in the supreme court of the state.

The argument is that, inasmuch as the injunction in this suit was vacated by the circuit court, the assessment of taxes completed, and suit brought upon it and judgment recovered, the appeal in this case is abortive and improper for the reason that the very things the bill was filed to prevent are accomplished facts, and the railway companies cannot be injured, inasmuch as they have a complete remedy by writ of error to

[31] the supreme \*court of the state from this court, if any Federal question be involved and decided against them by that court.

The question which arises upon this state of facts, is, first, whether a decree in an equity cause in a state court can be set up as *res judicata* pending an appeal from such decree to the supreme court of the state; and, second, whether, assuming the decree to be still in force pending the appeal, it can be pleaded as *res judicata* upon motion to dismiss the appeal in this court. We are of opinion that this is a defense to the merits of the case, and is no ground for the dismissal of the appeal. It would hardly be contended that, if this decree of the state court had been pronounced before the bill was filed in the Federal court, the appeal would be dismissed upon motion upon that ground: much less that it could be set up as ground for dismissing an appeal to this court. The case is not different, if the decree, instead of being rendered before the bill is filed in the Federal court, is rendered after such a bill is filed, and pending suit. In either case it is a question whether it operates as an estoppel. While the fact that an appeal has been taken from such decree, which is still pending, introduces a new element, it is still the same question whether the decree can be

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made available as an estoppel upon motion to dismiss.

It is true that since the injunction against him was dissolved, Adams has sued and has succeeded, but it does not follow that his judgment may not be reversed by the supreme court when plaintiff's right to prosecute this bill would be revived.

We think the question is practically covered by the decision of this court at the last term in the case of *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526. In that case Huntington, as a receiver of the Central Land Company, on February 28, 1891, filed a bill in the circuit court of the United States against Laidley and other defendants, to set aside certain deeds which were claimed to be in fraud of the rights of the land company, and a cloud upon its title. Defendants answered and set up by way of estoppel certain judgments in the state courts rendered before the bill was filed, in favor of Laidley and against the Central Land Company in an action of ejectment, and also in a suit in equity between them. The circuit court upon this state of

\*facts certified to this court whether that [32] court was without jurisdiction, because of the pendency in the state court, prior to the suit, of the action of ejectment begun by Laidley against the Central Land Company, and also of the suit in chancery brought in the state court prior to the commencement of the case. It was held by this court that the question "whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense, either by way of *res judicata*, or because of any control acquired by the state court over the subject-matter, to this bill in the circuit court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction." "The circuit court of the United States," said Mr. Justice Gray, "cannot, by treating a question of merits as a question of jurisdiction, enable this court upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case." So, too, in *Reilly v. Bader*, 50 Minn. 199, 52 N. W. 522, it was held that a former adjudication could not be set up by motion after trial and verdict. All that was held in *Marsh v. Shepard*, 120 U. S. 595, *sub nom. Marsh v. Nichols. S. & Co.* 30 L. ed. 794, 7 Sup. Ct. Rep. 704, was that one of several appellants cannot dismiss an appeal to this court, if the other appellants oppose such dismissal, though after the appeal was taken the supreme court of the state had enjoined all the appellants from enforcing their claims. Motion was denied upon the grounds that one appellant cannot control the appeal as against his coappellants. In *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, it was only held that where, after appeal taken, an event occurs which would



render it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal; in other words, that the court will not decide moot cases. In the case under consideration, however, the question still remains whether a decree of a state court can be made available as an estoppel pending an appeal to the supreme court, and this, as already stated, is a defense, upon the merits.

[33] \*As the circuit court certifies to this court, pursuant to § 5 of the courts of appeal act, that the bill was dismissed for the want of jurisdiction, and this fact further appears on the face of the decree discharging the restraining order and overruling the motion for an injunction, the motion to dismiss must be denied.

Coming now to the three questions certified upon the subject of jurisdiction by the circuit court, we are next to inquire whether such jurisdiction can be supported upon the ground (1) of diversity of citizenship; (2) of a question arising under the Constitution or laws of the United States; or (3) whether it is ousted by the fact that the suit is against the state of Mississippi in violation of the 11th Amendment to the Constitution.

2. Plaintiff is averred to be a citizen of Illinois, and all the defendants citizens of Mississippi; but it further appears that the Illinois Central Company claims the right to bring the bill upon the ground that it is the lessee of the property and a creditor and a mortgage bondholder of the Canton, Aberdeen, & Nashville Railroad Company, whose property is sought to be taxed. It seems that it was once the owner of all the bonds, amounting to \$2,000,000, but for some reason a subsequent mortgage was executed, and under it bonds to the amount of \$1,750,000 were issued and sold, and a like number of the first two million issue were surrendered, and a note, secured by a second mortgage, taken for the balance. The latter bonds and note are averred to have been paid for at par in good faith, and to be secured by a paramount lien, and in reliance upon the charter as valid, and upon the mortgaged premises as being free from taxation for twenty years. It is not averred in the bill that the Canton Company has ever refused to sue, or has in any way been requested to sue by the appellant, or by anyone else. The gravamen of the bill is that the Canton Company was chartered by the legislature of the state by act of February 17, 1882, and that by such charter it "was exempt from taxation for a term of twenty years from the date of approval of this act."

[34] It is here insisted, and such seems to have been the opinion \*of the court below, that the appeal cannot be sustained under the 94th Equity Rule, which provides that every bill brought by stockholders of corporations against the corporation and other parties, founded on rights which may properly be asserted by the corporation, "must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which

he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer upon a court of the United States jurisdiction of a case, of which it would not otherwise have cognizance;" and must "also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." Assuming under the affidavit of Adams, though made only upon information and belief, that the plaintiff, the Illinois Central, owns a majority of the stock of the Canton Company, we are still of the opinion that the defense set up under the 94th Rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill. Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one state, the defendant a citizen of another, if the amount in controversy exceed \$2,000, and the defendant be properly served with process within the district. Excepting certain quasi jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the circuit courts. It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law, neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the \*cause [35] of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; and *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497, that it was not a question of the jurisdiction of the circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the 94th Rule may be raised by demurrer, but the admitted power to de-



cide this question is also an admission that the court has jurisdiction of the case.

3. But we are also of opinion that the bill presents a case under the Constitution of the United States, and that jurisdiction may be sustained upon that ground alone. The bill set forth the provisions of the Constitution of 1869, and the interpretation put upon it in the case of *Mississippi Mills v. Cook*, 56 Miss. 40, rendered in 1878, wherein that court construed these provisions, and declared that they did not require the legislature to tax the property of corporations for pecuniary profits; that this ruling had been repeatedly affirmed and had become the settled rule of property in the state, adopted and acted upon by the legislative, judicial, and executive departments. The bill further alleged a continued course of legislative exemption of railway properties from taxation; that the railroad commission had never before denied the validity of the exemption of the Canton Company, nor attempted to assess that company for taxation; that the Constitution of 1890 expressly provided that exemptions from taxation to which corporations were legally entitled at the adoption of this Constitution should remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the general laws, unless sooner repealed by the legislature, and that successive legislatures had since the adoption of that Constitution refused to repeal exemptions contained in charters theretofore granted; that the plaintiff, upon the faith of this interpretation of the Constitution of 1869, and of a provision in the charter of the Canton Company exempting it from taxation for twenty years, advanced over \$2,500,000 to build and equip the road; that the same was built with the money so furnished; that a lease of such road was executed to plaintiff, and that it had since been and is now in possession of the property; that the charter, with its exemption, the right to lease and the lease itself, were contracts rightfully made in view of the settled law as declared, and were valid under the Constitution of Mississippi as previously expounded, and that the obligations of these contracts were binding as against any subsequent change of judicial decision. The bill further averred that the defendants, "claiming to act under laws of said state, passed subsequently to said charter and its acceptance, are endeavoring to and will, illegally, impair and destroy the obligations of said charter contract, as aforesaid, unless restrained by your honors, . . . and that they are also attempting and claim that they have succeeded in fastening upon said railroad a first and paramount lien under acts of said state, passed in 1892 and 1894, and acts done by them in 1898 which displaces and is paramount to the lien to secure said mortgage bonds." It also denied the constitutional power of subsequent legislatures to compel the payment of taxes retroactively, while not denying its power to repeal the exemption in the charter as to future taxes, and, generally, that

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the contract had been impaired by the acts of the legislature ordering the assessment of the property for taxation.

The bill clearly avers a case arising under the Constitution of the United States, and is one of which the circuit court would have jurisdiction irrespective of the citizenship of the parties. As we had occasion to observe in *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 564, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653, "whether the state had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one." See also *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 88, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142.

4. The question whether this is a suit against the state within the 11th Amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another state, is also one which we think belongs to the merits rather than to the jurisdiction. If it were a suit directly against the state by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the state, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the state that he is exempt from prosecution, on account of the matters set up in the particular bill, is more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. 738, 858, 6 L. ed. 204, 232, wherein he makes the following observation: "The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

It may be said in a certain sense that the judicial power does not extend to civil suits (at least if begun by *capias*) against members of Congress or of the state legislatures, pending the session; or against witnesses going to, attending, or returning from courts of justice; or against bankrupts for causes for action arising before bankruptcy and covered by the discharge; or against infants upon their general contracts; or against the owners of vessels who have petitioned for a limitation of liability; but it was never doubted that such power extended to an examination of the question whether the defendant was entitled to the exemption of liability claimed by him, and in passing upon this question the court necessarily assumed

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jurisdiction of the cause. In the great case of *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440, it was never intimated, either by court or counsel, that the question of the suability of the state was not within the jurisdiction of the court to decide, the whole argument being addressed to the question of nonliability to a citizen of another state. In that case the process was served upon the governor of the state, but, as he did not appear, counsel for the plaintiff made a motion that unless the state caused its appearance to be entered judgment should be rendered by default. This seemed to be the only method by which the court could be called upon to pass upon the suability of the state, and was in reality a motion for judgment. See also *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 12 Sup. Ct. Rep. 504.

But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. As already observed, this question depends upon the language of the statute, although the word "jurisdiction" is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case. To put a familiar test: Can it be possible that if the plaintiff company were to succeed in this suit, the decree in its favor could be attacked collaterally as null and void for want of jurisdiction, by reason of the fact that the bill failed to allege a compliance with the 94th Rule in Equity, or because the defendant was really a representative of the state, and the suit was in fact a suit against the state?

But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case. *Howard v. Waldo*, 1 Root, 539; *Conger v. Dean*, 3 Iowa, 463, 66 Am. Dec. 93; \**Lyon v. Smith*, 66 Mich. 676, 33 N. W. 753; *Bloss v. Tacke*, 59 Mo. 174; *Chapman v. Blakeman*, 31 Kan. 684, 3 Pac. 277; *Hill v. Hermans*, 59 N. Y. 396; *Oregon & Transcontinental Co. v. Northern P. R. Co.* 32 Fed. Rep. 428; *Cartwright v. The Othello*, 1 Ben. 43, Fed. Cas. No. 2,483; *Cushing v. Laird*, 4 Ben. 70, Fed. Cas. No. 3,508.

In *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, where a suit was brought against state officers to enjoin them from proceeding under an alleged unconstitutional law, the question whether they were representative of the state was disposed of upon answers filed by officers of the state.

5. The question whether the amount in controversy be sufficient to sustain this bill is not one of those certified by the circuit court, nor upon which that court expressed an opinion; but, assuming it to be properly before us, we think that jurisdiction cannot

be defeated upon that ground. The allegation of the bill is that the taxes assessed amount to a "large sum; much more than \$20,000, to wit, the sum of ——— dollars." The suit is against the revenue agent, who represents all the parties interested, to enjoin the collection of a gross sum far exceeding the jurisdictional amount. How that sum, if collected, would ultimately be disposed of, and to which and in what proportions and amounts it would be parcelled out to the several municipalities interested, is one which does not arise upon the face of the bill, and is unnecessary to be considered here. In *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348, the bill was filed by the railroad company against the officers of four counties through which the road passed to enjoin the collection of certain taxes. The amount applicable to each county was stated in the bill, and it appeared that in each case it was much less than \$2,000. It was held that had these taxes been paid under protest and the plaintiff sought to recover them back, it would have been obliged to bring separate actions in each county, as the amount recoverable from each county would be different, and no joint judgment could possibly be rendered. So, if the injunction had been sought in a state court, the defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county. This was also the case in *Fishback v. Western U. Teleg. Co.* 161 U. S. 96, 49 L. ed. 630, 16 Sup. Ct. Rep. 506. \*These cases are quite distinguishable from those which hold that an action may be maintained for a lump sum though each sum when collected may be subsequently distributed among various parties, each receiving less than the jurisdictional amount. *Shields v. Thomas*, 17 How. 3, 4, 15 L. ed. 93, 94; *Rodd v. Heartt*, 17 Wall. 354, 21 L. ed. 627; *The Connemara*, 103 U. S. 754, *sub nom.* *Sinclair v. Cooper*, 26 L. ed. 322; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364.

In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the circuit court to entertain this bill and its authority to pass upon the several defenses set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer: but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits.

Another case between the same parties (No. 78) arises upon a similar record, except that a demurrer and plea were interposed, which, however, become immaterial. This was also a bill by the Illinois Central



**Company against the revenue agent and railroad commission of the state, and against the Yazoo & Mississippi Valley Railway Company, to enjoin the assessment of taxes on railroad property formerly belonging to the Natchez, Jackson, & Columbus Railroad Company for the years 1886 to 1891 inclusive.** The plaintiff sued as owner of all but four shares of the capital stock of the Yazoo Company, which company in turn owned a large part of the capital stock of the Louisville, New Orleans, & Texas Company, of which plaintiff was a large bondholder. The Louisville Company had acquired by purchase the property and franchises of the Natchez, Jackson, & Columbus Company which was sought to be taxed by the assessment enjoined. The bill further set forth the consolidation of the Louisville Company with the Yazoo Company upon which the first of these cases turned, and claimed all [41] the immunities belonging to the \*constituent companies. The same questions are presented by the record and the same result must follow.

Still another case (No. 79) is brought by the Yazoo & Mississippi Valley Railway Company, consolidated October 24, 1892, with the Louisville, New Orleans, & Texas Company, whereby all the property and franchises formerly belonging to the Natchez, Jackson, & Columbus Company were transferred to and became the property of the plaintiff, including which were the contract rights of the Natchez Company under section 21 of the Mobile and Northwestern charter. The suit was brought to enjoin the collection of taxes for the year 1898 upon the property originally belonging to the Natchez and Louisville Companies. As the plaintiff was a citizen of Mississippi no question of the diversity of citizenship arose, and jurisdiction was not claimed upon that ground. The questions are otherwise identical with those presented in the former cases, and a similar result must follow.

*The decrees of the circuit court dismissing the bills in these cases for the want of jurisdiction must therefore be reversed, and the cases remanded to that court for further proceedings not inconsistent with this opinion.*

**YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al., Plffs. in Err.,  
v.  
WIRT ADAMS.**

(See S. C. Reporter's ed. 41-49.)

**Error to state court—Federal question—construction of contract—certificate of Federal question.**

**1. Jurisdiction to review a decision of a state**

**NOTE.**—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267, and Kiple v. Illinois ex rel. Akin, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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court on the ground that a Federal question as to the impairment of the obligation of a contract is raised does not exist when the only question involved in the state court was the construction of a charter or contract, although it appeared that there were statutes subsequent thereto which might have been, but were not, relied upon as raising a Federal question concerning the construction of the contract.

2. A certificate by the chief justice of the supreme court of a state, that upon the argument of the case the validity of state legislation was drawn in question upon the ground of its repugnancy to the Constitution of the United States, is insufficient to give jurisdiction to the Supreme Court of the United States on writ of error, where the statutes complained of are not stated.

[No. 80.]

*Submitted October 22, 1900. Decided January 7, 1901.*

**IN ERROR** to the Supreme Court of the State of Mississippi to review a decision affirming a judgment for the plaintiff in an action to recover municipal taxes. On motion to dismiss. *Dismissed.*

See same case below, 76 Miss. 545, 25 So. 366.

**Statement by Mr. Justice Brown:**

\*This was an action begun in the circuit [42] court of Hinds county, Mississippi, by Adams, as state revenue agent, suing for the use and benefit of certain cities and towns through which the defendant railway runs, to recover municipal taxes upon its property for the years 1893 to 1896 inclusive.

A demurrer to the declaration having been sustained upon the ground that the exemption claimed by defendant in its charter was perpetual and unconditional as to the municipal taxes, an appeal was taken to the supreme court, which reversed the action of the circuit court, and remanded the case for a new trial. 75 Miss. 275, 22 So. 824. An amended declaration having been filed claiming taxes from 1886 to 1897 inclusive, defendant interposed pleas (1) of the general issue; (2) that defendant was organized under an act of February 17, 1883, containing the following provision in § 8: "That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this state, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired the property of said railroad may be taxed at the same rate

[43] as other property in this state. All of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected by the treasurer of this state and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns; that the railroad was completed to the Mississippi river, October 25, 1892, by a consolidation with the Louisville, New Orleans, & Texas Railway Company, which had constructed and was then the owner of certain branches which reached the Mississippi river at several different points; (3) that after the company was organized, but before its line was finally located and constructed, the municipal authorities of the city of Jackson adopted an ordinance releasing the road from all city taxation for twenty years from date, provided it selected Jackson for its southeastern terminus, and provided, further, that the work on said road be commenced within one year and be completed within three years to Yazoo City; and that such ordinance was accepted and complied with by the defendant; (4) that, prior to the assessment of these taxes, defendant leased its road to the Illinois Central for a term of fifty years, which, until the bringing of this suit, held and operated such road under such lease; that by its terms the Illinois Central agreed to pay and discharge all taxes assessed upon the defendant company; that under defendant's charter it was exempted from all municipal taxation; that the right of the legislature to make such exemption had been judicially recognized in the case of *Mississippi Mills v. Cook*, 56 Miss. 40; and that such exemption entered into and constituted a part of the aforesaid lease, and of the charter contract between the defendant and the state; and that "the said exemption, by said charter conferred, has never been repealed by the legislature of said state," but that during the four years named the legislature refused to pass bills introduced to repeal such exemption.

A new trial resulted in a verdict for the plaintiff, which was affirmed by the supreme court. 76 Miss. 545, 25 So. 366. Hence this writ of error.

**Messrs. William D. Guthrie, James Fentress, Edward Mayes, J. M. Dickinson, and Noel Gale** submitted the cause for plaintiffs in error:

The suit, so far as it relates to taxes levied since 1892, was based upon the provisions of chapter 93 of the Annotated Code of 1892, entitled *Municipalities*, which confers the taxing power upon cities, towns, and villages in Mississippi, and regulates its exercise. The suit was therefore, as to those taxes, clearly an attempt to enforce a statute of the state subsequent to the charter of 1882.

*Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68.

The state court could not have held the plaintiffs in error liable for the taxes in suit

without deciding either (1) that the provisions of § 8 did not constitute a contract of exemption, or (2) that the subsequent tax legislation of the state did not impair that contract.

*Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; *Great Western Tele. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

**Mr. Marcellus Green** submitted the cause for defendant in error:

The fact that certain Mississippi legislation prescribing the duties and defining the powers of the state revenue agent is legislation subsequent to the granting of its charter, and that it impairs its contract rights, gives no jurisdiction, because it is a question that was never presented to the state court, which had no opportunity to pass upon it.

*Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995.

The statute must be specially set up by the party, and the decision must be against the claim.

*Montgomery v. Hernandez*, 12 Wheat. 129, 6 L. ed. 575.

The right on which the party relies must have been called to the attention of the court below in some way, and the decision of that court must have been against the right claimed.

*Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

To give this court jurisdiction by writ of error to a state court, it must appear by the record that a Federal question was raised; and nowhere in the record is any subsequent legislation shown that impaired any charter right.

*Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Levy v. San Francisco City & County Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

A definite issue as to the validity of the statute or the possession of a right must be distinctly deducible from the record, before the state court can be held to have disposed of such Federal question by its decision.

**Powell v. Brunswick County Supers.** 150

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U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 715, 41 L. ed. 1175, 17 Sup. Ct. Rep. 725.

This case only presents a controversy between citizens of the state as to the construction of a state statute unimpaired by subsequent laws, and this does not raise a Federal question.

*Turner v. Wilkes County Comrs.* 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

*Messrs. R. C. Beckett and F. A. Critz* also submitted the cause for defendant in error.

[44] \*Mr. Justice Brown delivered the opinion of the court:

Motion is made to dismiss for the want of a Federal question. The ground of the motion is that, while the second and fourth pleas set up the exemption contained in the charter from all municipal taxation, and the third pleads the exemption from city taxation by the ordinance of the mayor and aldermen of the city of Jackson, and inferentially, at least, that these constitute a contract under which the road was built, there is not only no averment that this contract had been impaired by subsequent legislation, but no discussion of the case in that aspect by the supreme court, which held that under a proper construction of the charter the railroad company is not entitled to an exemption from municipal taxation, because the road had never been completed to the Mississippi river. There was undoubtedly legislation both before and subsequent to the charter of this company, February 18, 1882, authorizing municipalities to impose taxes, but no allusion to them is made either in the pleadings, proofs, or in the opinion of the supreme court.

The case then resolves itself into this: Whether jurisdiction can be sustained when the only question involved is the construction of a charter or contract, although it appear that there were statutes subsequent thereto which might have been, but were not, relied upon as raising a Federal question concerning the construction of the contract. There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the supreme court of the state. The authorities upon this point are very numerous, but they all belong to a class of cases in which it was averred that, properly construed, the contract was impaired by subsequent legislation; but, if the sole question be whether the supreme court has properly interpreted the contract, and there be no question of sub-

[45] sequent \*legislative impairment, there is no Federal question to be answered. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

To sustain our jurisdiction under the 2d clause of Rev. Stat. § 709, relied upon here, there must be drawn in question the validity of a state statute upon the ground of its being repugnant to the Constitution or laws of 180 U. S.

the United States; but of what state statute is the validity attacked in this case? None is pointed out in the record; none set up in the pleas; none mentioned in the opinion of the court. In fact, in the fourth plea it is expressly averred that "the exemption by said charter conferred has never been repealed by the legislature of the state;" and we are only asked to infer that certain statutes describing in detail methods of municipal taxation did in fact impair the obligation of the chartered contract. But are we bound to search the statutes of Mississippi to find one which can be construed as impairing the obligation of the charter? It is true that, in the first assignment of error in this court, it is averred that the supreme court of the state erred in rendering its judgment, whereby the tax provisions of the Annotated Code of 1892, providing for the office of revenue agent, and chapter 34 of the Laws of 1894, defining the powers of that office "were given effect against the contract rights of the plaintiffs in error," contrary to the contract clause of the Constitution; but no mention is made of this in the assignments of error filed in the supreme court of the state, which were of the most general description; and no allusion is made to the Code of 1892 or to the act of 1894 in the opinion of the court.

There is a laxity of pleading, in failing to set up the subsequent law impairing the obligation of the contract, which ought not to be encouraged. Granting that, as the case arose under the 2d clause of Rev. Stat. § 709, the invalidity of the statute need not be "specially set up or claimed," it must appear, under the most liberal construction of that section, that it was necessarily involved, and must indirectly, at least, have been passed upon in the opinion of the supreme court; but, for aught that appears, the very statutes under which this road was taxed were in existence before the road was chartered, although others, prescribing a different method of assessing \*and collecting such [46] taxes, may have been passed subsequent thereto. This subsequent legislation, however, may have had, and apparently did have, nothing to do with the disposition of the case.

Three recent cases in this court are pertinent in this connection. In *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80, an action of ejectment was brought by Laidley against the land company in a court of West Virginia. The case turned upon the defectiveness of a wife's acknowledgment to a deed of land. The court of appeals of Virginia, prior to the organization of the state of West Virginia, had in several cases held that acknowledgments in this form were sufficient; but the court of appeals of West Virginia in this case held it to be insufficient, and the change of the settled construction of the statute was charged as an impairment of the contract. This court held that, under the contract clause of the Constitution, not only must the obligation of the contract be impaired, but it must have been impaired by some act of the legislative



power of the state, and not by decisions of the judicial department only. "The appellate jurisdiction of this court," said Mr. Justice Gray, "upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, . . . and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity." It was said by Mr. Justice Miller in *Knox v. Exchange Bank*, 12 Wall. 379, 383, 20 L. ed. 414, 415: "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

[47] So, also, in *Turner v. Wilkes County Comrs.* 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464, "it was said that, "this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own Constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject." In this case, too, the plaintiff in error sought to take advantage of a change of judicial construction by the supreme court of the state, which had held that the bonds were void because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the Constitution.

The case of the *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68, is much relied upon by the plaintiff in error, and is claimed to be full authority for the maintenance of the writ in this case. This was a bill by the plaintiff in error in the case under consideration, to enjoin a collection of taxes upon its property. "The illegality complained of was that the tax was in violation of the company's charter, by which it was insisted the property of the company incident to its railroad operations was exempted from taxation: and it was averred that the charter, as respects the exemption claimed, was a contract irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the state." Not

only does it appear from the opinion that the taxes in question were assessed under an act passed in 1888, subsequent to the charter, but on reference to the original bill, which we have consulted for that purpose, we find that this act of April 3, 1888, was specially set up and pleaded in the bill, and was charged to be a violation of the charter contract, which exempted the orator's road from taxation, and that such application of said act was the same as a repeal or revocation of the granted exemption, and therefore in violation of the Constitution of the United States \*forbidding such violation. In other [48] words, the bill in that case not only pointed out the exemptions contained in the plaintiff's charter, but also set up the subsequent statute, which, it was contended, impaired the obligation of that contract. The bill thus contained the allegation which is wanting in this case, and put it in the power of this court to say whether the contract set up in the bill had been properly construed by the state court. This was also the case in *Columbia Water Power Co. v. Columbia Electric Street Railway, Light, & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; and *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

If jurisdiction in this case be sustained, it results that whenever a state court gives a certain construction to a contract it is our duty to search the subsequent statutes, and to find out whether there be one which, under a different construction of the contract, may be held to impair it. We must decline the obligation. As was said by the Chief Justice in *Powell v. Brunswick County*, 150 U. S. 433, 440, 37 L. ed. 1134, 1137, 14 Sup. Ct. Rep. 166: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon in arriving at conclusions upon the matters actually presented and considered." See also *Louisville & N. R. Co. v. Louisville*, 166 U. S. 709, 715, 41 L. ed. 1173, 1176, 17 Sup. Ct. Rep. 725.

It is true that the chief justice of the supreme court certifies that upon the argument of this case the validity of legislation of the state of Mississippi subsequent to the statute of February 18, 1882, was drawn in question by the company upon the ground of its repugnancy to the Constitution of the United States; but we have repeatedly held that such certificate is insufficient to give us jurisdiction where it does not appear in the record, and that its office is to make more certain and specific what is too general and indefinite in the record. *Lawler v. Walker*, 14 How. 149, 14 L. ed. 364; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940. It is said in *Lawler's Case* that "the \*statutes complained of [49]



in this case should have been stated. Without that the court cannot apply them to the subject-matter of litigation, to determine whether or not they have violated the Constitution or laws of the United States." See also *Missouri & M. R. Co. v. Rock*, 4 Wall. 177, *sub nom. Mississippi & M. R. Co. v. Rock*, 18 L. ed. 381; *Parmelee v. Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; and cases cited.

*The writ of error is therefore dismissed.*

## THE QUEEN OF THE PACIFIC.

(See S. C. Reporter's ed. 49-58.)

### *Shipping—stipulation limiting time for claims for damage to goods.*

1. A stipulation in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within thirty days, applies to a libel against the ship itself, as well as to claims *in personam* against the owners.
2. A stipulation for notice of any claim of loss within thirty days from date of shipment, in a bill of lading for goods carried by ship from San Francisco to San Pedro, is not unreasonable as applied to a loss which was known to the consignors more than three weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice.

[No. 130.]

*Argued and Submitted December 14, 1900.  
Decided January 7, 1901.*

ON CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming that of the Circuit Court in favor of libellants against a steamship. *Reversed.*

See same case below, 36 C. C. A. 135, 94 Fed. Rep. 180.

Statement by Mr. Justice **Brown**:

[50] \*This was a joint libel by the Bancroft Whitney Company, a California corporation, and the firm of Hellman, Haas, & Company, against the steamship Queen of the Pacific, owned by the Pacific Coast Steamship Company, to recover damages to certain miscellaneous merchandise shipped April 29, 1888, at San Francisco, to consignees at San Pedro, in the state of California.

The contracts of affreightment were evidenced by bills of lading in the usual form and with the usual exception of perils of the sea, and, amongst others, with the following stipulation:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after

thirty days from date hereof no action, suit, or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

The steamship left San Francisco about two o'clock in the afternoon of April 29, 1888, bound for the port of San Diego and intermediate ports, having on board a cargo of general merchandise and upwards of 200 persons. A little more than twelve hours after she sailed, and about half-past two o'clock in the morning of the 30th, the steamer was seen to have sprung a leak and to be taking in water through a watertight compartment known as the starboard alleyway. At this time she had a list of from 5 to 8 degrees to starboard, which, when she reached Port Harford, four or five hours afterwards, had increased to an angle of 30 degrees. When about 250 or 300 yards from the wharf where she usually made her landing, she took the bottom in about 23 feet of water, and, in about twenty minutes thereafter, filled, sank, and lay in a helpless condition for three or four days. A diver, procured for that purpose, after repeated efforts, found the leak and stopped it, whereupon the water was pumped out of the vessel, and she was towed to San Francisco, where she arrived the next day. Her cargo was all discharged upon the wharf, and delivery thereof tendered and accepted by the several owners, who gave the usual average bonds. On May 19 that portion of the cargo belonging to Hellman, Haas, & Company was sold by them at public auction. No claim for damage to the merchandise was made \*up- [51] on the owners of the Queen prior to the sale, nor were they invited to such sale. In short, nothing further appears to have been done for nearly four years, though the steamer was constantly running to and from San Francisco, when on April 28, 1892, this libel was filed. Exceptions to the libel were interposed and overruled (61 Fed. Rep. 213), and the case subsequently went to a hearing upon libel, answers, and testimony, and resulted in a decree for the libellants for the full amount of their claim (78 Fed. Rep. 155), which was affirmed by the court of appeals. 36 C. C. A. 135, 94 Fed. Rep. 180. Whereupon this writ of certiorari was granted.

Mr. **Thomas B. Reed** argued the cause and filed a brief for petitioner:

Compliance with each of the thirty days' conditions in the contract was a condition precedent to enable the libellant to recover.

*California Sav. Bank v. American Surety Co.* 87 Fed. Rep. 118; *Albers v. Western U. Teleg. Co.* 98 Iowa, 51, 66 N. W. 1040; *Angel v. Cunard S. S. Co.* 55 Fed. Rep. 1005; *Moore v. Harris*, 34 L. T. N. S. 519. See also *Sherwood v. Agricultural Ins. Co.* 10 Hun, 593; *Ostrander*, Ins. § 221.

No cases whatever have been cited showing the ship to have been bound by any other

contract than by the one which bound the owners. Such, certainly, is not the language of other judges.

*The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *The Druid*, 1 W. Rob. 399. See also *The Bold Buccleugh*, 2 Eng. L. & Eq. Rep. 537; *The Kensington*, 36 C. C. A. 533, 94 Fed. Rep. 885.

In insurance cases notice within five and ten days is deemed reasonable.

*Angel v. Cunard S. S. Co.* 55 Fed. Rep. 1005.

If it is to be held reasonable that the claim must be made before the removal of the goods, can it be unreasonable that the claims should be required to be presented within thirty days after the making of a contract to be performed in five days,—especially when the parties both made the contract without protest?

*Skinner v. Chicago & R. I. R. Co.* 12 Iowa, 191; *Moore v. Harris*, 34 L. T. N. S. 519.

*Mr. George W. Towle, Jr.*, also filed a brief for petitioner.

*Mr. Milton Andros* submitted the cause for respondents:

If the company intended to include in the limitation in the bill of lading as to the time in which a suit may be brought a proceeding *in rem* against its steamships, it would not have expressed that intention in language so ambiguous that to extend the clause so as to embrace such a proceeding would be equivalent to engrafting into it an entirely independent provision. As this clause is for the benefit of the steamship company, and as the language used is its language, if it has chosen such as does not clearly express this intention, it is to be construed most strongly against it.

*Palmer v. Warren Ins. Co.* 1 Story, 360, Fed. Cas. No. 10,698; *Blackett v. Royal Exch. Assur. Co.* 2 Crompt. & J. 244; *Fowkes v. Manchester & L. Assur. Asso.* 3 Best & S. 917; *The Caledonia*, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537; *Atwood v. Reliance Transp. Co.* 9 Watts, 88, 34 Am. Dec. 503; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465; *Airey v. Merrill*, 2 Curt. C. C. 8, Fed. Cas. No. 115; *Hooper v. Wells, F. & Co.* 27 Cal. 28, 85 Am. Dec. 211; *Mason v. Pritchard*, 12 East, 227; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

[51] \**Mr. Justice Brown* delivered the opinion of the court:

The court of appeals in its opinion dwelt upon several propositions arising upon the pleadings and evidence, but in the view we have taken of the case we shall find it necessary to discuss but one, which is, in substance, that the libellants did not, as required by the bill of lading, present to the company their claims for damage to the merchandise within thirty days from the date of the bills of lading, April 27 and 28, 1888. There is no pretense of a compliance with this condition. Two answers are made to this defense: First, that the limitation applies only to claims against the steamship company or

any of the stockholders of said company, and not to claims against the vessel; second, that the limitation is unreasonable.

1. The first objection is quite too technical. It virtually assumes that there were two contracts, one with the company and one with the ship, the vehicle of transportation owned and employed by the company; and that while the company as to all its other property is protected by the contract, as to this \*particular property, used in carrying it [52] out, it is not so protected. But, if such be the case with respect to this particular stipulation, must it not also be so with respect to the other stipulations in the bill of lading to which the company is a party but not the ship? Thus, "the responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles." Can it be possible that the responsibility of the ship shall not cease at the same time? "The company shall not be held responsible for any damage or loss resulting from fire at sea or in port; accident to or from machinery, boilers, or steam," etc.; but shall the company be exempt and not the ship? "It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, etc., . . . nor for loss of specie, bullion, etc., unless shipped under its proper title or name, and extra freight paid thereon;" but shall the ship be liable for all these excepted losses notwithstanding that the company is exonerated? These questions can admit of but one answer. There was in truth but one contract, and that was between the libellants upon the one part, and the company in its individual capacity and as the representative of the ship, upon the other.

There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed; still, they ought not to be wholly frittered away by an adherence to the letter of the contract in obvious disregard of its intent and spirit. It is too clear for argument that it was the intention of the company to require notice to be given of all claims for losses or damage to merchandise intrusted to its care; and as such damage could only come to it while the merchandise was upon one of its steamers or in the process of reception or delivery, and as the owner would have his option to sue either *in rem* or *in personam*, it could never have been contemplated that in the one case he should be obliged to give notice, and not in the other. In either event, the money to pay for such damage must come from the treasury of the company; and we ought not to give such an effect to the stipulation as would enable the owner of \*the merchandise to avoid its operation by simply changing his form of action. [53] It would be almost as unreasonable to give it this construction as to hold that it should apply if the action were in contract, but should not apply if it were in tort. The "claim" is in either case against the com-



pany, though the suit may be against its property.

2. The question of the reasonableness of the requirement is one largely dependent upon the object of the notice and the length of the voyage. Thus, a notice which would be perfectly reasonable as applied to steamers making daily trips might be wholly unreasonable as applied to vessels engaged in a foreign trade. Indeed, a thirty-day notice, such as is involved in this case, would be wholly futile as applied to a steamship plying between San Francisco and trans-Pacific ports. Notice might also be deemed reasonable, or otherwise, according to the facts of the particular case. Thus, if the Queen had been driven out to sea, and was not heard from for thirty days, obviously the provision would not apply, since its enforcement might wholly destroy the right of recovery. The question is whether, under the circumstances of the particular case, the requirement be a reasonable one or not.

The Queen was engaged in short trips and in general trade to San Diego, doubtless delivering merchandise in different parcels and in different quantities to large numbers of consignees at the termini, and at intermediate ports. If any damage occurred to such articles, it was of the utmost importance to the company to have the claim made as soon as possible, while the witnesses, who must often be sailors, difficult to find, and still more difficult to retain, might be reached, and while their memory was fresh, that the company might then know whether it had a defense to the claim. In case of a disaster occurring on such voyage, it could hardly fail to be known in San Francisco within three or four days from the time the steamer left there. As a matter of fact the bills of lading in this case were signed April 27 and 28, the loss occurred on April 30, and notice was mailed to the shippers on May 2. There were thus over three weeks during which they were at liberty to make inquiries, examine into the facts, and determine whether to make claim upon the company or not.

Similar stipulations requiring notices of losses to be given to common carriers, express companies, telegraph and insurance companies have so often been upheld by the courts, when reasonable, that a review of the cases is quite unnecessary. Indeed, this is not the first time that the question has been before this court.

In *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, an agreement by an express company that it should not be liable for any loss of or damage to any package, unless claim should be made therefor within ninety days from its delivery to the company, was held to be one which the company could rightfully make, since the time for transit required only about a day. In *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867, there was a provision in the bill of lading that no claim for damage should be allowed, unless made within three days after the delivery of the goods. This was held to be valid. "The company, wishing to guard against any allegation of neglect in the delivery of  
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goods confided to them, require that when the goods are delivered they shall be promptly examined and complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort."

In *Goggin v. Kansas P. R. Co.* 12 Kan. 416, there was a requirement that claims for damage to live stock should be made in writing, before or at the time the stock was unloaded. Plaintiff alleged that he had signed the bill of lading under protest, and also verbally notified the servants of the company of the damage before the cattle were unloaded from the cars, and, immediately after giving verbal notice, sought for writing materials to make out a written notice, but, before he was able to find them, the cattle were unloaded, so that no notice was given. A demurrer was sustained to this reply, the court holding that his inability to procure writing materials was no excuse for not giving notice for more than a year afterward. "The parties were competent to make the contract, and did make it, and it must be held good, unless it is contrary to \*public policy." [55] See also *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387.

In *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332, where a package was shipped from a town in Indiana to Savannah, Georgia, during the Civil War, when transportation was much interrupted, it was held that a condition that the carrier should not be liable unless a claim was presented within thirty days after shipment was unreasonable. It was put upon the ground that the country being in an unsettled condition, occasioning great delays in shipments and in the transmission of mails, an attempt to incorporate this condition into their contract was placing it within the power of the company by a delay which, under the circumstances, would perhaps not have been unreasonable, to prevent any claim for loss or damage, however gross may have been its negligence. It appeared that the plaintiff's agent delayed shipping the property for a month or more, until Savannah was taken by the Federal troops, when he delivered it to the company, and the receipt was executed. That the case was determined upon the particular facts is evident from the subsequent case of *United States Exp. Co. v. Harris*, 51 Ind. 127, in which a stipulation that the company was not to be liable for any loss, unless the claim therefor should be made in writing, at the office of shipment, within thirty days from the date of said receipt, was held to be binding and valid, though it was doubted whether the claim must be made at the office of the company, where the property had passed into the hands of another carrier, or might be made in such case upon some agent or officer chargeable with the loss. The former case was distinguished as being applicable to its own facts.

There are doubtless some cases to the contrary, where upon the particular facts the condition was held to be unreasonable. In  
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*Missouri P. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574, the requirement was that the shipper should give notice in writing of his claim to some officer of the company or its nearest station agent, before the cattle were removed from their place of destination, and before they were mingled with other stock. The shipment was from an interior town in Texas to Chicago, the line of railway did not extend to the point of destination, \*and both parties understood that the carrier would transport the cattle from its own road over a connecting road. It was held that the failure of the answer to show that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable, was fatal on demurrer, and that no presumption could be indulged that the carrier had an officer near the place of destination. This case was evidently decided upon its special facts. In another case decided by the supreme court of Texas (*Pacific Exp. Co. v. Darnell* (Tex.) 6 S. W. 765), a piece of machinery was delivered to an express company in Texas for shipment to Baltimore. The contract of shipment provided that the company should not be held liable for any claim arising from the contract, unless it were presented within sixty days of the date of the contract. Held, that the failure to present the claim was not a bar to the right of recovery, the restriction of presentment of claims without reference to the time of loss being unreasonable. The court seemed to assume that the stipulation imposed a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed. The opinion seems to have gone off upon the point that, while the notice as applied to the facts might have been reasonable, it would be unreasonable when applied to a different state of facts. It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable or worked a manifest injustice to the libellants, we should not give it effect. All that was decided in *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300, was that a similar limitation of thirty days was pleaded as a condition precedent to the plaintiff's right to recover, when it should have been set up in the answer. See also *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118.

Other analogous limitations upon the common-law liability of a carrier, not operating to restrict his liability for negligence, have been sustained by this court; viz., exempting the carrier from liability from losses by fire occasioned without his negligence (*York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872); a restriction in value upon the property shipped (*New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; \**Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151); limiting its liability upon through shipments to losses occurring upon its own line (*Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827); and pro-

viding that in the case of loss the carrier shall have the full benefit of any insurance that may be effected upon the goods (*Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176). Indeed, in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, in an elaborate opinion by Mr. Justice Bradley, it was held by this court that common carriers may impose almost any just and reasonable limitation upon their common-law liability, not amounting to an exemption from the consequences of their own negligence. The methods of transportation have changed so radically during the century which has just closed that it seems almost necessary to the proper protection of a carrier, in transacting the enormous business of railway and steamship lines, that he should have the power by just and reasonable limitations incorporated in his contract or brought to the attention of his shippers, to place some restrictions upon the unlimited liability of the common law, particularly where articles of great value, such as jewels, money, bullion, laces, and precious stones, are transported without disclosing their contents, or articles or animals of exceptional value, such as race horses, are carried without information of their character; and that persons intending to make claims for losses should manifest their election to do so as soon as the circumstances can by reasonable diligence be ascertained. The law recognizes the fact that the measure of liability originally applied to a carter's wain or a waterman's hoy may often be illy adapted to the exigencies of modern commerce.

There is no hardship to the libellants in giving effect to the stipulation in this case. As was said of a similar condition in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 268, 22 L. ed. 556, 558: "It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required, and it is intrinsically just, as applied to the present case." The loss was known to the shippers within three days after it occurred. The steamer was then and continued to be in port, and the facts were easily ascertainable. \*Under the stipulation the company had a [58] right to assume that the proper inquiries had been made, and that the shippers were either satisfied that the company was not liable, or that they had elected to rely upon their policies of insurance. Instead of giving notice, libellants permitted four years to elapse before beginning suit, although both the ship and the company were readily accessible. True, the court of appeals found there was no change of circumstances and no loss of testimony in the meantime; but that is not material. The question concerns the binding effect of the stipulation. Had the ship been transferred to a bona fide purchaser there certainly would have been, had the witnesses whose testimony could explain the loss disappeared there probably would have been, laches, which would render the claim stale, irrespective of the stipulation; but the



stipulation itself would be invalid only upon showing that under the circumstances of the particular case its enforcement would work a manifest injustice. In this view it is unnecessary to consider whether the limitation of thirty days for the commencement of suit be reasonable or not.

We are of opinion that the clause in question was perfectly reasonable, and *the decree of the Court of Appeals must therefore be reversed*, and the case remanded to the District Court for the Northern District of California, with directions to dismiss the libel.

[59] \*AARON BRADSHAW, *Plff. in Err.*,  
v.

NEHEMIAH B. ASHLEY.

(See S. C. Reporter's ed. 59-71.)

*Ejectment—proof of possession—presumption as to ownership.*

1. The possession of land raises a presumption of ownership, in the absence of anything to show the contrary.

NOTE.—*Possession as sufficient evidence of title to support ejectment against one having no better right.*

The elementary rule that one must recover on the strength of his own, and not on the weakness of the title of his adversary, is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially against one who has taken possession by force and violence. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

Recovery may be had on bare possession only, against a trespasser without color of title. *Towke v. Darnall*, 5 Litt. (Ky.) 317; *Bagley v. Kennedy*, 85 Ga. 703, 11 S. E. 1091.

And the rule that prior possession is prima facie evidence of title against a naked trespasser or a mere intruder is applicable to a case where the entry was made without actual force and under a claim of right. *Watkins v. Smith*, 91 Tex. 589, 45 S. W. 560.

The plaintiff must recover on the strength of his own title. But actual prior possession is strong enough to sustain recovery from a mere trespasser. A mere intruder cannot enter on a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. *Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Wilson v. Fine*, 38 Fed. Rep. 789; *American Mortg. Co. v. Hopper*, 48 Fed. Rep. 47.

Possession is prima facie evidence of title, and sufficient to maintain ejectment against a mere naked trespasser. *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597; *Sacramento Valley R. Co. v. Moffatt*, 7 Cal. 577; *Nagle v. Macy*, 9 Cal. 427; *Stephens v. Hambleton* (Cal.) 47 Pac. 51.

And this rule is recognized in the following cases: *Gist v. Beaumont*, 104 Ala. 347, 16 So. 20; *Thompson v. Burhans*, 79 N. Y. 93.

So, in *Edrington v. Butler* (Tex. Civ. App.) 33 S. W. 142, the court said that it has long been the settled law in Texas that possession  
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2. Proof of possession of plaintiff in ejectment, at least if it is under color of right, on the day in question, is sufficient to sustain an action of ejectment, in the absence of any proof of defendant's right.

[No. 60.]

*Argued November 1, 1900. Decided January 14, 1901.*

IN ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment for plaintiff in an action of ejectment for real property. *Affirmed.*

See same case below, 14 App. D. C. 485.

The facts are stated in the opinion.

*Messrs. John Ridout and William F. Mattingly* argued the cause, and, with *Mr. William John Miller*, filed a brief for plaintiff in error:

In all cases in which the plaintiff seeks to recover on proof of adverse possession for twenty years, or the defendant to defend on the same ground, when the possession has been held by different persons for the twenty years it is a familiar rule that, in order

by plaintiff in an action of trespass to try title is prima facie evidence of title in him as against a trespasser.

A person in possession of real property in Alaska may maintain ejectment therefor, where ousted by a mere intruder. *Campbell v. Silver Bow Basin Min. Co.* 1 C. C. A. 155, 7 U. S. App. 71, 49 Fed. Rep. 47.

Actual possession of a mining claim, with or without a valid location, is sufficient to support ejectment against persons who, without color of right or title, acting as naked intruders or trespassers, ousted and ejected the plaintiff. *Meydenbauer v. Stevens*, 78 Fed. Rep. 787.

Prior possession enables plaintiff in ejectment to prevail against a mere intruder, regardless of whether there be an outstanding title. *Mission of Immaculate Virgin v. Cronin*, 14 Misc. 372, 36 N. Y. Supp. 77.

And even where title may be shown to exist in another. *Bequette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615; *Turner v. Aldridge*, McAll. 232, Fed. Cas. No. 14,249.

Though plaintiff in ejectment must in Oregon have a legal estate, actual possession at the time of the ouster is a sufficient estate against a mere intruder. *American Mortg. Co. v. Hopper*, 48 Fed. Rep. 47.

The possessory right to land on which an ice house was standing at the time Alaska was ceded to the United States, although it had not been granted, is sufficient to sustain an action for possession against a mere intruder, under the statutes of Oregon (which are applicable to Alaska) giving any person who has a legal estate and a present right to possession the right to recover it. *Haltern v. Emmons*, 46 Fed. Rep. 452.

Prior possession of real property under a colorable title is sufficient to support an action to recover possession from a mere trespasser. *Oregon R. & Nav. Co. v. Hertzberg*, 26 Or. 216, 37 Pac. 1019.

Plaintiff's actual prior possession under a bona fide claim of title is sufficient in ejectment as against a mere intruder. *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342.

The occupation of real property as a homestead, under and by virtue of a formal deed to the property, is sufficient to support an action

to tack the possessions together, there must be shown a privity of estate between them, either grantee, heir, or devisee.

Tyler, Ejectment, 915; *Davis v. Furlow*, 27 Md. 536.

In those jurisdictions where recovery is permitted on proof alone of prior possession, short of twenty years, and the plaintiff seeks to avail himself of the prior possession of another under whom he claims, he must show a valid conveyance from such party.

*Plume v. Seward*, 4 Cal. 95, 60 Am. Dec. 599; *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

The possession held by the defendant is presumptive evidence of a right of possession, and he cannot be deprived of his possession by any other than the rightful owner.

McHenry, Ejectment, 115; *Smith v. Mc-*

of ejectment against a trespasser. *Hall v. Gallemore*, 138 Mo. 638, 40 S. W. 891.

Prior possession of real property by one holding under a purchase, whether valid or not, from the state, is sufficient ground for ejectment against a mere interloper. *Gray v. Thompson*, 5 Tex. Civ. App. 32, 23 S. W. 926.

Actual possession of real property under a claim of title is prima facie evidence of title, and is sufficient to sustain a recovery of the property against persons who entered into possession without any title in themselves, unless the evidence is of such character as to defeat this right. *House v. Reavis*, 89 Tex. 626, 35 S. W. 1063.

But prior possession is sufficient to entitle a party to recover in an action of ejectment, only against a mere intruder or wrongdoer, or a person subsequently entering without right. *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461.

Recovery can be had in ejectment on proof of prior possession, against one not showing a better right, or an intruder. *Dothard v. Denson*, 72 Ala. 541; *McCall v. Doe*, 17 Ala. 533; *Ashmead v. Wilson*, 22 Fla. 259; *Probst v. Domestic Missions of General Assembly*, 3 N. M. 373, 5 Pac. 702.

Priority of possession gives precedence in an action to recover the possession of real property, where no better title can be shown as belonging to either of the parties. *Christy v. Richolson*, 48 Kan. 177, 29 Pac. 398.

Actual possession of real property is sufficient evidence of title to sustain ejectment, until the defendant has shown a better title. *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89.

By the express provision of Ga. Civ. Code, § 5008, a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever. *Ellis v. Dasher*, 101 Ga. 5, 29 S. E. 268.

A bare naked possession was said, in *Stewart v. Scott*, 57 Ark. 153, 20 S. W. 1088, to be sufficient to support ejectment against all persons who cannot show a superior title or better right to possession.

One who holds possession of real property under claim of ownership and color of title is entitled to recover it as against one who has no right or title thereto. *Hentig v. Plpher*, 58 Kan. 788, 51 Pac. 229.

One who has been expelled from a part of the public domain which he has inclosed, by threats of others having no better title, after a proper demand for restoration of the possession, can

*Cann*, 24 How. 398, 16 L. ed. 714; *Medley v. Williams*, 7 Gill & J. 61; *Wilson v. Inloes*, 11 Gill & J. 358; *Lannday v. Wilson*, 30 Md. 536; *Winter v. White*, 70 Md. 305, 17 Atl. 84; *Hammond v. Inloes*, 4 Md. 138; *Fenn v. Holme*, 21 How. 481, 16 L. ed. 198; *Sheirburn v. Cordova*, 24 How. 423, 16 L. ed. 741; *Fussell v. Gregg*, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631; *Hogan v. Kurtz*, 94 U. S. 773, 24 L. ed. 317; *Anderson v. Smith*, 2 Mackey, 275; *Peck v. Heurich*, 6 App. D. C. 273.

This court has uniformly held, in all cases involving title to real estate, that the law of the state where the land lies, as evidenced by the decisions of the judicial tribunals, is a rule of property and binding on the court.

*Morsell v. First Nat. Bank*, 91 U. S. 357, 23 L. ed. 436; *Thaw v. Ritchie*, 136 U. S. 519, *sub nom. Thaw v. Falls*, 34 L. ed. 531.

maintain ejectment, under N. M. Comp. Laws, § 1570, allowing the action for a mining claim or any other real estate from which a party has been wrongfully ousted. *New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 293, 13 Pac. 201.

Though a purchaser from an executor at private sale, with bond for titles and part of the purchase money paid, may have acquired no title to or interest in the land, yet, being told by the executor to go and take possession, he has a right to the possession as against an intruder, and can sue out the statutory process to expel him. *Bagley v. Stephens*, 78 Ga. 304, 2 S. E. 505.

Possession at time of defendant's entry is sufficient on which to recover against one showing no title in himself. *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551.

For against such an one, possession is title. *Wilder v. St. Paul*, 12 Minn. 192, Gil. 116; *Rau v. Minnesota Valley R. Co.* 13 Minn. 442, Gil. 407.

In *Bleckley v. White*, 98 Ga. 594, 25 S. E. 592, it was said that possession under a claim of right raises a presumption of law that the occupant has a rightful and legal possession, and proof of this fact makes out a prima facie case of title in him, calling on the defendant to assume the burden of proof.

In *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338, T. had entered into possession of land in New York, in 1769, on which he had built a house, and he continued in possession until his death in 1775. His family continued in possession until expelled by the British in 1776; and no possession was thereafter taken of the premises until 1795, when L. entered as a bona fide purchaser, and continued in possession until 1810, when the heirs of T. brought action to recover in ejectment. It was held that the prior possession of T. was prima facie evidence of right, and that it was not necessary that the plaintiff should show either a possession of twenty years or a paper title. Kent, Ch. J., said: "That the first possession should in such cases be the better evidence of right seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has in the first instance; and after a continued possession for twenty years, under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry. But until the possession of the tenant has become so matured,



10 Sup. Ct. Rep. 1037; *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461.

The doctrine of *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338, has been repudiated in Maryland.

*Mitchell v. Mitchell*, 1 Md. 44.

Actual prior possession is necessary in New York.

*Greenleaf v. Brooklyn, F. & C. I. R. Co.* 141 N. Y. 395, 36 N. E. 393.

Even under the New York rule permitting recovery on proof of prior possession, it was on an alleged presumption of title from proof of possession; but where the actual title was shown to be outstanding in a stranger, the plaintiff could not recover.

*Gillett v. Stanley*, 1 Hill, 121; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299.

*Messrs. J. J. Darlington and A. S.*

It would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned, as derelict, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession, and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession, by showing a regular legal title or right of possession."

This doctrine is sustained by the following cases: *Davis v. Easley*, 13 Ill. 192; *Brooks v. Bruyn*, 18 Ill. 541; *Barger v. Hobbs*, 67 Ill. 592; *Hubbard v. Little*, 9 Cush. 475; *Jones v. Easley*, 53 Ga. 454; *Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Whitney v. Wright*, 15 Wend. 171; *Thompson v. Burhans*, 79 N. Y. 93; *Kinney v. Harrett*, 46 Mich. 87, 8 N. W. 708; *Bates v. Campbell*, 25 Wis. 613; *Yates v. Yates*, 76 N. C. 142; *Findley v. Johnson*, 84 Ga. 69, 10 S. E. 594; *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743; *Wilson v. Palmer*, 18 Tex. 592; *Tapscott v. Cobbs*, 11 Gratt. 172; *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Den ex dem. Johnson v. Morris*, 7 N. J. L. 6, 11 Am. Dec. 508; *Doe ex dem. Harding v. Cooke*, 7 Bing. 346.

The general rule in ejectment restricting a plaintiff to a recovery on the strength of his own title does not require the production of a perfect chain of title from the original source, as against one wrongfully in possession, as in such a case plaintiff may recover by showing the prior actual possession to that of defendant, or a good conveyance to himself from one in actual possession and prior to that of a defendant not showing a better right. *Goodwin v. Markwell*, 37 Fla. 464, 19 So. 885.

Possession for the full period of seven years, required by the Florida statute of limitations to confer a title by possession, need not be shown in an action of ejectment brought by one having a prior possession against a bare trespasser who enters with no right or claim of title, since a plaintiff in ejectment may recover on proof of prior possession against one not having a better right, or an intruder. *Jackson v. Halsley*, 35 Fla. 587, 17 So. 631.

So, prior possession, though for a period less than twenty years, is sufficient to give rise to the presumption of title as against a defendant who has subsequently acquired possession by a mere entry without any lawful right, provided that such prior possession was not voluntarily

**Worthington** argued the cause and filed a brief for defendant in error:

In an action of ejectment where the defendant shows no title in himself, but stands in the position of a mere intruder, the plaintiff is entitled to recover upon showing that before the defendant's entry he had been in possession claiming title, and that that claim of title had not been abandoned.

*Ricard v. Williams*, 7 Wheat. 105, 5 L. ed. 409; *Hickey v. Stewart*, 3 How. 759, 11 L. ed. 818; *Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Gaines v. New Orleans*, 6 Wall. 642, 18 L. ed. 950; *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Sabariego v. Maverick*, 124 U. S. 296, 31 L. ed. 443, 8 Sup. Ct. Rep. 461.

By the common law, prior unabandoned possession is all that a plaintiff need show in an action of ejectment, as against a defend-

relinquished without the *animus revertendi*. *Staffan v. Zeust*, 10 App. D. C. 260.

The prior possession of plaintiff under a claim of right or color of title, and not voluntarily abandoned, though short of the statutory bar, is sufficient in ejectment against a naked trespasser. *Hall v. Gallemore*, 138 Mo. 638, 40 S. W. 891.

As against a defendant who relies upon possession alone, it is sufficient for plaintiff in ejectment to show an actual peaceable possession under color of title, prior in point of time to the possession of the defendant, although such possession has not continued for the statutory period of seven years. *John Henry Shoe Co. v. Williamson*, 64 Ark. 100, 40 S. W. 703.

The provision of Cal. Code Civ. Proc. § 325, requiring the payment of taxes by one claiming adverse possession, does not apply to an action to recover possession against one who enters on the property without right or title, since prior possession is always sufficient ground for the maintenance of ejectment against a naked trespasser. *Shanahan v. Tomlinson*, 103 Cal. 89, 36 Pac. 1009.

As against a mere intruder, plaintiff in ejectment is entitled to recover on showing that his ancestor, under whom he claims as heir, died in possession. *Mobley v. Bruner*, 59 Pa. 481, 98 Am. Dec. 360; *West v. Pine*, 4 Wash. C. C. 691, Fed. Cas. No. 17,423.

An heir at law may recover in ejectment upon the prior possession of an ancestor, as against one who does not show a better title. *Burbage v. Fitzgerald*, 98 Ga. 582, 25 S. E. 554; *Wolfe v. Baxter*, 86 Ga. 705, 13 S. E. 18.

Twelve or thirteen years' seisin of freehold, and dying seised, give prima facie a right to maintain ejectment against a tortious holder. *Den ex dem. Cain v. McCann*, 3 N. J. L. 439, 4 Am. Dec. 584.

A possession of eight or ten years under claim and color of title is sufficient to entitle a plaintiff in ejectment to recover against a trespasser. *Jackson ex dem. Duncan v. Harder*, 4 Johns. 202, 4 Am. Dec. 262.

Prior possession of unsurveyed government lands is sufficient to sustain ejectment against a mere trespasser, although the act of Congress of February 25, 1885, declares the inclosure of such lands to be unlawful. *Gonder v. Miller*, 21 Nev. 180, 27 Pac. 333.

Peaceful possession of real property under a lease is sufficient evidence of title in the tenant to maintain his action of trespass to try title against a mere wrong intruder; and his right to maintain such an action cannot be defeated by a deed given by the lessor to the trespasser



ant who has entered without an honest claim of title.

*Read v. Erington*, 1 Cro. Eliz. 321; *Bateman v. Allen*, 1 Cro. Eliz. 437; *Allen v. Rivington*, 2 Saund. 111; *Doe ex dem. Pitcher v. Anderson*, 1 Starkie, 262; *Doe ex dem. Hughes v. Dyball*, 3 Car. & P. 608; *Doe ex dem. Smith v. Webber*, 1 Ad. & El. 119; *Davison v. Gent*, 38 Eng. L. & Eq. Rep. 469; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

The common law on this subject had not been changed or modified by the Maryland courts prior to February 27, 1801.

*Hutchins v. Erickson*, 1 Harr. & M'H. 339; *House v. Beatty*, 3 Harr. & M'H. 182.

In no reported case in the District from 1801 down to the present time has it been held that when the defendant in an action of ejectment appears to be a mere intruder can he put the plaintiff, who has been in possession or who claims under those who have been in possession, to prove his title. All the decisions, so far as they relate to this point at all, are to the contrary.

*Edmondson v. Lovell*, 1 Cranch, C. C. 103,

after the tenant has brought the action. *Holland v. San Antonio* (Tex. Civ. App.) 23 S. W. 756.

The right of a plaintiff in ejectment to recover upon prior possession alone, or upon a prescriptive title based on seven years' adverse possession under color of title, cannot be defeated by showing a subsequent possession in the defendant, which he obtained by procuring the plaintiff's tenant to attorn to him, the latter never having surrendered possession to his landlord, the plaintiff. *Sparks v. Conrad*, 99 Ca. 643, 27 S. E. 764.

#### What constitutes possession.

On the subject of what constitutes actual possession, Field, Ch. J., in *Coryell v. Cain*, 16 Cal. 567, said: "By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Maintenance of fences around a vacant lot, and payment of taxes upon it, constitute sufficient prior possession to sustain an action of ejectment. *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

Mr. Justice Story, in *Ellicott v. Pearl*, 10 Pet. 442, 9 L. ed. 488, said that no authority was needed for so plain a proposition as that "to constitute actual possession it is not necessary that there should be any fence or inclosure of the land."

One who actually enters upon a strip of beach land about 1,300 feet front and 900 feet deep, which could not be fenced on account of the blowing and shifting of the sands, and places stone monuments around it, and brings lumber upon it to build, thereby takes full possession of it which will support an action of ejectment against a subsequent intruder. *Mission of Immaculate Virgin v. Cronin*, 14 Misc. 372, 36 N. Y. Supp. 77.

A party seeking to eject a person from real property, who entered upon the premises without pretense of right, must, if he relies upon prior possession alone as evidence of his title, prove by competent evidence a possession from which a title may be inferred. *Thompson v. Burhans*, 61 N. Y. 562, per Gray, C.

The possession which will enable a person to maintain ejectment as against a mere intruder

Fed. Cas. No. 4,286; *Worthington v. Etchison*, 5 Cranch, C. C. 302, Fed. Cas. No. 18,053; *Anderson v. Smith*, 2 Mackey, 279; *Staffen v. Zeust*, 10 App. D. C. 260.

In view of all the foregoing it seems to be immaterial what the court of appeals of Maryland may have held to be the law on this subject after 1801. The decisions of that court after that date are entitled to great respect, but are not binding in this District.

*Van Ness v. Hyatt*, 13 Pet. 299, 10 L. ed. 170; *Thaw v. Ritchie*, 5 Mackey, 200.

And among the Maryland reported cases since 1801 there are several which indicate that, if this precise question should be presented to the court, it would recognize the exception to the general rule which is involved in the case at bar.

*Norwood v. Shipley*, 1 Harr. & J. 295; *Cockey v. Smith*, 3 Harr. & J. 20; *Hoye v. Swan*, 5 Md. 237; *Tyson v. Shuey*, 5 Md. 540; *Sanders v. McDonald*, 63 Md. 503.

The rule against intruders is not exceptional or contrary to the general doctrine

must have all the elements except time requisite to sustain the plea of the statute of limitations. It must be open, notorious, unequivocal, and hostile. *Akin v. Byrd*, 153 Pa. 23, 25 Atl. 866.

In order to enable one to recover on possession alone in an action of trespass to try title, the possession should be actual and corporeal, and not constructive. *Lea v. Hernandez*, 10 Tex. 137; *Conn v. Franklin* (Tex.) 19 S. W. 126.

The making of one crop on land is not sufficient possession. *Conn v. Franklin* (Tex.) 19 S. W. 126.

To constitute possession, mere assertion of title and the exercise of casual acts of ownership are not sufficient; there must be bona fide occupation, a *possessio pedis*, a subjection to the will and control. *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599.

A trustee in whom the fee of land is vested as a perpetual right of way for all railway companies doing business within the city has not the possession necessary to maintain ejectment against one of the companies for a misuser. *Elyton Land Co. v. South & North Ala. R. Co.* 95 Ala. 631, 10 So. 270.

The payment of taxes on real property, and the causing of surveying to be done upon it, do not show a possession sufficient to support an action of ejectment, even against a mere intruder or trespasser. *Thompson v. Burhans*, 61 N. Y. 52, 79 N. Y. 93.

So, the mere payment of taxes, claim of title, assertions of ownership made even upon the land, or mere words, however emphatic, were said in *Greenleaf v. Brooklyn, F. & C. I. R. Co.* 141 N. Y. 395, 36 N. E. 393, not to show the actual possession which raises a presumption of title sufficient to maintain ejectment.

And evidence that plaintiff in ejectment paid taxes on the land, and appointed an agent to look after it, who on several occasions took parties to see it, walked over it, and tried to sell it; and that on one occasion plaintiff did sell the land, and afterwards foreclosed a lien and purchased the land,—does not show such actual possession by him as will entitle him to recover from a subsequent intruder. *John Henry Shoe Co. v. Williamson*, 64 Ark. 100, 40 S. W. 703.

Nor does the fact that plaintiff in ejectment gave permission to a farmer to lodge some of his cotton pickers in a hut which had been erected



upon the subject in this country. On the contrary the universal doctrine in the United States seems to be that which has been so often promulgated by this court.

*Plummer v. Bucknam*, 55 Me. 105; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Breck v. Young*, 11 N. H. 485; *Slater v. Rawson*, 6 Met. 439; *Hubbard v. Little*, 9 Cush. 475; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338; *Jackson ex dem. Murray v. Denn*, 5 Cow. 200; *Whitney v. Wright*, 15 Wend. 172; *Thompson v. Burhans*, 79 N. Y. 97; *Hunter v. Starin*, 26 Hun. 529; *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Den ex dem. Johnson v. Morris*, 7 N. J. L. 7, 11 Am. Dec. 508; *Mobley v. Bruner*, 59 Pa. 483, 98 Am. Dec. 360; *Turner v. Reynolds*, 23 Pa. 199; *Hull v. Campbell*, 56 Pa. 154; *Holt v. Hemphill*, 3 Ohio. 237; *Doe ex dem. Wood v. West*, 1 Blackf. 133; *Davis v. Easley*, 13 Ill. 192; *Mason v. Park*, 4 Ill. 532; *Barger v. Hobbs*, 67 Ill. 597; *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634; *Harrell v. Enterprise Bank*, 183 Ill. 541, 56 N. E. 63; *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422;

*Van Auken v. Monroe*, 38 Mich. 725; *Bates v. Campbell*, 25 Wis. 613; *Rau v. Minnesota Valley R. Co.* 13 Minn. 442, Gil. 407; *Sherin v. Brackett*, 36 Minn. 153, 30 N. W. 551; *Simpson v. Boring*, 16 Kan. 251; *Douglass v. Ruffin*, 38 Kan. 530, 16 Pac. 783; *Duffey v. Rafferty*, 15 Kan. 9; *Hestress v. Brannan*, 21 Cal. 423; *Donahue v. Gallavan*, 43 Cal. 573; *Bawn v. Reay*, 96 Cal. 465, 29 Pac. 117, 31 Pac. 561; *Tapscott v. Cobbs*, 11 Gratt. 172; *Sowder v. McMillan*, 4 Dana, 456; *Seymour v. Creswell*, 18 Fla. 29; *Simmons v. Spratt*, 20 Fla. 495; *Goodwin v. Markwell*, 37 Fla. 466, 19 So. 885; *Hartley v. Ferrell*, 9 Fla. 374; *Bagley v. Kennedy*, 85 Ga. 706, 11 S. E. 1091; *Boynton v. Brown*, 67 Ga. 396; *Thorpe v. Atwood*, 100 Ga. 599, 28 S. E. 287; *Badger v. Lyon*, 7 Ala. 564; *Dingey v. Paxton*, 60 Miss. 1038; *Trager v. Shepherd* (Miss.) 18 So. 122; *Wilson v. Palmer*, 18 Tex. 595; *White v. Keller*, 114 Mo. 483, 21 S. W. 860; *Bains v. Bullock*, 129 Mo. 121, 31 S. W. 342; *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256; *Carnall v. Wilson*, 21 Ark. 67, 76 Am. Dec.

upon the land by a squatter show an actual possession by plaintiff which will entitle him to recover against a subsequent intruder, where it does not appear that possession was taken under such permission. *Ibid.*

Entering from time to time upon uncleared and unimproved land, under claim of title to the entire tract, for the purpose of cutting logs and of building a shanty and barn for temporary use, is not such possession, actual or constructive, as will support ejectment, even against a mere intruder, to recover anything more than the land cleared about the shanty and barn. *Thompson v. Burhans*, 79 N. Y. 93.

One who, having a deed to land which he knows does not confer title, enters on the land and begins the erection of a shanty on two different occasions, but is driven off each time and the shanty torn down, after which nothing is done for three years, when he brings an action of ejectment, has no such possession as will support the action. *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208.

Actual personal presence of defendants on the land at the time of the institution of the action is not necessary to the maintenance of ejectment, but any subjection of the property to their will and dominion is sufficient. *Bell v. Foxen*, 14 Sawy. 499, 42 Fed. Rep. 755; *Quicksilver Min. Co. v. Hicks*, 4 Sawy. 688, Fed. Cas. No. 11,508; *Garner v. Marshall*, 9 Cal. 268.

It is sufficient if there is continuous dominion evidenced by continuous acts of ownership. *Coleman v. Billings*, 89 Ill. 189.

But where the proof on the part of the plaintiff does not show a possession continuous until actual possession by the defendant or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession had not been abandoned. *Sabarlego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461.

Thus, possession, although originally acquired under color of title, is not sufficient to support ejectment against a mere intruder, where a period of eight years, during which the defendants or those under whom they claim title entered into possession, is entirely unaccounted for, and, so far as the plaintiffs are concerned, the premises appear to have been vacant and possession abandoned. *Ibid.*

So, the surviving partner of a firm of build-  
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ers which used a lot for the deposit of materials, by selling out and moving away, and by conveying land between it and the highway cutting off access to it, thereby loses any possession which would support ejectment against a subsequent intruder, although when he removed he left upon the lot two or three spout stones and half a dozen pieces of terra cotta pipe. *Akin v. Byrd*, 153 Pa. 23, 25 Atl. 866.

A purchaser of land has, for the purposes of ejectment, constructive possession of all the land described in his deed, which is not interfered with by a subsequent deed by the vendor covering part of the same territory. *White v. Ward*, 35 W. Va. 418, 14 S. E. 22.

And the actual possession of part of a tract of land under a claim of title to the whole tract, which is equivalent to a possession of the whole under the statute of limitations, is prima facie evidence of title to the entire tract described in the deed, in an action of trespass to try title against one who makes a wrongful entry, though without actual force and under a claim of right. *Watkins v. Smith*, 91 Tex. 589, 45 S. W. 560.

But actual possession of 400 out of a tract of 25,000 acres, under claim of title to the whole, will not support an action of ejectment against a mere intruder or trespasser to recover an unoccupied and unimproved portion of such tract containing 4,000 acres and lying several miles distant from the tract actually occupied. *Thompson v. Burhans*, 61 N. Y. 52.

Prior possession under a bona fide claim of ownership sufficient to support a recovery in ejectment against one who shows no better title is shown by proof of a parol gift and entry thereunder in good faith, although such entry was not made until after the donor's death, and it does not affirmatively appear that the donor had ever been in possession of or had title to the property, since such a gift could nevertheless be made the basis of an honest possession by the donee, accompanied by a bona fide claim of right, which could in time ripen into a perfect title. *Ellis v. Dasher*, 101 Ga. 5, 29 S. E. 268.

On the general subject. What title or interest will support an action of ejectment?—see *Hancock v. McAvoy*, 151 Pa. 460, 18 L. R. A. 781, and *note*, 25 Atl. 47.



351; *Jackson v. Haisley*, 35 Fla. 587, 17 So. 631.

In a great number of the cases the lands in controversy were those upon which there were no buildings and around which there were no inclosures, the only possession had by the plaintiff being that constructive possession by which, ordinarily, wild and vacant lands are held by the owners.

*Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Hunter v. Starin*, 26 Hun, 529; *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Davis v. Easley*, 13 Ill. 192; *Van Auken v. Monroe*, 38 Mich. 725.

[59] \*Mr. Justice **Peckham** delivered the opinion of the court:

The defendant in error, the plaintiff below, brought this action of ejectment in the supreme court of the District of Columbia to recover from the defendant the possession of one undivided fifth-part of certain lots in the city of Washington, \*in square 939, sometimes described as lots 1, 2, and 3 in that square, and sometimes as lots 4, 5, and 6; and he also sued to recover an undivided fourth-part of another lot in the same square, sometimes designated as lot 20 and sometimes as lot 3. Entry and ouster were alleged to have taken place on March 22, 1889, and, in another count, on November 28, 1890. There were proper counts, also, for the recovery of mesne profits. The defendant pleaded not guilty. There was a verdict for the plaintiff for the possession of the property and for 1 cent damages. The defendant appealed to the court of appeals of the District, where the judgment was affirmed, and he comes here by writ of error.

On the trial the plaintiff endeavored to prove a record title to the lots, through various mesne conveyances from the original owners, and for that purpose gave evidence, under the objection of defendant, tending to explain the appearance of two sets of numbers on the map of square 939, on file in a public office of the District, one set being in ink and one set in pencil; and he claimed that the pencil were the correct numbers, in which case he contended his record title in fee was perfect. He also gave evidence tending to show a title by adverse possession for twenty years.

The defendant controverted these claims, but at the time he rested his case there was not the slightest evidence which tended to show title in himself or to connect himself in any way with the title. He put in evidence some deeds executed by certain individuals residing in England, which recited that they (the grantors) were some of the heirs at law of George Walker, who was the original owner of the square; but there was no evidence of the truth of those recitals, nor was any attempt made to show that these grantors were heirs of Walker, or that they had any title to the lots which the deeds purported to cover. The deeds seem to have been offered in evidence upon the theory that the defendant by that means showed that he was not a mere trespasser or intruder,

but came in under a claim of title, although it was not shown to have the least validity. Some other deeds of like nature were also put in evidence.

\*At the close of the case the evidence [61] showed that the defendant was a simple trespasser without the color of title, and the counsel for the plaintiff, not insisting upon the proof regarding his record title or upon an adverse possession for twenty years, thereupon based his case upon the claim that he had proved that at the time when the defendant intruded upon and ousted him he had been, by himself or his grantors, for a number of years in the actual, continuous, and undisturbed possession of the lots, claiming to own under deeds purporting to cover them, and that he was therefore entitled to recover as against the defendant, who was a mere intruder, without further proof of title.

The court was therefore requested by the plaintiff to charge the jury that, if it found from the evidence that the plaintiff and his grantors had been thus in possession when he was ousted by the defendant, himself being without title, the plaintiff was entitled to recover. The court charged as requested, the defendant excepted, and the jury found in accordance with the plaintiff's claim. This course eliminated all questions regarding a valid record title, or a title by adverse possession for twenty years, and so all questions of admissibility or sufficiency of evidence to prove either of those claims drop out of the case, and we have to deal with the simple proposition of the correctness of the charge.

The defendant urges here that the charge was erroneous because it ignored and ran counter to the rule in ejectment, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant; that the mere fact of prior possession of the premises by the plaintiff, without evidence of any legal title to them, was not sufficient to allow a recovery as against the defendant in possession, even though the defendant had no title himself and did not connect himself with the legal title. He claims that, whatever it may be in other jurisdictions, the rule as charged by the court does not obtain in the District of Columbia, and that in this District the plaintiff is always bound to prove a good and valid title as against a defendant in possession, by some other evidence than prior possession. He also contends that if the rule be otherwise, yet in this case there is not sufficient evidence that the \*plaintiff had [62] such possession of the lots, at the time the defendant entered, as to enable him to base a claim to the benefit of the rule, or to authorize a recovery in this action.

The evidence is that, when defendant entered upon them, they were unimproved and vacant city lots. It is undisputed that the plaintiff and his grantors claimed title to them by virtue of conveyances which they contended came from the original owners, and plaintiff and his predecessors, under such deeds, had exercised usual acts of own-



ership and possession natural in the case of a city lot which was vacant and unimproved. The lots had not been fenced, but the evidence showed there had been a building on one of them, and after its sale to Ashley, the plaintiff's decedent, the house had been removed by Ashley's permission, and rent had been paid for it to him while it remained on the lot. It also appeared that for quite a long time the plaintiff and his grantors had rented and collected the rent of the other lots for pasturing cattle thereon; they had authorized others to take sod therefrom, and pursuant to such authority sod had been taken from these lots by other persons, and although this had ceased about 1886, and the defendant did not enter until 1889 or 1890, yet the possession of the plaintiff was not in the meantime in any manner disturbed or interfered with, but continued as it had been, up to defendant's entry; taxes had been paid by him or his predecessors upon the lots; and, in brief, it appears that all that the nature of the case admitted in order to show actual and continuous possession and claim and acts of ownership had been proved and claimed in regard to the property by the plaintiff. Although the tenancy may have ceased and the sale of the sod concluded some time before defendant entered, yet the plaintiff had remained in the constructive possession, claiming full ownership of the premises, ever since the tenancy, and up to the time of defendant's entry. There was an utter absence of any evidence of abandonment.

[63] The contention of the defendant practically is that in ejectment there can be no possession, within the rule referred to, of a vacant and unimproved city lot, unless it is at least surrounded by a fence sufficient to warn off trespassers or intruders; that if the lot be vacant, unimproved, and unfenced, no matter what acts of ownership have been exercised over the lots for a long time by the person claiming to own it, the trespasser or intruder may nevertheless enter upon the land, and cannot be ousted without strict proof that the plaintiff has a good and valid title to the lot aside from any claim of prior possession. We do not assent to this contention.

We think the plaintiff in this case proved enough to submit to the jury the question of possession, and enough, if believed, to entitle him to recover as against the defendant, who gave no evidence of any title in himself nor in anyone under whom he claimed, and who was, so far as the evidence disclosed, a mere trespasser upon the lots claimed by the plaintiff.

An examination of the authorities will, as we think, render it clear that the rule in regard to possession and the presumption arising therefrom was correctly stated, and it will appear that it is not inconsistent with the acknowledged rule in ejectment that the plaintiff must recover upon the strength of his own title, and not upon the weakness of the title of the defendant. The question is, 180 U. S.

What presumption arises from the fact of possession of real property? Generally speaking, the presumption is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title. Therefore, when in an action of ejectment the plaintiff proves that on the day named he was in the actual, undisturbed, and quiet possession of the premises and the defendant thereupon entered and ousted him, the plaintiff has proved a prima facie case, the presumption of title arises from the possession, and, unless the defendant prove a better title, he must himself be ousted. Although he proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession of the plaintiff was sufficient to authorize him to maintain it as against a trespasser, and the defendant, being himself without title, and not connecting himself with any title, cannot justify an ouster of the plaintiff. This is only an explanation of the principle that the plaintiff recovers upon the strength of his own title. His title by possession is sufficient, and it is a title, so far as regards a defendant who only got into possession by a pure tort, a simple act of intrusion or [64] trespass, with no color or pretense of title.

The latest case in this court upon the subject is that of *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461. It was there stated that the rule was that a person who was in possession of the premises under color of right, which possession had been continuous, and not abandoned, gave thereby sufficient proof of title as against an intruder or wrongdoer who entered without right. Mr. Justice Matthews, in delivering the opinion of the court, said, at page 297, L. ed. p. 444, Sup. Ct. Rep. p. 480:

"This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title. *Fowler v. Whitman*, 2 Ohio St. 270; *Drew v. Swift*, 46 N. Y. 204. And, in the language of the supreme court of Texas in *Wilson v. Palmer*, 18 Tex. 592, 595, 'the evidence must show a continuous possession, or at least that it was not abandoned, to entitle a plaintiff to recover merely by virtue of such possession.' That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of



by a wrongful intrusion by the defendant, whose possession therefore originated in a trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive possession. If the lands, when entered upon by

[65] \*the defendant, were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his actual possession was not abandoned; otherwise, he cannot be said to have had even a constructive possession."

Many of the leading cases on the subject are referred to in the opinion of the court in the above case, and it is unnecessary to cite them here. They show that the rule has been recognized by nearly all those jurisdictions which acknowledge the common law, and that it is indeed one of the fundamental rules applicable to the action of ejectment, and it does not interfere with or overrule the other principle also applicable to that action, that a plaintiff is bound to recover on the strength of his own title, and not upon the weakness of that of his adversary. The rule is intended to prevent and redress trespasses and wrongs, and it is limited to cases where the defendants are trespassers and wrongdoers; it is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession, and it does not extend to cases where the defendant has acquired possession peaceably and in good faith, under color of title.

It would seem to be under this limitation of the rule that the defendant proved he had deeds from individuals, who asserted they were some of the heirs at law of Walker, the original owner, but this clearly was not enough to show the entry was in good faith and under color of title. Otherwise, a party might wrongfully intrude and enter upon the possession of another, as a pure intruder, and yet make a claim of title under a deed which manifestly conveyed none, and which the party could not in good faith have supposed conveyed a title, and then call upon plaintiff for full proof of title in fec. Such entry could not be excused by any subterfuge of that kind. Mr. Justice Matthews in the foregoing case, in speaking of a defendant acquiring possession peaceably and in good faith, under color of title, cited among others the case of *Drew v. Swift*, 46 N. Y. 204. In that case the plaintiff relied upon a prior possession of the disputed land, and gave no proof of a conveyance from the original proprietor, nor of any paper title, and he recovered \*upon the strength of such possession alone. This judgment was reversed in the court of appeals on the ground that the deed from a former owner, under which the defendant entered, included the premises in controversy, and the title to the *locus in quo* was therefore in the defendant,

and he was entitled to a verdict and to retain the lands as within the boundaries of his grant; that the defendant was not a trespasser, but went into possession having title, and the plaintiff was not, therefore, entitled to recover upon proof of any prior possession other than an adverse possession for a period which would bar an entry, and no such possession was shown. The court held that the defendant was entitled to a judgment on the merits. In that case, as will be seen, the presumption of title arising from the prior possession by the plaintiff was overcome, and the defendant proved title in himself by virtue of the deed under which he entered. But the rule applies where there is on the side of the defendant an absence of proof showing any color of title in him, and in such case, where the plaintiff proves prior and peaceable possession under a claim and color of title, an entry and ouster by the defendant, without a pretense of title, will not be upheld, even though the defendant seek to justify his entrance by proof of a deed from someone who had no title to the premises; and this is so, although at the time of such entry the lands were apparently vacant and actually unoccupied. 124 U. S. *supra*, 298, 31 L. ed. 444, 8 Sup. Ct. Rep. 461.

In *Jackson ex dem. Murray v. Deann*, 5 Cow. 200, the premises were actually vacant and unoccupied at the time of the entry by the defendant, who entered without color of title, but it was shown that the plaintiff had leased the land to a tenant who had left the premises without informing the landlord, who did not know of it until after the defendant entered. "This shows," said the court, "that the possession had never been abandoned by the lessors without the *animus revertendi*." Prior possession, although the land was, at the time of defendant's entry, actually unoccupied, was also said in *Whitney v. Wright*, 15 Wend. 172, to be sufficient to enable the plaintiff to recover as against a mere intruder, where the prior possession of the plaintiff had not been voluntarily relinquished without the *animus revertendi*.

\*In *Smith ex dem. Teller v. Lorillard*, 10 Johns. 337, cited in *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461, the plaintiff had been in the possession of the premises for many years until he was expelled by the British in 1776, and in 1795 the defendant entered upon the premises, which were then vacant, and continued to live there for some years. An action of ejectment was brought by the plaintiff, and it was held by the supreme court, Kent, Ch. J., delivering the opinion, that his prior possession was *prima facie* evidence of right, and it was not necessary that he should show either a possession of twenty years or a paper title so long as the subsequent possession of the defendant was acquired by mere entry without any lawful right.

The case of *Greenleaf v. Brooklyn, F. & C. I. R. Co.*, cited by defendant, 141 N. Y. 395, 36 N. E. 393, reported on previous appeal in 132 N. Y. 408, 30 N. E. 762, is not opposed to these views upon the question of occu-



pancy. The case shows that the plaintiff never was in possession of the land, actually or constructively, never exercised the slightest act of ownership over it, nor were his grantors ever in possession or occupancy thereof, nor did they exercise any act of ownership over the land except when they assumed to convey it to others. In the report in 132 N. Y. the court stated that the land in question was on the beach, incapable of being inclosed with fences or occupied like ordinary agricultural lands; but at the same time there was no evidence that the land had ever been occupied by plaintiff or his grantors for any purpose whatever, and it did not even appear that grass or sand had been taken from the land, or that it had been used as a means to approach the ocean for fishing or for any other purpose. It was simply the case of a conveyance by deed of land which the grantor had no title to and never occupied or possessed, the only claim of ownership being the execution of a deed assuming to convey the premises, and on some occasions an oral statement of ownership. Clearly, all this was wholly insufficient to show possession within the rule, and the case is entirely unlike the one at bar.

[68] Nor is it material that the plaintiff, in addition to proof of prior possession, also gave proof of a record title which defendant claims is not valid. He is still entitled to recover on \*proof of his prior possession, where the defendant is simply an intruder and has no color of title. As was said by Pollock, Chief Baron, in *Davison v. Gent*, 38 Eng. L. & Eq. 469, if a party has a right to maintain an action of ejectment, by reason of his possession, and attempts also to show title, and discloses a flaw in it, he may still recover by reason of his possession. He may say, "I claim to recover both by reason of my title and my possession; and failing in one I will rely upon the other." His prior possession is good in any event, as against a trespasser entering without right. *Bramwell and Watson*, BB., were of the same opinion. See also *Asher v. Whitlock*, L. R. 1 Q. B. 1. 5, opinion by Cockburn, Ch. J., and concurred in by Mellor and Lush, JJ., decided in 1865.

Notwithstanding the authorities above referred to, the defendant claims that the law is different in this District, because, he says, the law was different in Maryland at the time of the cession of the District to the United States, and that the law of Maryland as it was then governs this case. 2 Stat. at L. 103, chap. 15. § 1. Counsel makes this claim because the land originally formed part of the state of Maryland, and we must look to the law of the state in which the land is situated for the rules which govern the descent, alienation, and transfer of property, and the effect and construction of wills and other conveyances. *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461. Upon this foundation counsel for the plaintiff in error seeks to show that the law of Maryland

was, when this District was ceded by it to the United States, opposed to the rule enunciated by the trial court, and as evidence of what the law of Maryland was at that time he cites the case of *Mitchell v. Mitchell*, decided in 1851, and reported in 1 Md. 44. The case actually decided did not involve this question. According to the facts stated in the report, Francis J. Mitchell obtained possession of the premises in 1817, and held the same until the time of his death in 1825. Immediately after his death, his son, James D. Mitchell, his devisee, entered upon and possessed the land until his death in 1837. Immediately after his death, his widow Elizabeth, as devisee for life under his will, entered and possessed the land until her death, in 1841. The plaintiff's lessor was the \*sole sister of the whole blood of James D. Mitchell and his heir at law. The possession of the premises from 1817 to 1841, the time of the death of Elizabeth, was continuous, peaceable, exclusive, uninterrupted, and adverse to all persons. The defendant was half brother of James D. Mitchell, and upon the death of Elizabeth entered on the land, declaring that it was his son's property, and that no other brother or sister survived the said James D. Mitchell. The verdict was for the defendant. The plaintiff was never personally in possession of the premises, but was simply claiming under James D. Mitchell as his heir at law. The defendant was in possession at the time the plaintiff commenced his suit, holding for his son under a claim that his son was the heir at law of James D. Mitchell. He was not a mere trespasser or intruder within the meaning of the rule, but took possession on the death of the life tenant, ousting no one, and claiming title for his son as heir at law. The question then became one of superiority of title as between the two claimants, the defendant being in possession. [69]

Upon these facts it would seem that in other states which follow the common law the plaintiff would have been entitled to recover on proof that he was the sole heir at law of James D. Mitchell, the latter having been devisee of Francis J. Mitchell, and their possession, together with that of the widow of James D. Mitchell, as his devisee, having been continuous, peaceable, exclusive, uninterrupted, and adverse to all persons from 1817 to 1841, when Elizabeth died and the defendant took possession. But the court held that in Maryland a plaintiff in ejectment was bound to recover, not only on the strength of his own title, but must show that he had a legal title to the land and a right of possession, and that he could not establish legal title in himself without first showing the land had been granted by the state. The case decides that upon a question of a conflict of title, the plaintiff must prove that the state had at some time granted the land. It was not a case of prior peaceable possession, interfered with by the defendant without pretense or color of title, and simply as a mere trespasser or intruder.

The case of *Hall v. Gittings*, 2 Harr. & J. 125, decided in 1807; \**Cockey v. Smith*, [70]

3 Harr. & J. 20, 26, decided in 1810; and *Wilson v. Inloes*, 11 Gill & J. 351, 358, decided in 1840,—are cited by the court, and justify the statement that there seems to be a particular rule in Maryland, by which it is necessary in actions of ejectment, where there is a real contest as to title, to show either a grant from the lord proprietary, or the state as successor, or else very strong facts and circumstances, as secondary evidence upon which to presume a grant, as mentioned in *Cockey v. Smith*, 3 Harr. & J. 20, 26. None of the cases presents the phase of a mere trespasser intruding, without color of title, upon the possession of the plaintiff and ousting him by a plain tort. It will be observed they were all decided since the cession. A Declaration of Rights preceded the first Constitution of Maryland, and was affirmed by it. 1 Kilty's Laws of Maryland, § 3, Declaration of Rights. It was therein provided that the people of that state were entitled to the common law of England. The decisions of the courts of Maryland prior to the cession might be regarded as authority for what the common law then was in that state, but those made after the cession, while entitled to very high respect as the decisions of a state court, are not to be regarded as authority for what the common law was prior to 1801. That question was not involved in those cases.

There are, however, some cases in that state arising before the cession, in actions of ejectment, where possession alone seems to have been regarded as sufficient to maintain the action as against an intruder. They are *Hutchins v. Erickson*, 1 Harr. & McH. 339, and *House v. Beatty*, 3 Harr. & McH. 182. There was no opinion delivered in either case (and those reports contain but few opinions in any of the decided cases), but the facts stated in the first show that prior possession was relied on as against an intruder, by counsel, who referred to the very case of *Allen v. Rivington*, 2 Wms. Saund. 111, which was cited to maintain the same proposition by Kent, Ch. J., in 10 Johns. 337, and by Mr. Justice Matthews in *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461. The case certainly looks in the direction of maintaining the proposition charged by the court in this case. The facts in the other case do not make it so clear. Neither is very satisfactory authority, but they certainly do not

[71] maintain the proposition of \*the plaintiff in error, and we have found no case that does. Upon the whole, we think the almost universal character of the rule laid down by the trial court, taken in connection with the slight evidence in its favor in the two cases arising before the cession, and the absence of cases to the contrary, are enough to show that the rule prevailed in 1801 in Maryland the same as elsewhere.

There are no cases to which our attention has been called involving this question in the District of Columbia, which hold a different doctrine from that laid down herein by the trial court. In a very late case,

the opinion in which was written by Mr. Chief Justice Alvey of the court of appeals, formerly Chief Justice of Maryland (*Staffan v. Zeust*, 10 App. D. C. 260), he made use of the following language:

"The action of ejectment is, strictly speaking, a possessory action, the plaintiff being required to show a present legal right to the possession of the premises as against the defendant. This may be done by evidence to establish the fact of prior possession by the plaintiff, even though that possession be for a time less than twenty years; such possession being sufficient to give rise to the presumption of title as against a defendant who has subsequently acquired possession by mere entry without any lawful right; provided, however, that such prior possession of the plaintiff was not voluntarily relinquished without the *animus revertendi*. *Allen v. Rivington*, 2 Wms. Saund. 111; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338, 356; *Christy v. Scott*, 14 How. 282, 292, 14 L. ed. 422, 426; *Sabariego v. Maverick*, 124 U. S. 296, 300, 31 L. ed. 444, 445, 8 Sup. Ct. Rep. 461."

Although this exact question was not involved, it shows that the court of appeals of the District was not of opinion that the law in regard to ejectment was in any exceptional condition here. The Chief Justice cites the same case in 2 Saund., so frequently cited, to show the rule in this particular.

After a careful consideration of the question we are of opinion that the case of *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461, expresses the true rule in this District as well as elsewhere, and therefore the trial court was right in the direction given to the jury, and the judgment of the Court of Appeals, affirming that of the trial court, must be affirmed.

\*C. S. THOMPSON, Joseph Mazet, Rose D. Mosher, F. M. Culp, Henry C. Vincent, R. J. Tarbell, John J. Shore, I. B. Cox, and Edwin G. Carter, *Plffs. in Err.*,

v.

LOS ANGELES FARMING & MILLING COMPANY.

(See S. C. Reporter's ed. 72-81.)

*Mexican grant—patent on confirmation of—collateral attack.*

A patent from the United States, based upon the confirmation of a grant from the Mexican government by the board of land commissioners under the act of Congress of 1851 (9 Stat. at L. 631, chap. 41) giving the board jurisdiction over claims "by virtue of any right or title derived from the Spanish or Mexican government," cannot be attacked collaterally on the ground that the grant was invalid and that the board had no jurisdiction to confirm an invalid claim, since the board is given jurisdiction to consider whatever is necessary to the validity of the claim, including the question of the fact of a grant or the power to grant.



*Argued and Submitted November 8, 1900.  
Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of the State of California to review a decision affirming a judgment in favor of plaintiff in an action for lands. *Affirmed.*

See same case below, 117 Cal. 594, 49 Pac. 714.

The facts are stated in the opinion.

**Mr. Harvey M. Friend** argued the cause and filed a brief for plaintiffs in error.

**Mr. Z. Montgomery** also filed a brief for plaintiffs in error.

**Messrs. Stephen M. White and James H. Shankland** submitted the cause for defendant in error. **Messrs. Graves, O' Melveny, & Shankland** were with them on the brief.

Contentions of counsel sufficiently appear in the opinion.

[72] **\*Mr. Justice McKenna** delivered the opinion of the court:

This is an action of ejectment in which defendant in error was plaintiff in the court below, and the plaintiffs in error were defendants. It was brought in the superior court of Los Angeles county, state of California. Besides a prayer for the recovery of the land in controversy an injunction was asked against the commission or repetition of certain described trespasses. The land sued for was the south half of the Rancho ex-Mission de San Fernando, with certain exceptions. The defendant in error relied for title upon a patent of the United States to Eulogio de Celis, dated January 8, 1875, which recited that it was based upon the confirmation of his title as one derived from the Mexican government through a deed of grant made the 17th day of June, 1846, by Pio Pico, the then constitutional governor of the department of the Californias. The grantor of defendant in error purchased an undivided half of the rancho in 1869, and became the owner in severalty of the tract sued for by partition proceedings.

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One of the defenses of the action, and the only one we are concerned with on this writ of error, was the invalidity of the patent based on the invalidity of the grant from the Mexican government, and its confirmation by the board of land commissioners.

The answer sets out the proceedings before the board, its decision and decree, and the deed of Pio Pico. As much of the deed as is necessary to quote is as follows:

"The undersigned, constitutional governor of the department of the Californias, in virtue of the powers vested unto him by the supreme government of the nation, and in virtue of a decree of the honorable departmental assembly of April 3d of the present year, to raise means for the purpose of maintaining the integrity of the territory of this department, for the sum of \$14,000 which he receives, sells unto Don Eulogio de Celis and his heirs, ex-Mission of San Fernando with all its properties, estates, lands, and movables, with the exception of the church and all its appurtenances, which remains for public

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use. Said purchaser obligating himself to maintain on their lands the old Indians on the premises during their lifetime, with the right to make their crops, with the only condition that they shall not have the right to sell the lands they cultivate and any other which they possess without anterior title from the departmental government, for all of which the aforesaid Senor Celis shall be acknowledged as the legitimate owner of the aforesaid ex-Mission of San Fernando, to use the same as to him shall seem best, guaranteeing unto him, as this government does guarantee, that he is well possessed of the aforesaid estate with all the prerogatives granted by law to purchasers, with the only condition that the above-mentioned purchaser shall not take possession within the space of eight months from the date hereof, within which delay the government shall have the right to annul this contract by reimbursing to the aforesaid Senor Celis the sum of \$14,000 with interest at the current commercial rates; but if this reimbursement is not operated within the aforesaid eight months, this sale shall be valid."

\*The petition to the board was as follows: [74]  
"Before the Commissioners to Ascertain and Settle Private Land Claims in the State of California.

"Eulogio de Celis gives notice that he claims a tract of land situated in the present county of Los Angeles, known by the name of Mission of San Fernando, bounded as follows: On the north by the rancho of San Francisco, on the west by the mountains of Santa Susanna, on the east by the rancho of Miguel Triunfo, and on the south by the mountains of Portesuelo, which tract is supposed to contain 14 square leagues.

"Said land was sold to said Celis by a deed of grant dated the 17th day of June of the year 1846, by Pio Pico, constitutional governor of the Californias, thereto duly authorized by the supreme government of the nation and by a decree of the departmental assembly of April 3d, 1846; said sale was made for the sum of \$14,000, which was paid by the said Celis to the said Pio Pico, who acknowledged the receipt thereof, as will more fully appear by reference to the aforesaid deed of grant, copy whereof marked A is hereto annexed.

"Claimant avers that the aforesaid deed of sale contains the condition that the government of Mexico shall have the right to annul the contract by reimbursing to this claimant the aforesaid sum of \$14,000, with the current rates of interest, and in case said sum is not reimbursed within said eight months, said Mission of San Fernando shall be his in full property. And this claimant avers that said sum of \$14,000 was never reimbursed to him by the Mexican government, or by any person whatsoever.

"Said Mission of San Fernando was leased by the government of Mexico to Andres Pico in December, 1845, for the term of ——— years, which lessee has been in the occupancy of the said property up to the present date.

"Claimant further avers that he knows of no other claim to the aforesaid Mission, and



he relies on the documents above referred to and witnesses he shall produce to substantiate his claim."

[75] "The material part of the decision was as follows:

"The grant purports to have been made in consideration of the payment of the sum of \$14,000 in money. Pio Pico testifies that he executed the grant at the date that the same bears, and that it was made under special instructions of his government for the purpose of raising the necessary funds to enable the department to prepare for a defense against the attack of the Americans, and that the sum of \$14,000 was actually received by him from the grantee in consideration thereof, and that the funds were used by him for the benefit of the nation in the defense of the same. The genuineness of the grant is clearly established, and the circumstances under which it was made so clearly explained as to leave no doubt but it was done in good faith."

A decree was entered confirming the grant. The title based on the proceedings before the commissioners is alleged in the several answers to be invalid for the following reasons:

"I. Because, as appears on its face, it was a deed of sale whereby said Pio Pico, governor of California, attempted, for the consideration of \$14,000, to grant the lands therein mentioned to said Eulogio de Celis, which act was *ultra vires*, unauthorized by and in violation of the laws of the Republic of Mexico.

"II. Because the lands so attempted to be granted were lands embraced within and belonging to the Mission of San Fernando, and not legally subject to the granting power of said governor.

"This defendant further says in this behalf that said 'commissioners to ascertain and settle the private land claims in the state of California' never had any jurisdiction over the subject-matter of said claim of said Eulogio de Celis, otherwise called Eulogio Celis, because he says that it was set out and appeared on the face of the notice and petition of said Eulogio Celis and accompanying documents, to wit, the alleged grant itself, that at the time of the making of said alleged grant the lands embraced therein were mission lands, and also that said so-called grant was in the nature of a sale for money, and that said grant was therefore without authority of law, and void, and did not constitute a claim by virtue of any right or title derived from the Spanish or Mexican government.

"And defendant says that, because of the facts so set out and shown in said notice and petition and accompanying documents so filed with said commissioners by said Eulogio de Celis, said commissioners were wholly without jurisdiction to adjudicate upon or to confirm said claim, and that their said decree of confirmation thereof is and always was *ultra vires* and utterly void, and that all subsequent proceedings based thereon, including the survey and patenting of said lands by the United States government, were

and are wholly without authority of law and void."

"The defendant in error obtained judgment in the trial court, which was affirmed by the supreme court of the state. 117 Cal. 594, 49 Pac. 714. Thereupon the chief justice of the state allowed this writ of error.

The error assigned is as to the action of the trial court in excluding testimony which, it is claimed, tended to support the said defense.

To support the assignment of error it is urged that the governor of the Californias had no authority to make the grant, "and therefore the decree of confirmation was without that authority of law, and was also absolutely void and a mere nullity." And it is hence further contended that the patent based on and reciting the decree was void on its face. The ultimate basis of the contention is that the court of private land claims had no jurisdiction to confirm the grant because the governor of the Californias had no power to convey the public land for a money consideration. That is to say, the grant being void it could not be the basis of a claim to lands "by virtue of any right or title derived from the Spanish or Mexican government." This conclusion is attempted to be deduced from the words of § 8 of the act of Congress of 1851 (9 Stat. at L. 631, chap. 41) creating the board of land commissioners. The section provided:

"That each and every person claiming lands in California *by virtue of any right or title derived from the Spanish or Mexican government* shall present the same to said commissioners when \*sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claim; and it shall be the duty of the commissioners when the case is ready for hearing to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claims."

We think that counsel put too limited a signification on the words of § 8, that the claim shall be "by virtue of any right or title derived from the Spanish or Mexican government." The words, of course, were descriptive of the class of claims of which the board of land commissioners was given jurisdiction. They made a special tribunal of the board, limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—propositions of law or propositions of fact, the fact of a grant, or the power to grant—was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the district court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. Every question which could arise on the title



claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted, not only to fulfil our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted, but required, all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. § 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district \*court. § 9. Indeed, the proceedings in the district court were really new, and further evidence could be taken. § 10. Upon the confirmation of the claim by the commissioners or by the district or Supreme Court, a patent was to issue and be conclusive against the United States. § 15.

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Further general discussion we do not think is necessary. This court has had occasion heretofore to consider the statute and the jurisdiction of the board of land commissioners. *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *More v. Steinbach*, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

In considering what was involved in the inquiry into the validity of a claim to land under the act, this court said in *More v. Steinbach*, quoting *United States v. Fossatt*, 21 How. 445, 16 L. ed. 186:

"It is obvious that the answer to this question must depend in a great measure upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made. . . ."

The plaintiff in *More v. Steinbach* depended upon a patent of the United States issued to one Manuel Antonio Rodrigues de Poli, dated August 24, 1874. It recited the proceedings taken before the land commissioners under the act of March 3, 1851; the filing of his petition in March, 1852, asking for the confirmation of his title to a tract of land known as the Mission of San Buena Ventura, his claim being founded upon a sale made on the 8th of June, 1846, by the then governor of the department of the Californias; the affirmation of the decree successively by the district court of the southern district of California, and by the Supreme Court of the United States, and the survey of the claim confirmed. It was contended that the sale to Poli of the ex-Mission San Buena Ventura was illegal and void, and hence no title passed to the patentee on its confirmation, and in support of the contention *United States v. Workman*, 1 Wall. 745, 17 L. ed. 705, was cited.

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Replying to the contention the court said by Mr. Justice Field:

"In that case [*United States v. Workman*] it was held that the departmental assembly of California had no power to authorize the governor to alienate any public lands of the department, and that its own power was restricted to that conferred by the laws of colonization, which was simply to approve or disapprove of the grants made by the governor under those laws. But it does not follow that there were not exceptional circumstances with reference to the sale to Poli, which authorized the governor to make it. We are bound to suppose that such was the case, in the absence of any evidence to the contrary, from the fact that the validity of his claim under it was confirmed by the board of land commissioners, by the district court of the United States, and by this court on appeal. The question of its validity was thereby forever closed, except as against those who might be able to show a prior and better title to the premises."

More fully on the point of the effect of the patent it was said in *Beard v. Federy*:

"This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized \*in one suit, and rejected in another, and, if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be opened to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid or was not properly located, and therefore he could not be disturbed by the patentee. No construction which will lead to such results can be given to the 15th section. The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable

them to resist successfully any action of the government in disposing of the property."

Plaintiffs in error deny the applicability of *Beard v. Federy* to the case at bar. We think it is applicable. They attempt to distinguish *More v. Steinbach*. We think it cannot be distinguished. That case, it is said, depended upon the possible presence of "exceptional circumstances with reference to the sale to Poli which authorized the governor to make it (the grant)." And it is hence contended that the court felt itself "bound to suppose such was the case in the absence of any evidence to the contrary. And taking for granted," counsel further say, "as it had to do, the jurisdiction of the board of commissioners that confirmed the Poli claim the court could reach no other conclusion. But the very thing which this court was compelled to assume in the case of the Poli claim (namely, the jurisdiction of the land commissioners), for the want of evidence to the contrary, is the thing which in this case we offered to prove in the court below did not exist; but we were denied that privilege, and this denial we insist was error."

But how was it attempted to be shown that such jurisdiction did not exist? It was attempted to be shown, as declared in the assignment of error, by "the petition of said de Celis before the board of land commissioners for the confirmation of his claim to the land, together with copies of the grant from Governor Pico to him, and the decision of confirmation by the board."

[81] \*There is nothing in either of those papers which shows that exceptional circumstances with reference to the sale to de Celis did not exist. The petition makes a claim of title based on "a deed of grant dated the 17th day of June of the year 1846, by Pio Pico, constitutional governor of the Californias, thereto duly authorized by the supreme government of the nation and by a decree of the departmental assembly of April 3d, 1846."

The decision of the board recites that Pio Pico testified that he had special instructions from his government to make the grant, and the decision further recites that "the genuineness of the grant is clearly established, and the circumstances under which it was made so clearly explained as to leave no doubt but it was done in good faith."

The papers offered in evidence therefore, instead of showing the nonexistence of special circumstances with reference to the sale to de Celis, which authorized the governor to make it, affirm the existence of those circumstances, and the contention of plaintiffs in error is reduced to this dilemma: the papers ruled out, the validity of the grant will be implied; the papers ruled in, the validity of the grant will be shown.

*Judgment affirmed.*

A. L. GUSMAN, in Behalf of Samuel Wright, *Appt.*,

v.

L. H. MARRERO, Sheriff of the Parish of Jefferson, State of Louisiana.

(See S. C. Reporter's ed. 81-87.)

*Action to release prisoner—lack of interest in plaintiff—habeas corpus from Federal court.*

1. An action by a private person against a sheriff to compel him to release from custody another person whom he alleges to be held in forcible custody in violation of the constitutional rights of the prisoner cannot be maintained because of any friendship or sympathy that the plaintiff may have for the prisoner, or any concern he may feel as to the enforcement of unconstitutional laws.
2. Habeas corpus from a Federal court to release a prisoner held under sentence of a state court will not ordinarily be granted on the ground of the invalidity of the state law under which the sentence was passed, where that question has not been presented to and passed upon by the state court.

[No. 223.]

*Submitted December 3, 1900. Decided January 7, 1901.*

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decision dismissing a petition in an action for the release of a prisoner from custody. *Affirmed.*

The facts are stated in the opinion.

Mr. A. A. Birney submitted the cause for appellant. Mr. A. L. Gusman was with him on the brief.

Mr. Robert J. Perkins submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

\*Mr. Justice McKenna delivered the [82] opinion of the court:

The appellant has not ventured to give a specific name to this action. The appellee claims that it is not an application for a writ of habeas corpus, nor for writ of mandamus (this word is used in the prayer of the petition), but that it is "an ordinary action of which the appellant has no concern."

The purpose of the proceeding is to deliver from the custody of the sheriff of the parish of Jefferson, state of Louisiana, one Samuel Wright, who is under sentence of death for the crime of assault with intent to commit rape, for which he was convicted in the twenty-first judicial district court for the parish of Jefferson.

The appellant's petition was filed in the

NOTE.—As to the jurisdiction of Federal courts on habeas corpus—see notes to *Re Huse*, 25 C. C. A. 4; *Tinsley v. Anderson*, 43 L. ed. U. S. 92; *Pearce v. Texas*, 39 L. ed. U. S. 164.



circuit court of the United States for the eastern district of Louisiana, and alleges that he appeared on behalf of Nathan Wright. It further alleges that Wright was convicted of criminal assault with intent to commit rape, and sentenced to death, and that Marrero (appellee) as sheriff "proposes, under said sentence and an order of execution lately received by him from Murphy J. Foster, governor, so called, of the state of Louisiana, to hang said Wright on February 9, 1900, until dead, and will do so unless restrained therefrom by this honorable court; . . . that said conviction was obtained and sentence passed without due process of law, in direct violation of the 14th Amendment of the Constitution of these United States; that the grand jury that indicted Wright consisted of only twelve members, while the fundamental law of the state, the Constitution of 1879, imperatively requires that the grand jury shall consist of sixteen members, and that the assent of at least thirteen of these members shall be secured for the presentation of a true bill;" and "that these fatal departures from an indis-

[83] pensable due \*process of law arose from the very erroneous beliefs of the hon. judge of said district court and of Governor Foster, that a so-called Constitution of 1898 is the fundamental law of the state, and not that of 1879; that they erred; and that the latter is the real and valid Constitution of Louisiana, petitioner in proof presents the following counts and pleas."

There is a specification of reasons, under eight "counts and pleas," why the Constitution of 1898 is not the Constitution of the state. The reasons are all reducible to the general and ultimate one that the Constitution of 1898 was not adopted in pursuance of the provisions of the Constitution of 1879, and "hence act No. 52 of 1896 (an act of the legislature), generally known as the constitutional convention law, goes far beyond the limits of legislative authority, is *ultra vires*, and absolutely null and void, and everything done under it equally null and void."

It is also alleged that certain other acts, to wit, acts Nos. 89 and 13 of 1896, are unconstitutional, because they reduce the number of registered voters, and therefore are "not in any sense an expression of sovereignty, and therefore of no force, effect, or validity." The particular reasons given are that the acts are bills of attainder, *ex post facto* laws, violate the guaranties of the 14th Amendment to the Constitution of the United States, take away suffrage without due process of law, make sweeping exemptions from the new requirements and additional qualifications of the suffrage based upon wealth and money, do not provide for ratification by the people of the state in compliance "with the provisions of the Federal Constitution exacting from every state of the Union a republican form of government."

The petition concludes as follows:

Petitioner further shows in behalf of said Wright that the aforesaid insurrectionary, revolutionary, usurpative, and unconstitutional proceedings compel him to go outside

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of the state courts, and to appeal to this hon. court for protection against an ordered extrajudicial murder, under the well-established maxim of constitutional law that state courts are not competent to pass upon the validity of the Constitution under which \*they themselves exist and from which they [84] derive all their power.

Wherefore, the above duly considered, petitioner prays for citation and service of petition upon the aforesaid Lucien H. Marrero, sheriff of the parish of Jefferson, state of Louisiana, commanding him to show cause, if any he has, why the said Nathan Wright, now in his illegal and wrongful custody, should not be by him set at liberty.

Petitioner further prays that, after all necessary services, legal delays, and due trial, there be judgment by this hon. court mandamusing and ordering the said Lucien H. Marrero, sheriff of the parish of Jefferson, to restore Nathan Wright to that liberty he has been wrongfully depriving him of.

Finally, petitioner prays for such general and special relief for said Wright as the law and evidence may on trial show him entitled to receive.

Respectfully submitted.

(Signed) A. L. Gusman.

Before me, the undersigned authority, personally appeared A. L. Gusman, to me known, who, being first by me duly sworn, says that the above facts and allegations are true and correct; that the aforesaid Wright has no adequate legal remedy in the state courts of Louisiana for the denial of due process of law, of which he is the victim, and that his only avenue of escape from an unconstitutional sentence of death is an appeal to this hon. court for justice and protection.

(Signed) A. L. Gusman.

This done and subscribed in my office, city of New Orleans, this 2d day of January, A. D. 1900.

[SEAL.] (Signed) W. B. Barnett,  
Not. Pub.

Upon the filing of the petition, and without any action of the court or of the circuit judge, the clerk of the court issued a citation, entitled in the cause, and in the name of the President of the United States, to Lucien H. Marrero, sheriff of the parish of Jefferson, and summoned him to comply with the demand of the petition (a copy of which accompanied the citation), or \*to deliver his answer in the office of the clerk of the court within ten days after service thereof, with increase of one day for every 10 miles Marrero's residence was distant from New Orleans, the place where the court was held. [85]

In due time Marrero, by attorney, filed exceptions to the petition on the ground that the court had no jurisdiction in the case, and on the ground that the petition disclosed no cause of action.

The answer concluded as follows:

"In the event that defendant's exception be overruled, and only then, defendant answers that he holds no prisoner named Martin Wright nor Nathan Wright, as alleged in plaintiff's petition, but that a man named Sam. Wright, now in his custody as sheriff

of the parish of Jefferson, was tried and convicted on Monday, the 11th day of December, 1899, before the honorable the twenty-first judicial district court for the parish of Jefferson, presided over by Hon. Emile Rost, judge, of the crime of 'entering a dwelling house in the night-time, armed with a dangerous weapon, and, having so entered, having made an assault upon the body of a girl therein residing with the felonious intent to commit rape.'

"Further answering, defendant alleges that, pursuant to a subsequent order of the court aforesaid sentencing him to be hanged, the said Sam. Wright was committed to custody of defendant to await a day to be fixed by his excellency the governor of Louisiana for the execution of said Wright.

"Defendant alleges that Friday, February the 9th, has been fixed by the governor of Louisiana for the execution of the orders of the said court.

"Whereupon defendant prays that plaintiff's petition be dismissed."

The exceptions were set down for trial for the 2d of February, 1900, at 11 o'clock, and the petitioner's counsel was ordered to be notified. On that day the exceptions came on to be heard, and were argued, submitted, and sustained, and the petition was dismissed.

On February 5, 1900, the petitioner, by his counsel, moved for a new trial on the following grounds:

[186] "First. That the court erred grievously and to Wright's prejudice and injury in holding that this is a mandamus suit. No writ is needed, none was asked, and the words 'mandamus' and 'writ' are nowhere to be found in the petition. No perpetuation of the writ of mandamus that has no existence is either asked or denied. The petition and prayer shows that this is simply an ordinary action. The summons to the defendant Marrero evidences the same thing, and his exceptions and answer are additional proofs of this fact.

"Second. The court also erred grievously when it refused to allow a trial of the merits of the question, since this was necessary in order to show whether or not Sheriff Marrero, in holding Wright in forcible custody under an assumption of governmental authority, was not invading Wright's constitutional rights and guaranties without due process of law.

"Third. The court also erred grievously and injuriously in ruling that appearer's contentions as to jury trials and juries are untenable, on the grounds that Amendments 4, 5, 6, 7 of the Federal Constitution do not apply to state courts, as held by the United States Supreme Court in the 110 U. S. Supreme Court Report in a California case, the said court since then having held that they do.

"Fourth. That this hon. court furthermore grievously and injuriously erred in holding that appearer's eighth count involves a political question over which Congress alone has jurisdiction. This was once true, but it is no longer, for Congress a number of

years ago settled the question affirmatively, and it is now the duty of this court to enforce this decision just as much as it is its duty to enforce the provisions of the statutes of Congress.

"Fifth. The court additionally erred in holding that Wright had no valid right of action, since a resort to mandamus proceedings was not the proper remedy. As no such resort was ever made the decision is clearly erroneous."

The motion for new trial having been submitted to the court it was refused.

A petition for appeal was presented, assigning as errors substantially the grounds stated in the motion for new trial, and \*ex- [87] cepting to the court's action thereon. The appeal was allowed, and the case is here in consequence.

The contention of appellee is that this is not an application for habeas corpus nor for writ of mandamus, but is an ordinary action. The appellant not only concedes the fact, but takes pains to assert it. It follows necessarily that he has no cause of action. However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are,—the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this. The judgment of the circuit court must therefore be affirmed. Even if we regard the proceeding as one in habeas corpus, the same result would follow. *Davis v. Burke*, decided December 17 of this term, 179 U. S. 399, ante, 249, 21 Sup. Ct. Rep. 210.

*Judgment affirmed.*

Mr. Justice Harlan took no part in the decision.

SUMPTER TURNER, Syndic of M.  
Schwartz & Company, Plff. in Err.,  
v.

F. L. RICHARDSON, Receiver of the American National Bank.

(See S. C. Reporter's ed. 87-92.)

*National banks—powers of receiver—acting without authority from Comptroller—questions on writ of error—raising question first on rehearing.*

1. Authorization by the Comptroller is not necessary to entitle a receiver of a national bank to bring an action to establish a claim of the bank against an insolvent debtor and for the sale of collateral held by the bank, since the provision of U. S. Rev. Stat. § 5234, to the effect that the receiver shall be under the direction of the Comptroller, means only that he shall be subject to such direc-

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Klpley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



tion, and not that he shall be obliged to get special authority for every act that he does in collecting the assets and debts of the bank.

2. To render a Federal question available on writ of error to a state court it must have been raised in the case before judgment, and cannot be claimed for the first time in a petition for rehearing.

[No. 408.]

*Submitted October 29, 1900. Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of the State of Louisiana to review a decision affirming a judgment in favor of a receiver of a national bank. *Affirmed.*

See same case below, 52 La. Ann. 1613, 28 So. 158.

The facts are stated in the opinion.

*Messrs. J. N. Luce and Henry L. Lazarus* submitted the cause for plaintiff in error.

*Mr. Frank L. Richardson* submitted the cause for defendant in error. *Mr. Frank Soulé* was with him on the brief.

Contentions of counsel sufficiently appear in the opinion.

- [88] \**Mr. Justice McKenna* delivered the opinion of the court:

The commercial firm of M. Schwartz & Company, of the city of New Orleans, was indebted to the American National Bank of that city on the 5th of August, 1896, in the sum of \$88,600.16. To secure this indebtedness certain shares of the Schwartz Foundry Company and other securities were pledged to the bank.

Schwartz & Company became insolvent, and, after proper proceedings in the civil district court of the parish of Orleans, Sumpter Turner and Edward Weil were elected syndics of the firm and of the individual members thereof. Weil subsequently died, and Turner was elected sole syndic, and is plaintiff in error here.

The bank also failed, and F. S. Richardson was appointed receiver by the Comptroller of the Currency. He attended the meeting of the creditors of the insolvent firm, proved the claim of the bank, voted to accept the cession, and for the appointment of the syndics. Subsequently he applied to the civil district court to have the claim recognized, and his rights as pledgee enforced by a sale of the securities pledged, and the proceeds applied to the payment of the claim. Exceptions to his petition were filed and overruled, and an answer was then filed. The case was tried and judgment rendered in favor of the receiver for \$74,045.16, being the greater part of the claim, and the securities pledged were ordered to be sold, and the proceeds applied to the payment of the indebtedness adjudged. A suspensive appeal was taken to the supreme court of Louisiana, and the judgment was affirmed. 52 La. Ann. 1613, 28 So. 158. This writ of error was then sued out.

One of the assignments of error in the state supreme court was as follows:

"That it is not averred nor proved by

plaintiff, nor does the record show the averment and proof, that the receiver of the American National Bank was authorized to sue and stand in judgment herein, nor that the receiver was authorized to have sold the collaterals set up as pledged at public auction in the manner demanded by the receiver or ordered by the court; that without the direction and authorization required under § 5234 \*of the United States Revised Statutes [89] the receiver was incompetent to stand in judgment herein, and to have sold or to cause to be sold the stocks, bonds, and securities belonging to or pledged to the American National Bank, and that therefore his demand for a judgment for the amount claimed, with recognition of a pledge, and his demand to have the alleged pledged collaterals sold, should be rejected at his costs."

In his brief for rehearing filed in the supreme court of the state, plaintiff in error urged "that the jurisdiction over and affecting the liquidation of national banks was vested exclusively in the United States circuit courts and the Federal courts, and that the state courts were without jurisdiction, in the said cause, to grant and order the sale authorized under § 5234 of the United States statutes and its provisions; said defendant and plaintiff in error citing paragraphs 3, 10, and 11 of § 629 of the United States statutes, and the proviso of § 4 of the act of Congress adopted August 13, 1888; that said paragraphs and said proviso vested the courts of the United States with exclusive jurisdiction in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such (national) banks."

It is assigned as error here that the supreme court of Louisiana erred in holding—

"1. That the defendant and plaintiff in error was not entitled to the right and privilege, under § 5234 of the United States statutes and its provisions, to have the direction and authority of the Comptroller of the Currency for the application to sell such securities, the sale, and the time, manner, and terms thereof;

"2. That defendant and plaintiff in error was not entitled to have the proceedings for the sale instituted and prosecuted by a person competent to stand in judgment, and that the receiver was competent to make such application to sell and to prosecute the same and stand in judgment;

"3. In holding that the supreme court of Louisiana and the state courts had jurisdiction *ratione materiae*, and in denying the exclusive jurisdiction of the United States courts:

"4. That the court further erred in not setting aside the \*judgment of the lower state court and rejecting the demand of the defendant in error." [90]

The claim presented in the trial court and in the supreme court, as expressed by the latter, was "that it was necessary for the receiver to aver and prove he was authorized by the Comptroller of the Currency, United States Treasury Department, to institute the present action and to sell at public auction the collaterals pledged to secure the in-

debtedness declared on, and that without this authorization the judgment recovered cannot stand."

On that contention both courts passed. It was discussed at length by the supreme court, and was held to have "no sufficient basis of fact to rest upon." This conclusion was based on the ruling in *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 21 L. ed. 554. We think it was correctly based on that decision.

Section 5234 of the Revised Statutes enacts:

That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to such association, and, upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the 12th section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, etc.

This section was construed in *National Bank of the Metropolis v. Kennedy*, and Mr. Justice Bradley, speaking for the court, after distinguishing between stockholders and ordinary debtors of the national bank, which was the ground of decision in *Kennedy v. Gibson*, 8 Wall. 506, 19 L. ed. 479, said:

[91] "The language of the statute authorizing the appointment of a receiver to act under the direction of the Comptroller means no more than that the receiver shall be subject to the direction of the Comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected, of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver."

Expressing what it was necessary for the receiver to do to collect the assets of the bank, the supreme court of Louisiana said:

"The receiver here could not sell the collaterals in his hands without obtaining the order of a court of competent jurisdiction, and this order must fix the terms of the sale."

"The object of this suit was to obtain such an order. The civil district court of the parish of Orleans is a court competent to grant the order. It did so."

The other point now made, to wit, that the state courts had no jurisdiction of the petition of the receiver because under paragraphs 3, 10, and 11 of § 629, and the proviso of § 4 of the act of Congress adopted August 13, 1888, the courts of the United States had exclusive jurisdiction, was not made in the trial court nor in the supreme court at the original hearing. It was made for the first time in the brief filed for rehearing. To maintain its availability to plaintiff in error it is claimed that, "if the state courts were utterly without jurisdiction, it was their duty to dismiss the proceedings *ex proprio motu*, and such is the jurisprudence of Louisiana. Where there is a want of jurisdiction *ratione materiae*, it is not too late to suggest or raise it on rehearing, or at any time."

Whether such was the duty of the state courts, and what questions could be suggested or raised on rehearing, the supreme court was undoubtedly competent and able to decide. For this court we need only say that we have decided too often to make [92] it necessary to do more than announce the rule, that to render a Federal question available on writ of error from a state court it must have been raised in the case before judgment, and cannot be claimed for the first time in a petition for rehearing. *Meyer v. Richmond*, 172 U. S. 82, 92, 43 L. ed. 374, 378, 19 Sup. Ct. Rep. 106, and cases cited.

As there is no error in the record, judgment is affirmed.

Mr. Justice Brown took no part in this decision.

#### DISTRICT OF COLUMBIA, Plff. in Err., v.

LEIGH ROBINSON and Conway Robinson, Jr., Executors of the Will of Conway Robinson, Deceased.

(See S. C. Reporter's ed. 92-109.)

*Highways—question for jury—effect of user—extent of use—propriety of instructions—instructions on evidence—effect of answers to bill of discovery—discretion of jury as to interest.*

1. Conflicting evidence as to the establishment of a road makes a question for the jury.
2. Mere use of land for a public highway is not sufficient to constitute the road a highway, unless the use is adverse to the owner of the fee, and not permissive.
3. The right to an easement of common and public highway, acquired by a prescriptive use of the road, is confined to the lines and width of the road as actually used for the period of prescription.
4. The surveying, platting, and recording of a road will not be presumed from the fact that the road has been worked and kept in repair

NOTE.—On public easement acquired in a highway by prescription—see *Marion v. Skillman* (Ind.) 11 L. R. A. 55, and note.

On the question of the right to interest on sum allowed as damages—see *Wilson v. Troy* (N. Y.) 18 L. R. A. 449, and note.



by the authorities, where the evidence tends to establish that the road was never surveyed, platted, or recorded.

5. An instruction submitting to the jury the question whether gravel was obtained as an incident to the legal exercise of the power to grade a street is not erroneous as submitting a question of law, where the jury are told that what is meant by the legal power to grade is a power exercised by commissioners jointly.
6. An instruction to a jury may properly summarize the facts in evidence and state that any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case.
7. A responsive answer to a bill for discovery brought in preparation for an action for damages is not conclusive against the plaintiff or his representatives, when they offer it in evidence in the action at law.
8. An allowance of interest is properly left to the discretion of the jury in an action of tort.

[No. 86.]

Argued November 7, 8, 1900. Decided January 7, 1901.

**I**N ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment in an action for trespasses. *Affirmed.*

See same case below, 14 App. D. C. 512.

The facts are stated in the opinion.

Mr. **Andrew B. Duvall** argued the cause, and, with Mr. **Clarence A. Brandenburg**, filed a brief for plaintiff in error:

The element of adverse right, where the bare fact of user for twenty years is relied on to constitute dedication, is supplied by an uninterrupted enjoyment by the public for twenty years.

*Onslott v. Murray*, 22 Iowa, 457; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Green v. Oaks*, 17 Ill. 249; *Holt v. Sargent*, 15 Gray, 97; *Jennings v. Tisbury*, 5 Gray, 74; *Valentine v. Boston*, 22 Pick. 75, 33 Am. Dec. 711.

And a public use of property or rights for twenty years without interruption has been held sufficient evidence of dedication without further proof.

*Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *New Orleans v. United States*, 10 Pet. 718, 9 L. ed. 595; *Parrish v. Stephens*, 1 Or. 59; *Lemon v. Hayden*, 13 Wis. 167; *McConnell v. Lexington*, 12 Wheat. 582, 6 L. ed. 735; *Waugh v. Leech*, 28 Ill. 488.

This proposition rests upon the theory that a user uninterrupted and unexplained for twenty years is adverse.

*Black v. Everett*, 1 Allen, 248; *Leonard v. Leonard*, 7 Allen, 277; *Barnes v. Haynes*, 13 Gray, 188, 74 Am. Dec. 629; *Sargent v. Ballard*, 9 Pick. 251; *Samuels v. Borrowdale*, 104 Mass. 210; *Hammond v. Zehner*, 21 N. Y. 118; *Perrin v. Garfield*, 37 Vt. 304; *Polly v. McCall*, 37 Ala. 20.

And the presumption of a grant or dedication arising from twenty years' uninterrupted and unexplained user by the public is imperative and conclusive.

*Tyler v. Wilkinson*, 4 Mason, 97, Fed. 180 U. S.

Cas. No. 14,312; *Leonard v. Leonard*, 7 Allen, 277; *Ross v. Thompson*, 78 Ind. 90; *Veale v. Boston*, 135 Mass. 187; *State v. Atterton*, 16 N. H. 203; *Stevens v. Nashua*, 46 N. H. 192; *Wood v. Hurd*, 34 N. J. L. 87.

There was error in allowing the jury to enhance damages by any sum not greater than the interest on the amount from August 28, 1882, when the action was brought, to the time of trial.

*Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 46 L. R. A. 724, 44 Atl. 265; *Richards v. Citizens National Gas Co.* 130 Pa. 37, 18 Atl. 600.

Messrs. **Conway Robinson, Jr.**, and **Walter D. Davidge** argued the cause, and, with Mr. **Leigh Robinson**, filed a brief for defendants in error:

The party who relies upon and claims under user to prove a right of way or easement must make out, not the mere user alone, but each and every essential quality and ingredient necessary to thereby establish such right of way or easement.

Washb. Easem. 4th ed. p. 151,\*86; *Oliver v. Hook*, 47 Md. 311; *American Co. v. Bradford*, 27 Cal. 368; *Com. v. Kelly*, 8 Gratt. 632; *Nelson v. Madison*, 3 Biss. 253, Fed. Cas. No. 10,110; *Colvin v. Burnet*, 17 Wend. 568; *Sargent v. Ballard*, 9 Pick. 255; *Smith v. Miller*, 11 Gray, 149.

The user, having commenced without claim of right, must be considered to have been afterwards permissive and in accordance with the original agreement of the parties until the plaintiff asserted some claim or exercised some right indicating that he made, or intended to assert, a claim adverse to the right of the defendant or of his predecessors.

*Smith v. Miller*, 11 Gray, 149; Washb. Easem. 4th ed. p. 154,\*89; *Taylor v. Gerrish*, 59 N. H. 571; *Wiseman v. Lucksinger*, 84 N. Y. 42, 38 Am. Rep. 479; *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480, 20 S. W. 942.

Even where exclusive, uninterrupted, open, and adverse use and enjoyment of a road under a claim of right for the required length of time is proved without any explanatory, qualifying, or rebutting circumstances, it is not conclusive as the statute of limitations would be, and does not justify the court in taking the question from the jury, but, on the contrary, is mere evidence for them and must be left to them to make the presumption or not, as they see fit.

*Stevens v. Taft*, 11 Gray, 33; *Livett v. Wilson*, 3 Bing. 118; *Nichols v. Aylor*, 7 Leigh, 561; *Smith v. Miller*, 11 Gray, 148.

*A fortiori*, where there are explanatory, qualifying, or rebutting circumstances the jury is entitled to consider them and to decide accordingly.

*Livett v. Wilson*, 3 Bing. 118; *Nichols v. Aylor*, 7 Leigh, 561; *Smith v. Miller*, 11 Gray, 148.

The District of Columbia, having the burden of proof resting upon it, and having to establish, not merely user by the public for the required length of time, but every essential element, quality, and ingredient showing such user to be adverse and under



a claim of right, is bound, in order to prove its plea by this kind of evidence, to satisfy the jury that such user cannot be placed upon any other footing than a claim or assertion of right; otherwise the District fails to maintain its plea.

*Golding v. Williams*, Dud. L. 94; Washb. Easem. 86, \*87, \*89, 4th ed. 152, 153, 155; *Nichols v. Aylor*, 7 Leigh, 558; *State v. Green*, 41 Iowa, 695; *Beasley v. Clarke*, 2 Bing. N. C. 709; *Polly v. McCall*, 37 Ala. 29; *Cox v. Forrest*, 60 Md. 79; *Nelson v. Madison*, 3 Biss. 255, Fed. Cas. No. 10,110; *Pentland v. Keep*, 41 Wis. 501; *Shellhouse v. State*, 110 Ind. 511, 11 N. E. 484; *Colvin v. Burnet*, 17 Wend. 569; *Pue v. Pue*, 4 Md. Ch. 387.

A highway acquired by prescription or long use is merely of the width actually used for and at the end of the prescribed period of twenty years.

*Plummer v. Ossipee*, 59 N. H. 55; Elliott, Roads & Streets, p. 136; *Scheimer v. Price*, 65 Mich. 639, 32 N. W. 873; *Cahill v. Layton*, 57 Wis. 611, 16 N. W. 1; *Ehret v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 262; *Epler v. Niman*, 5 Ind. 460; *Hart v. Bloomfield Twp. ex rel. Weir*, 15 Ind. 227; Washb. Easem. \*72, \*85, \*86, 4th ed. 135, 149, 150; *State v. Welpton*, 34 Iowa, 144; *Walker v. Caywood*, 31 N. Y. 63; *Watrous v. Southworth*, 5 Conn. 309; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429.

In trover and conversion it is generally held that the plaintiff may recover as compensatory damages the value of the property at the time of conversion, with interest thereon from the conversion to the time of trial, or with an amount not exceeding such interest added.

*Parrott v. Housatonic R. Co.* 47 Conn. 576; *Collier v. Lyons*, 18 Ga. 648; *Andrews v. Clark*, 72 Md. 440, 20 Atl. 429; *Thomas v. Sternheimer*, 29 Md. 272; *Hopper v. Haines*, 71 Md. 76, 18 Atl. 29, 20 Atl. 159; *Heinekamp v. Beaty*, 74 Md. 393, 21 Atl. 1098, 22 Atl. 67.

So, in trespass for taking or destroying property, if the case be one where exemplary damages ought not to be assessed, it is generally held that the plaintiff may recover as compensatory damages the value of the property at the time of such taking or destruction, with interest thereon from the taking or destruction to the time of trial, or with an amount not exceeding such interest added.

*Parrott v. Housatonic R. Co.* 47 Conn. 577; *Plumb v. Ives*, 39 Conn. 127.

So, too, in trespass on the case for the destruction of property, it is generally held that plaintiff may recover as compensatory damages the value of the property at the time of such destruction, with interest thereon from the destruction to the time of trial, or with an amount not exceeding such interest added.

*Parrott v. Housatonic R. Co.* 47 Conn. 576; *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Chicago & N. W. R. Co. v. Schultz*, 55 Ill. 421; *Johnson v. Chicago & N. W. R. Co.* 77 Iowa, 669, 42 N. W. 512; *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 275, 1 N.

E. 324; *Woodland v. Union P. R. Co.* (Utah) 26 Pac. 298; *Gress Lumber Co. v. Goody*, 104 Ga. 613, 30 S. E. 810; *Western & A. R. Co. v. Brown*, 102 Ga. 15, 29 S. E. 130.

In all actions of tort to property, even such as are brought to recover purely unliquidated damages for destruction of property, or for injuries to real or personal property which diminish its value, the jury if they find for the plaintiff are entitled to allow damages suffered and sustained by him by the destruction of his property or by the diminution in its value, as the ease may be, resulting from defendant's tortious acts, and may enhance such damages by a sum not exceeding legal interest thereon from the commission of the tortious acts to the time of the trial, if, in the exercise of their judgment and discretion, they see fit so to do.

*Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 143; *Pittsburgh, Ft. W. & C. R. Co. v. Swinncy*, 97 Ind. 596; *Burdick v. Chicago, M. & St. P. R. Co.* 87 Iowa, 387, 54 N. W. 439; *Frazier v. Bigelow Carpet Co.* 141 Mass. 127, 4 N. E. 620; *Ludlow v. Yonkers*, 43 Barb. 493; *Walrath v. Redfield*, 18 N. Y. 462; *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 43; *Reiss v. New York Steam Co.* 27 Jones & S. 58, 12 N. Y. Supp. 557; *Wilson v. Troy*, 135 N. Y. 105, 18 L. R. A. 449, 32 N. E. 44, Affirming 60 Hun, 187, 14 N. Y. Supp. 721; *Duryec v. New York*, 96 N. Y. 499; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 507; *Brush v. Long Island R. Co.* 10 App. Div. 540, 42 N. Y. Supp. 103; *Jamieson v. New York & R. R. Co.* 11 App. Div. 54, 42 N. Y. Supp. 915; *Lawrence R. Co. v. Cobb*, 35 Ohio St. 98; *Clarendon Land Invest. & Agency Co. v. McClelland* (Tex. Civ. App.) 31 S. W. 1088; *Pennsylvania S. Valley R. Co. v. Ziemer*, 124 Pa. 571, 17 Atl. 187; *Lincoln v. Claflin*, 7 Wall. 139, 19 L. ed. 109; *The Amiable Nancy*, 3 Wheat. 560, 4 L. ed. 459; *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 221, 28 N. E. 328; *Wabash R. Co. v. Williamson*, 3 Ind. App. 205, 29 N. E. 455; *Gulf, C. & S. F. R. Co. v. Jagoe* (Tex. Civ. App.) 32 S. W. 719; *Moore v. Schultz*, 31 Md. 423; 3 Sutherland, Damages, p. 383. See also 1 Sutherland, Damages, pp. 534, 629; *Hetzel v. Baltimore & O. R. Co.* 6 Maekay, 1; *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 276.

\*Mr. Justice McKenna delivered the [93] opinion of the court:

This is an action for damages, which was brought by Conway Robinson against the District of Columbia, for certain alleged trespasses on his land called the "Vineyard." The trespasses consisted in breaking and entering his close, and digging a trench 386 feet long, 33 feet wide, and 14 feet deep, and carrying away 4,683 cubic yards of gravel. The grounds of action were presented in several counts. The District pleaded the general issue and the statute of limitations. The plaintiff joined issue on the first plea, and demurred to the second. No disposition was made of the demurrer until February 18,



1884, when the death of the plaintiff was suggested.

[94] On the 29th of October, 1886, the defendants in error, executors \*of Conway Robinson, filed an amended declaration, presenting the cause of action in three counts. The first alleged the taking of the gravel from Harewood road; the second, its taking and using upon other roads; the third, the breaking and entering the close; the fourth, the breaking and entering the close and the excavation of a trench, thereby separating parts of the close from other parts and impairing its value as suburban property.

On December 30, 1896, the District pleaded the general issue to the amended declaration. Issue was joined on the plea. Subsequently, by leave of the court, the District filed additional pleas. First, the statute of limitations of three years; second, *liberum tenementum*; third, that the trespasses complained of consisted in the excavation and removal of gravel and soil from within the lines of a public highway known as Harewood road. Upon motion the first plea was stricken out and a demurrer was sustained to the second. The case was tried on the general issue and the third plea.

A verdict was rendered for the plaintiffs (defendants in error) in the sum of \$8,000, and a judgment was duly entered thereon. It was affirmed by the court of appeals (14 App. D. C. 512), and the case was then brought here.

The errors assigned are on exceptions taken to the giving, refusing, and modifying instructions. It is not necessary to detail the testimony. It is enough to say that it tended to support the issues made by the parties respectively, and to support the claim that Harewood road was a public highway. For the latter the District relied upon prescription and dedication arising from twenty years' use by the public, and also upon the action of the levy court in relation to the road.

For the statutes in regard to the levy court and its functions we may quote from the opinion of the court of appeals as follows:

"The law of Maryland in force at the time of the cession of the District declared that the county courts 'shall set down and ascertain in their records, once every year, what are the public roads of their respective counties.' Act 1704, chap. 21, § 3.

[95] \*"The act of Congress, July 1, 1812, empowered the levy court to lay out public roads, condemn lands therefor, and so forth, and provided that when a road shall have been so established, marked, and opened they shall return the courses, bounds, and plat thereof to the clerk of the county to be by him recorded, and it shall thereafter be taken, held, and adjudged to be a public road. 2 Stat. at L. 771, chap. 117.

"Section 2 of the act of May 3, 1862, declares that all roads which have been used by the public for a period of twenty-five years or more as a highway, and have been recognized by the levy court as public county

roads, and for the repairs of which the levy court has appropriated and expended money, shall be public highways whether they have been recorded or not. Section 3 provides that within one year from its passage the levy court shall cause the county surveyor to survey and plat all such roads and have the same recorded. In making the survey he was required to follow as near as possible the boundaries heretofore used and known for the highway and to mark the same at all angles with stones or posts. 12 Stat. at L. 383, chap. 113, § 3. This time for surveying, platting, and recording was extended three years by act of February 21, 1863 (12 Stat. at L. 658, chap. 51), and again for three years from July 1, 1865, by act of June 25, 1864. 13 Stat. at L. 193, chap. 157, § 6. The Revised Statutes of the District (A. D. 1874) also provide that all public roads which have been duly laid out, or declared and recorded as such, are public highways (D. C. Rev. Stat. § 246); and that every public highway shall be surveyed and platted, and that a certificate of the survey and plat shall be recorded in the records kept for that purpose. *Idem.* § 248.

"The penalty provided for the obstruction of public roads, as re-enacted in the Revised Statutes of June 22, 1874, is limited to such as had been used and recognized for twenty-five years prior to May 1, 1862, and which 'were thereafter duly surveyed, recorded, and declared public highways according to law.' D. C. Rev. Stat. § 269."

Whatever evidence is necessary to illustrate the instructions will be stated hereafter.

There is an assignment of error which in effect, though in \*form an attack on instructions, questions the sufficiency of the evidence to justify any recovery, and which asserts that it was the duty of the court to have taken the case from the jury. In other words, it is claimed that the trial court should have decided, and not left to the jury to decide, that the road was a public highway. It is not clear upon what the contention is rested; whether it is rested on the ground that the road was established by the levy court, or that evidence showed beyond reasonable dispute that the road had been acquired by adverse use, or had been dedicated by plaintiffs' predecessors in the title. But the evidence did not establish either conclusion beyond reasonable dispute. Both conclusions were disputable and disputed, and whether they were or were not justifiable inferences from the evidence, which was conflicting, was for the jury to determine, not for the court; and the court properly declined to do so. What were within the functions of the court, and what were within the functions of the jury, are questions entirely aside from the distinction between public and private ways and the manner of acquiring either,—whether by grants or by acts *in pais* establishing title by dedication or prescription, the propositions which counsel have learnedly argued.

There is no evidence of a formal grant.



The dedication of the road, or the prescriptive right of the public to it, was sought to be proved by the acts of the owners of the land and certain uses by the public. There was opposing evidence, or, rather, evidence of opposing tendency, which could be claimed to show that the use by the public was in subordination to the title,—was permissive, not adverse. The issue hence arising was properly submitted to the jury.

The other assignments of error are more specific, and exhibit for review the legal propositions which were involved in the issues. These are that the court erred in the following particulars:

(1) In holding and so instructing the jury that the use of the road by the public must have been adverse to the owner of the fee.

(2) In holding and instructing the jury [97] “that the prescriptive \*right of highway is confined to the width as actually and without any intermission used for the period of twenty years.”

(3) By depriving the District of the presumption that the public acts required to be performed were performed.

(4) By leaving to the jury a pure question of law; to wit, “whether the District of Columbia had done the acts constituting the trespass, ‘without the execution of its lawful powers according to law.’”

(5) By submitting to the jury a question of law; to wit, “whether the gravel was obtained incident to the lawful exercise of the power to grade.”

(6) By “sustaining the granting of the twelfth prayer of the defendants in error, and thereby submitting to the jury to find and determine both the law and the facts of the case; and also thereby holding that if the jury found any one of the facts enumerated in said prayer, without regard to its probative force, it would tend to prove Harewood road was not a public way, and rebut any presumption that it was a public highway.”

(7) By refusing the twenty-third prayer of the District, “and thereby holding that the defendants in error were not bound by the answer of the commissioners to the bill of discovery filed by the testator of the defendants in error respecting the bona fides of the action of said commissioners in respect of the alteration of Harewood road and the purpose of such alteration.”

(8) By instructing the jury that they “might enhance the damages that would make them whole by any sum not greater than the interest on such amount from the time of the filing of the original declaration.”

1. The first proposition was presented by the following prayers requested by the District and modified by the court. The words in brackets were struck out by the court, those in *italics* were added:

“II. If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the ‘Harewood road,’ in the District of Columbia, and that the said road had been used

and recognized as a public county road for a period of twenty-five years prior to May 3, 1862,\* *adverse to the plaintiffs’ testator and those under whom he claimed*, and that said road was, after said last-mentioned date and prior to the 1st day of July, 1868, surveyed and recorded in the records of the levy court as a public highway, then the [plaintiffs are not entitled to recover in this action, and the verdict should be for the defendant] the jury should find that the said roadway is a public highway of the width that it had actually been used prior to May 3, 1862. [98]

“The maps introduced by the defendants are not such surveys and records as the act of 1862 contemplated, but may be considered, together with all the other evidence in the case bearing upon that point, in determining whether such survey and record was made.”

“III. If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the ‘Harewood road,’ in the District of Columbia, and that said road was a public county road, generally used and recognized as such by the public for an uninterrupted period of more than twenty years prior to 1880, and *adversely to the plaintiffs’ testator and those under whom he claimed*, under the control of and kept up and repaired by the public authorities, and used by it publicly, openly, and notoriously for all the purposes of a public highway, under a claim of right, then the jury may and ought to presume a grant of a right of way to the public over said road [and the plaintiffs are not entitled to recover in this action, and the verdict should be for the defendant] *to the width it had been so used*.”

“V. [The rule of presumption is one of policy as well as of convenience, and is necessary for the peace and security of society and] if the jury believe from the evidence that the public used ‘Harewood road’ as a public highway, whenever it saw fit, without [asking] leave of the owner and without objection from him, this is adverse, and uninterrupted adverse enjoyment for twenty years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant.

“XX. If the jury believe from the evidence that Harewood \*road was on May 3, 1862, a [99] road within the county of Washington, in the District of Columbia, which had been used by the public *adverse to the plaintiffs’ testator and those under whom he claimed* for a period of twenty-five years or more as a highway, and had been recognized by the levy court of said county prior to that date as a public county road, and the said levy court had appropriated and expended money for the repairs of said Harewood road, then they are instructed that the said Harewood road was at the time of the alleged trespasses complained of a public highway, *of the width it had been used*, although the same may not have been recorded.”

But for the criticism of counsel the modi-



fications and additions made by the court might be considered as having done no more than to bring out more clearly the meaning of the prayers. The recognition and control of the road by the District, and its use by the public under "a claim of right" (third prayer), or "without asking leave of the owner and without objection from him" (fifth prayer), seem equivalent to a declaration of adverse use. Counsel, however, now contend for a different meaning and a different principle of law. They contend first, as we understand, that use alone, without regard to the consent of the owner of the fee or his attitude to the use, constituted the road a highway (prayer 2), and required a grant of it to be presumed (prayers 3 and 5).

[100] The contention is not justified. The use must be adverse to the owner of the fee. The rule is correctly stated in 2 Greenleaf on Evidence. The learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced "a new kind of title, namely, the presumption of a grant, made and lost in modern times, which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time," says: "In the United States grants have been very freely presumed, upon proof of an adverse, exclusive, and uninterrupted enjoyment for twenty years." And after stating the quality of presumption which arises, he continues: "In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is under \*a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." §§ 538, 539. Under a different rule, licenses would grow into grants of the fee, and permissive occupations of land become conveyances of it. "It would shock that sense of right," Chief Justice Marshall said in *Kirk v. Smith ex dem. Penn.* 9 Wheat. 286, 6 L. ed. 91, "which must be felt equally by legislators and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title."

2. This proposition arises on the following prayer given at the request of the plaintiff:

"The jury are instructed that the right to an easement of common and public highway, acquired by a prescriptive use or long use of the road, is confined to the lines and width of the road as actually used for and at the end of the period of twenty years, and does not extend to a greater width beyond the width of the road so actually used, and in this connection the jury are further instructed that the planting or placing of the boundary stones mentioned in the evidence, if the same occurred within twenty years before the acts complained of, which are in evidence, would not extend such easement by 180 U. S.

prescription beyond the lines and width of such actual use."

The same reason and principle applies to this as to the preceding proposition. Relying for right of way on use, the right could not extend beyond the use. Or, as it has been expressed, "if the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user." 1 Elliott, Roads & Streets [2d ed.] § 174, and cases cited.

3. This proposition is based upon the modifications by the court of the twelfth prayer requested by the District. It was as follows:

"[The levy court of the District of Columbia was a corporation. Its duty, among other things, was to supervise and \*keep in repair the public roads of the county of Washington, and to plat, record, and mark with boundary stones such roads.] [101]

"If the jury find from the evidence that boundary stones were placed along Harewood road and at the point of the alleged trespass by the surveyor of the levy court in 1865 or thereabouts, and that thereafter said levy court worked and kept said road in repair, then [in the absence of evidence to the contrary the presumption is that] it is a question for the jury to determine whether said levy court caused said road to be surveyed, platted, and recorded as a public highway in accordance with the act of Congress [requiring the same to be done, and such presumption is not overcome by the fact that the record of the survey and plat of said road is lost or cannot be found], and it will be competent for them to so find if all the evidence establishes the fact to their satisfaction, although no record of a survey and plat of said road has been given in evidence."

The objection to the action of the court is that the District was thereby deprived of the presumptions which attend and support the acts of public officers.

One of the defenses made by the District was that the road had become a highway under and by virtue of the acts of Congress heretofore referred to. As a condition of this defense it was necessary to establish that the road had been surveyed, platted, and recorded by the levy court, and it was the effect of the prayer which was requested that the performance of that duty would be presumed by the law from the fact that the road had been worked and kept in repair by the levy court. In other words, such surveying, platting, and recording would be presumed because it was the duty of the levy court to have done them under the acts of Congress. Undoubtedly the law indulges presumptions of the performance of their duty by public officers, and presumptions of the existence of circumstances which generally precede or accompany acts testified to and which are necessary to their validity, but such presumptions are in aid of the evidence. They are not independent of the evidence, nor raised against it. The record 445



[102] shows that the plaintiffs' testimony tended to establish "that the road was never surveyed, platted, or recorded as a public road, as required by \*law." The testimony on the part of the District was that the secretary to the governor of the District in 1871 obtained from the former secretary of the levy court what were supposed to be all of the records of the court, and turned them over to the treasurer of the board of public works, and that those records may be among the old records of the District, but witness did not know; nor did he know what was among them, and had no distinct recollection of any map of the road. Another witness, who was road supervisor from 1869 to 1871, testified that he saw the map of Harewood road and other roads among the records of the old levy court of the District, in its room in the city. He did not know, however, when the map was prepared or by whom; that it embraced several roads; it was a map of the District of Columbia and the roads in it. Another witness (William T. Richardson), a civil engineer, testified that under the direction of the commissioners of the District he found records and maps of the levy court relating to Harewood road; that he found some maps, one made in 1873, in Governor Shepherd's time, and also a copy of the levy court map; that the maps and records were found in the vault of the old District building on First street; that he found no other maps or records relating to the levy court or Harewood road; that the map found was a copy of the original map showing the roads of the District, signed by a president of the levy court and clerk; that the first map was in pen work, and was an original made in 1873 under authority of an act of the late legislative assembly of the District. There was another map professing to have been made in 1857 by Mr. Boscke, while he was an employee of the District. The accuracy of the Boscke map was testified to, and it and the other maps were put in evidence.

The evidence therefore showed what the levy court did as to surveying, platting, and recording the road, and the effect of it could not be taken from the jury and a presumption substituted for it. Such presumption might have been given to the jury as an element of decision in connection with the evidence, and might have been so given by the court if asked.

[103] The prayer was objectionable for another reason. It assumed that a record of the survey and plat of the road was \*made and lost. This was a fact in issue, and could not be assumed. The court left the fact to be deduced from the evidence, telling the jury, however, that they could infer it, although there was no direct evidence of it.

4. The eighth prayer given at the request of the plaintiff was as follows:

"If the jury believe from the evidence that at the time of doing the acts complained, which are in evidence, there was a right of common and public highway in the defendant to a road of only about 25 feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the

defendant's right of highway and of about 33 feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator, and removed and used the same beyond the limits of said land to repair or improve other public highways in the District of Columbia, without making just compensation to the owner of the soil, or having any condemnation proceedings, or exercising its lawful powers according to law,—then the jury are instructed that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiff and assess such damages as the evidence shows would make them whole."

The italics are ours, and they indicate the words upon which the District especially bases its objection. That objection is that a pure question of law was submitted to the jury. The objection is very general, and hardly attains to such specification of an error as can be noticed. However, we have examined the charge of the court, and think what was meant by the words objected to was sufficiently explained.

5. The eleventh prayer asked by the plaintiff was as follows:

"The burden of proof is upon the defendant to satisfy the jury that the gravel was obtained incident to the legal exercise of the power to grade. Such power, to be lawful, must have been exercised by the commissioners jointly. It could not be exercised by any one of the said commissioners, as the power could not in law be delegated. If the gravel obtained and used \*was not the inci- [104] dent to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade, then the use of the said gravel, as well as the said excavation, was unlawful, and the defendant has not maintained its plea of justification.

"If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employees of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact."

It is objected that the prayer submitted to the jury a pure question of law; to wit, whether the gravel was taken as an incident to the legal exercise of the power to grade. But a definition accompanied the question. The jury was told that what was meant by the legal power to grade was a power exercised by the Commissioners jointly, and the court carefully added that such legal power could be presumed from the supervision of the grading by the officers and employees of the District. The prayer is not amenable to the objection made.

6. The twelfth prayer requested by defendants in error, and given by the trial



court with the modifications expressed in italics, was as follows:

"If the jury believe from the evidence that there was a lane or road over the land of the plaintiffs' testator, yet if from the evidence the jury believe that travel over said lane or road originated for the accommodation of some prior owner or owners of that tract and the adjoining tract, or either of said tracts, and of those deriving title from or under such owner or owners of either or of both of said tracts, and believe that said lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law, and believe that the various owners of said tract of land by mesne conveyances conveyed the same from one to the other, with covenants of warranty, without showing, mentioning, or excepting any lane or road over the same, either in the body of any of these deeds or in plats annexed to any of them; and believe that the location of said [105] lane or road or part thereof over the land of the plaintiffs' testator was changed by Mr. John Agg, a prior owner of said land, for the reason that he wished it further from his house, and that he employed and paid the hands who made this change; and believe that from about 1843 to about the time of the conveyance of May 15, 1857, to the plaintiffs' testator, gates were maintained across said lane or road by the owner or owners of said tract or their tenants, and that the gate posts of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late war had commenced; and believe that taxes were assessed by the public authorities upon and paid by the owners of said land or their tenants upon said tract of land, as a whole, including land within the limits of said lane or road; and believe that acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator; and believe that said lane or road was not repaired by the public authorities until after the late civil war, or recognized by the public authorities as a public road until after the late civil war; or if the jury believe any of these facts,—then the jury are instructed that these facts, or any of them which the jury may believe, would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway; and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case; and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained of which have been given in evidence, *and was not a highway by dedication*, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

The objection that this prayer left to the jury to decide the law and the facts of the case is not justified, nor that it was held that, if any one of the enumerated facts was

proved, the Harewood road was not a public way. The prayer summarized the facts in evidence, but did not express an opinion as to their probative force, whether collectively or separately considered. \*Each fact [106] had some probative quality and value, and it was proper for the court to say so, "and that any and all such facts," as the court remarked, "if believed by the jury, were to be considered in connection with the other evidence in the case." And the court further said: "If the jury upon the whole evidence believe [not upon any one fact believe] that the said lane or road was not such highway at the time of the facts complained of, and was not a highway by dedication," then they should find that the gravel was not removed from a public highway, which was the defense made in the third additional plea of the District.

7. The testator of defendants in error filed a bill for discovery in 1882, on the equity side of the supreme court of the District of Columbia, against the District, its commissioners, and two assistants of the engineer commissioner. The bill alleged that he intended to bring an action against the defendants in said bill for the trespasses which constitute the matter of the present controversy, and, after stating with particularity the grounds of discovery, submitted interrogatories to be answered by the defendants, as to the time the acts were done which were complained of as trespasses, by whom done, under whose superintendency, by whom paid and out of what fund the work was paid for, the amount of gravel or earth dug and where taken, if taken from the limits where dug, and if any books, accounts, documents, or papers were kept recording or evidencing the facts. Certain of the defendants made answer under oath to the interrogatories. As to the probative force of the answers the District at the trial of the case at bar asked the court to instruct the jury as follows:

"The jury are instructed that the plaintiffs are bound by the answer of the commissioners *and* the District of Columbia to the bill of complaint of their testator [No. 7959, equity, Supreme Court, District of Columbia] offered in evidence by them, and so far as said answer is responsive to the allegations of said bill it is the evidence of the plaintiffs themselves, and the jury are not at liberty to ignore it or find the facts otherwise than in said answer set forth."

The prayer was refused. Upon what ground, however, does \*not appear. It might [107] have been refused, and could have been, even if it contained a correct declaration of law, on account of its general character. It is attempted here to be particularized. The specification of error is that the court, by refusing the prayer, held "that the defendants in error were not bound by the answer of the commissioners to the bill of discovery filed by the testator of the defendants in error respecting the bona fides of the action of said commissioners in respect of the alteration of Harewood road and the purpose of such alteration." Whether the trial court would have given the prayer if it had been limited

to the good faith of the District commissioners we cannot know. Presumably not, if it made their answer in the discovery suit conclusive proof, as claimed in the prayer which was refused. The greatest strength of proof attributable to an answer under oath in a suit in equity is that it cannot be overcome by a single witness unaccompanied by some corroborating circumstance. That it has even that strength in a common-law court we are not called upon to decide. It certainly has not conclusive strength. *Lyon v. Miller*, 6 Gratt. 438, 439, 52 Am. Dec. 129; 1 Pom. Eq. Jur. § 208. The prayer requested was therefore properly refused.

8. At the request of the plaintiff the court instructed the jury as follows:

"If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may [include] *enhance the damages by any sum not greater than the interest on the amount from August 28, 1882, when this action was brought, to the time of this trial [as part of the plaintiffs' damages], if the jury [see fit to include such interest as damages, and may consider the time during which the plaintiffs and their testator were kept out of their money between those dates] shall find from the evidence that such allowance would be reasonable and just.*"

[108] The objection is to the interest. It is not claimed that in cases of tort interest may not be allowed in the discretion of \*the jury. It is asserted that under the circumstances of the case the court should not have submitted the claim of interest to the jury. But it was the plaintiffs' right to have invoked the exercise of the discretion of the jury, and the circumstances of the case were to be considered by it in exercising such discretion, and presumably were considered.

9. One of the issues in the case was whether the gravel was taken as an incident to grading the road or for use on certain streets in the District. There was also an issue as to the width of the road and the right to take gravel outside of that width. Prayers were asked on those issues. The ninth prayer of the District was modified by the court and given as modified as follows (the additions of the court are in italics):

"[Unless] *If the jury shall believe from the evidence that Harewood road at the point of the alleged trespass was a public highway, and that the gravel was taken in pursuance of the power to grade, and not for the sole purpose of obtaining gravel for use elsewhere, then if they find for the plaintiffs in this case they are instructed that the measure of damages is the value to the plaintiffs' testator of such gravel as is shown by the evidence to have been taken by the defendant from the plaintiffs' testator's land exterior to the lines of Harewood road, and such damages, if any, to the residue of the land as was occasioned by the removal of*

*the gravel exterior to the boundaries of the road.*"

The criticism of the court's action is that it allowed the jury to consider the motive of the District in grading the road. We think counsel misapprehended the purpose of the modifications of the prayer. It did not question the motives of the District authorities, nor did it assume anything that was not within the issues of the case. The right to take gravel within the limits of the road which might be established by the evidence, and in the exercise of grading, was conceded. The right to take gravel outside the limits of the road, or not for the purpose of grading it, was denied, and properly denied. It was an easement in the land, not the fee to the land, which the public acquired by the road, and the measure of the easement was the width of the road. The right to grade and improve was incident to the easement, but the easement gave no other right in the soil \*or to the soil. The right [109] to remove soil from one part of a road to another part may be conceded. And it has been decided such right extends to other streets forming parts of the same system. Of this, however, we are not required to express an opinion, as it is not involved in the prayer.

Finding no error in the record, the judgment is affirmed.

Mr. Justice Gray took no part in the decision.

CHARLES F. W. NEELY, Appt.,  
v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York.

(See S. C. Reporter's ed. 109-125.)

*Judicial notice—of relations with Cuba—extradition—from foreign territory under control of United States—occupation of Cuba—military government—constitutional guaranties in case of crimes against foreign country—power of Congress to interfere in government of Cuba.*

1. Judicial notice may be taken that the island of Cuba was at the date of the act of Congress of June 6, 1900, and still is, occupied by, and under the control of, the United States.
2. Cuba is foreign territory within the meaning of the act of Congress of June 6, 1900, amending U. S. Rev. Stat. § 5270, so as to provide for extradition of persons violating laws of foreign territory occupied by, or under the control of, the United States, notwithstanding the fact that the island is under a military government appointed by and representing the President of the United States in the work of assisting the inhabitants of that island to establish a government of their own.

NOTE.—On judicial notice—see *Olive v. State* (Ala.) 4 L. R. A. 33, and note.

As to foreign extradition—see note to *Kentucky v. Dennison*, 16 L. ed. U. S. 717.

On habeas corpus to secure discharge from restraint in extradition proceedings—see note to *Re Huse*, 25 C. C. A. 23.



3. It is competent for Congress by legislation to enforce or give efficacy to the provisions of the treaty of Paris between the United States and Spain, by which the United States agreed to assume and discharge the obligations that might, under international law, result from the fact of its occupation of Cuba, for the protection of life and property there.
4. The fundamental guaranties of life, liberty, and property, made by the Federal Constitution, such as those relating to the writ of habeas corpus, bills of attainder, *ex post facto* laws, and trial by jury for crimes, have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.
5. The occupancy and control of the island of Cuba under military authority of the United States cannot be deemed to be an unconstitutional and unauthorized interference with the internal affairs of a friendly power, by virtue of the joint resolution of Congress of April 20, 1898, declaring that "the people of Cuba are, and of right ought to be, free and independent," since this declaration was not intended as a recognition of the existence of an organized government instituted by the people of that island in hostility to the government maintained by Spain.
6. It is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification, as it is the function of the political branch of the government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba.

[No. 387.]

*Argued December 10, 11, 1900. Decided January 14, 1901.*

**A**PPEAL from the Circuit Court of the United States for the Southern District of New York to review a decision denying an application for a writ of habeas corpus to obtain discharge from restraint in extradition proceedings. *Affirmed.*

See same case below, 193 Fed. Rep. 631.

The facts are stated in the opinion.

**Mr. John D. Lindsay** argued the cause, and, with **Mr. De Lancey Nicoll**, filed a brief for appellant:

The recognition of a foreign power belongs to the sphere of diplomacy; therefore to the executive branch of the government.

*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 331.

Recognition of a new state may be evidenced by any act fairly indicating an intention to recognize it.

16 Am. & Eng. Enc. Law, 2d ed. p. 1127; Hall, International Law, 4th ed. § 26, p. 92.

If the action taken by the President in pursuance of the joint resolution of Congress approved April 20, 1898, constituted a recognition by the political branch of our government of the independence of the Cuban people, this court is precluded from any inquiry as to the truth of the fact thus recognized.

*Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.  
180 U. S.

It is quite immaterial that it did not in express terms recognize the existence of a Cuban "republic" or "government" in some formal manner, or declare it to be a "state," "nation," or "power."

Recognition of the independence of the Cuban people was not justified unless at the time the people of that island had an established government of their own, and possessed all the powers and attributes of sovereignty, entitling them to take and maintain a place among the nations of the world.

16 Am. & Eng. Enc. Law, 2d ed. pp. 1128, 1129; Wharton, Digest of International Law, § 70.

Since this action would not have been permissible unless independence was actually established, it must be assumed that that condition did in fact exist. As independence implies an organized government and all the features of sovereignty, these must also be assumed to have existed.

The recognition of the independence or existence of a foreign state is well known to preclude any further inquiry by the judicial tribunals into the fact of their due organization.

*Scott v. Jones*, 5 How. 374, 12 L. ed. 195; *Cherokee Nation v. Georgia*, 5 Pet. 50, 8 L. ed. 42; *United States v. Palmer*, 3 Wheat. 634, 4 L. ed. 478.

When the word "foreign" is used in a Federal statute it means within the dominion of a foreign nation, or without the dominion of the United States.

13 Am. & Eng. Enc. Law, 2d ed. p. 830; *Bigley v. New York & P. R. S. S. Co.* 105 Fed. Rep. 74; *The Eliza*, 2 Gall. 4, Fed. Cas. No. 4,346; *United States v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336; *The Lark*, 1 Gall. 55, Fed. Cas. No. 8,090; *The Sally*, 1 Gall. 58, Fed. Cas. No. 12,257; *The Adventure*, 1 Brock. 235, Fed. Cas. No. 93; *Taber v. United States*, 1 Story, 1, Fed. Cas. No. 13,722; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

So, a port or place in the hands of the enemy ceases to be domestic and becomes a foreign place for the time being, because it is no longer under the sovereignty of the United States.

*United States v. Hayward*, 2 Gall. 500, Fed. Cas. No. 15,336; *United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562.

A citizen of Cuba is a foreign citizen.

*Betancourt v. Mutual Reserve Fund Life Asso.* 101 Fed. Rep. 305.

When the act was passed there was no treaty provision or act of Congress under which persons charged with crime in Cuba could have been lawfully apprehended in the United States and surrendered for trial in that island. There was, therefore, no authority for their extradition.

*Holmes v. Jennison*, 14 Pet. 540, 614, 10 L. ed. 579, 618; 2 Ops. Atty. Gen. Taney, 452; 6 Ops. Atty. Gen. Cushing, 85. See also House Report No. 1652, 56th Congress, 1st Session; Senate Report No. 1515, 56th Congressional Record, pp. 6606, 6961, 6966, 6987.

The alleged offenses of the appellant in  
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Cuba, his "indictment" there, and the absence of any provision of law, by treaty, legislation, or otherwise, authorizing his extradition, were the "known conditions" out of which the occasion for the adoption of the measure arose.

*United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Dunlap v. United States*, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319.

It has been judicially decided that the treaty of Paris worked no change in the political status of Cuba.

*Beltancourt v. Mutual Reserve Fund Life Ins. Asso.* 101 Fed. Rep. 305.

Martial law exists, or at least can be properly exercised, only in time of war, and originates in military necessity.

Benet, *Military Law & Courts-Martial*, 14; Halleck, *International Law*, 380; O'Brien, *American Military Laws & Practice of Courts Martial*, p. 26. See also 1 Bl. Com. chap. 13, p. 413; 1 Kent, Com. 10th ed. p. 377; De Hart, *Military Law*, p. 17; Cowell, *Law Dict.*; 2 Burrill, *Law Dict.* p. 708; Clode, *Military & Martial Law*, p. 162; *United States v. Dieckelman*, 92 U. S. 520, 23 L. ed. 742.

Since, under the common law, martial rule is only permissible as a war measure in time of actual war, and then only in hostile territory, it is clear that there was never any authority for its exercise in Cuba, if our position regarding the status of that island is sound.

3 *State Trials*, N. S. p. 1355, Appx. I.; *Dow v. Johnson*, 100 U. S. 158, 25 L. ed. 632; Finlason, *Commentaries on Martial Law*, p. 87.

The forcible intervention of the United States in the war between Spain and the Cuban people made the United States the friendly ally of the latter in a joint war against Spain.

*Ford v. Surget*, 97 U. S. 594, 24 L. ed. 1018.

If the island of Cuba was Spanish territory at the time of the American intervention, the Cubans were our enemies.

*Hanger v. Abbott*, 6 Wall. 535, 18 L. ed. 941; *The Amy Warwick*, 2 Black, 635, *sub nom.* *Currie v. United States*, 17 L. ed. 459; *Jecker v. Montgomery*, 18 How. 110, 15 L. ed. 311; *Thé Rapid*, 8 Cranch, 155, 3 L. ed. 520; *Brown v. Hiatt*, 15 Wall. 177, 21 L. ed. 128; *United States v. Pacific R. Co.* 120 U. S. 227, 30 L. ed. 634, 7 Sup. Ct. Rep. 490; *Mrs. Alexander's Cotton*, 2 Wall. 404, *sub nom.* *United States v. Alexander*, 17 L. ed. 915.

The President can exercise no authority whatever but that which the Constitution and laws give him.

Cooley, *Const. Lim.* p. 9; *Martin v. Hunter*, 1 Wheat. 326, 4 L. ed. 102.

The decisions in the English courts are not in point.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

The executive power with which the President of the United States is invested by article 2 of the Constitution is the executive

power of the United States. It is not an unlimited power. It does not correspond to the powers which have been or may be exercised by the executive of any other government.

There is nothing in the provision of article 2 of the Constitution requiring the President of the United States to "take care that the laws be faithfully executed," which justifies the government now in Cuba.

4 Webster's Works, p. 186.

The war power of the President is in fact nothing more than the authority to command the armies and fleets which Congress causes to be raised. To command them is simply to direct their operations.

Federalist, No. 69; *Brown v. United States*, 8 Cranch, 126, 3 L. ed. 510; *Dynes v. Hoover*, 20 How. 81, 15 L. ed. 844; *Wilson v. Mackenzie*, 7 Hill, 97, 42 Am. Dec. 51.

In time of peace the legislative and judicial branches of the government are supreme in their respective spheres.

Executive Power, by Benjamin R. Curtis, Cambridge, Mass. 1862.

The establishment of a military government by the United States in Cuba after the war was ended and absolute peace prevailed cannot be defended as a war measure.

*Luther v. Borden*, 7 How. 85, 12 L. ed. 617, dissenting op. citing Vattel, *Law of Nations*, B. 3, chap. 8, § 149.

Even in time of war the Commander in Chief can employ only such measures as are necessary for the preservation of the army or the safety of the nation. He has no right to use the national forces for any other purpose whatever.

*Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589.

The Federal Constitution admits of no plea of necessity.

*Ex parte Milligan*, 4 Wall. 120, 18 L. ed. 295.

The treaty of Paris furnishes no justification for the military occupation of Cuba by the United States.

*Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *License Cases*, 5 How. 504, 12 L. ed. 256; *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573.

When the President assumed the right to govern the island of Cuba, all the laws then in force in that island in any manner repugnant to our Constitution were, by the settled principles of international law, immediately displaced.

*Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; Halleck, *International Law*, chap. 33, § 14; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

If this court shall decide that the political power has assumed jurisdiction and sovereignty in Cuba, and made declarations and assertions clearly indicating an intention to treat that island as within our national authority and dominion, the courts are bound by such governmental acts, and must treat that island as exclusively within the sovereignty of the United States; and the respon-



sibility of maintaining the national authority as so determined rests with the executive and legislative branches of the government.

*Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *Williams v. Suffolk Ins. Co.* 13 Pet. 420, 10 L. ed. 228; *The James G. Swan*, 50 Fed. Rep. 108.

The act of June 6, 1900, is in effect a treaty or compact with a foreign state, the power to make which is, by the Constitution, vested exclusively in the President and the Senate.

*Holmes v. Jennison*, 14 Pet. 540, 614, 10 L. ed. 579, 618; *People ex rel. Barlow v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483.

If Cuba is land appertaining to the United States by reason of conquest and treaty stipulation, and subject to our jurisdiction and dominion *pro tempore*, as the government insists it is, then the political branch of the government has accepted it as a part of the United States, and it is now territory or other property belonging to the United States, in dealing with which all the agencies of the general government must observe the constitutional limitations affecting the fundamental rights of life, liberty, and property.

*Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301.

Territory is "foreign" when our sovereignty and dominion over it have been suspended or do not extend to it.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276; *United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562.

It follows that territory over which our sovereignty and dominion do extend, and are conceded by the political branch of the government to extend in the fullest and amplest degree, cannot be regarded as foreign.

The limitations imposed upon the powers of the Federal government by these fundamental provisions are binding and obligatory at all times and in all places.

*Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.

Assistant Attorney General **Beck** argued the cause and filed a brief for appellee:

The mere assertion by Neely that the present government of the island of Cuba is a usurpation is not conclusive upon this court, which can and is bound to take judicial cognizance of the historic facts in the matter.

*Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

The fact that our sovereignty may be temporary in character cannot affect its essential nature. Sovereignty is none the less sovereignty, even though it be voluntarily or involuntarily terminated.

*Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

Powers may by treaty assume something less than the absolute responsibilities of annexation, and something more than mere protectorates.

1 Halleck, International Law, 3d ed. p. 70, note; 6 Calvo, Droit International, pp. 14, 15.

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"Definitive occupation" as well as "incorporation" of a subject territory may subject it to military government.

Ortolan, *Diplomatie de la Mer*, liv. ii, chap. xiii.

While the superior power is in "exclusive possession" of foreign territory, other nations must respect it as the territory *pro tempore* of the power in possession, as alone able to fulfil international obligations.

2 Halleck, International Law, 3d ed. 444; *Fleming v. Page*, 9 How. 615, 13 L. ed. 281.

While the power to govern Cuba, and, incidentally, to punish crimes therein, can be properly traced to the power to make war, and the equal power to make treaties, yet it can also be placed upon the broader ground of the inherent right of the United States as a sovereign power to govern that which it acquires.

*Jones v. United States*, 137 U. S. 212, 34 L. ed. 695, 11 Sup. Ct. Rep. 80.

Sovereignty follows the flag of a conquering army, even though conquered territory does not thereby become a portion of the country as a political entity.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276; *United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562.

The constitutional provisions as to jury trials have no application to cases arising outside of the accepted territorial limits of the government.

*Re Ross*, 140 U. S. 453, *sub nom. Ross v. McIntyre*, 35 L. ed. 581, 11 Sup. Ct. Rep. 755.

This case does not fall within the ruling of *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281, where a civilian, disconnected with the military service, was tried, not by the civil courts or by the procedure of civil law, but by a court-martial, in accordance with martial law.

The sovereignty of the United States over the island of Cuba is a political, and not a judicial, question; and its exercise by the political department of the government conclusively binds the judges as well as all other officers, citizens, and subjects of that government.

*Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

This court is equally without power to impute to the President a desire to break a solemn pledge of the nation and to rule Cuba with the arbitrary power of a despot.

*Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415.

Our right to govern Cuba under the law of belligerent right remains as long as this government is in possession of it and until we shall see fit to surrender it.

*Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. ed. 701.

\*Mr. Justice Harlan delivered the opinion of the court:

By § 5270 of the Revised Statutes of the United States it is provided:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, cir-



cuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of any such foreign government any of the crimes \*provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This section was amended by Congress June 6th, 1900, by adding thereto the following proviso:

"*Provided, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder, and assault with intent to commit murder; counterfeiting or altering money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value, burglary, defined to be the breaking and entering by night-time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or building of another, whether in the day or night-time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance, or other companies, with the \*intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human*

*life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered, as hereinafter provided, to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: Provided further, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: And provided further, That no return or surrender shall be made of any person charged with the commission of an offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial."* 31 Stat. at L. 656, chap. 793.

On the 23th day of June, 1900, a warrant was issued by Judge Lacombe of the circuit court of the United States for the southern district of New York commanding the arrest of Charles F. W. Neely, who, "being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May in the year of our Lord one thousand nine hundred, or about that \*time, [113] having then and there charge of the collection and deposit of moneys of the department of posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said island of Cuba the sum of \$10,000 and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the Penal Code of the said island of Cuba,—that is to say, a crime within the meaning of the said act of Congress approved June 6th, 1900, as aforesaid, relating to the 'embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries.'" The warrant directed the accused to be brought before the judge in order that the evidence of probable cause as to his guilt could be heard and considered, and, if deemed sufficient, that the same might be certified, with a copy of all the proceedings, to the Secretary of State, that an order might issue for his return and surrender pursuant to the authority of the above act of Congress.

The warrant of arrest was based on a verified written complaint of an assistant United



States attorney for the southern district of New York.

On the same day and upon a like complaint a warrant was issued against Neely by the same judge, commanding his arrest for the crime of having unlawfully and fraudulently, while employed in and connected with the business and operations of a branch of the service of the department of posts in Havana, Cuba, between July 1st, 1899, and May 1st, 1900, embezzled and converted to his own use postage stamps, moneys, funds, and property belonging to and in the custody of that department, which had come into his custody and under his authority as such employee, to the amount of \$57,000, in violation of §§ 37 and 55 of the Postal Code of Cuba.

[114] Neely having been arrested under these warrants, application was made by the United States for his extradition to Cuba. The accused moved to dismiss the complaints upon various grounds. That motion having been denied, the case was heard \*upon evidence. In disposing of the application for extradition, Judge Lacombe said: "In the opinion of this court, the government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of 'embezzlement or criminal malversation of the public funds,' he being at the time a 'public officer,' or 'employee,' or 'depository.' Such an offense is obnoxious to the Penal Code in force in Cuba, article 401 of which provides that 'the public employee who, by reason of his office, has in his charge public funds or property, and who should take (or consent that others should take) any part therefrom, shall be punished,' etc. There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the 'public' to which the Code, remaining unrepealed, now refers. The suggestion that under this Penal Code no public employee could be prosecuted or punished until his superior had heard the case and turned the offender over to the criminal law for trial is matter of defense, and need not be considered here. The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 6th, 1900, and which is also a violation of the criminal laws in Cuba, and upon such evidence he will be held for extradition." But it was further said: "Two obstacles . . . now exist. He [the accused] has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover \$45,000, which, it is alleged, he has converted. When both of these proceedings have been discontinued the order in extradition will be signed. This may be done on August 13th at 11 A. M."

Subsequently, August 9th, 1900, Neely presented in the court below his written application for a writ of habeas corpus, and prayed that he be discharged from restraint in the extradition proceedings. He claimed on various grounds that the act of June 6th, 180 U. S. U. S., Book 45.

1900, under which he was arrested, detained, and imprisoned was in violation of the Constitution of the United States.

The application for the writ of habeas corpus having been \*denied, and an appeal [115] having been duly taken, the petitioner was remanded to the custody of the marshal to await the determination of such appeal in this court.

1. That at the date of the act of June 6th, 1900, the island of Cuba was "occupied by" and was "under the control of the United States," and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was therefore resolved: "1. That the people of the island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect. 4. That the \*United States here- [116] by disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." 30 Stat. at L. 738.

The adoption of this joint resolution was followed by the act of April 25th, 1898, by which Congress declared: "1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between 453



the United States of America and the Kingdom of Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states to such extent as may be necessary to carry this act into effect." 30 Stat. at L. 364, chap. 189.

The war lasted but a few months. The success of the American Arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th of August, 1898. By that agreement it was provided that "Spain will relinquish all claim of sovereignty over and title to Cuba," and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 Stat. at L. 1742.

Commissioners possessing full authority from their respective governments for that purpose having met in Paris, a treaty of peace was signed on December 10th, 1898, and, ratifications having been duly exchanged, it was proclaimed April 11th, 1899. 30 Stat. at L. 1754.

That treaty contained, among other provisions, the following:

"Art. I. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

[117] "Art. XVI. It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations." 30 Stat. at L. 1754-1761.

On the 13th of December, 1898, an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the division of Cuba, consisting of the geographical departments and provinces of the island of Cuba, with headquarters at Havana, was created and placed under the command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the division, to "exercise the authority of military governor of the island." And on December 28th, 1898, General Brooke, by a formal order, in accordance with the order of the President, assumed command of that division, and announced that he would exercise the authority of military governor of the island.

On the 1st day of January, 1899, at the palace of the Spanish governor general in Havana, the sovereignty of Spain was formally relinquished and General Brooke imme-

diately entered upon the full exercise of his duties as military governor of Cuba.

Upon assuming the positions of military governor and major general commanding the division of Cuba, General Brooke issued to the people of Cuba the following proclamation:

"Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights. To this end the protection of the United States government will be directed, and every possible provision made to carry 'but these ob-[118]jects through the channels of civil administration, although under military control, in the interest and for the benefit of all the people of Cuba and those possessed of rights and property in the island. The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government. The people of Cuba, without regard to previous affiliations, are invited and urged to co-operate in these objects by the exercise of moderation, conciliation, and goodwill one toward another; and a hearty accord in our humanitarian purposes will insure kind and beneficent government. The military governor of the island will always be pleased to confer with those who may desire to consult him on matters of public interest."

On the 11th day of January, 1899, the military governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the island of Cuba," ordered that thereafter "the civil government shall be administered by four departments, each under the charge of its appropriate secretary," to be known, respectively, as the departments of state and government, of finance, of justice and public instruction, and of agriculture, commerce, industries and public works, each under the charge of a secretary. To these secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the military governor, a supreme court for the island was created, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the military governor, the jurisdiction of the



ordinary courts of criminal jurisdiction was defined.

[119] Under date of July 21st, 1899, by direction of the military governor, a code known as the Postal Code was promulgated \*and declared to be the law relating to postal affairs in Cuba. That Code abrogated all laws then existing in Cuba inconsistent with its provisions. It provided that the director general of posts of the island should have the control and management of the department of posts, and prescribed numerous criminal offenses, affixing the punishments for each. It is not disputed that one of the offenses charged against Neely is included in those defined in the Postal Code established by the military governor of Cuba, and that the other is embraced by the Penal Code of that island which was in force when the war ensued with Spain, and which by order of the military governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June, 1900, the present military governor of Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6th, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.

While by the act of April 25th, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20th, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by [120] the public history of the relations \*of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The  
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occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6th, 1898, the President said that, "as soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves," and that, "until there is complete tranquility in the island and a stable government inaugurated, military occupation will be continued." Nothing in the treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6th, 1900, indicating any change in the policy of our government as defined in the joint resolution of April 20th, 1898. In reference to the declaration, in that resolution, of the purposes of the United States in relation to Cuba, the President in his annual message of December 5th, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the treaty of Paris contemplated only a temporary occupancy and \*control of Cuba [121] by the United States. While it was taken for granted by the treaty that, upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that, "so long as such occupation shall last," the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, should "advise any government established in the island to assume the same obligations."

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquility in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty, under international law and pending the pacification of the island, to protect in all appropriate legal modes the lives, the liberty, and



the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the treaty of Paris; and the act of June 6th, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty, and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in § 8 of article I. of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the

[122] return to that island, to be tried by its constituted authorities, of those who, having committed crimes there, fled to this country to escape arrest, trial, and punishment? No crime is mentioned in the extradition act of June 6th, 1900, that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employee, or depositary fleeing to the United States after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country.

We must not be understood, however, as saying that, but for the obligation imposed by the treaty of Paris upon the United States to protect life and property in Cuba pending its occupancy and control of that island, Congress would have been without power to enact such a statute as that of June 6th, 1900, so far as it embraced citizens of the United States or persons found in the United States who had committed crimes in the foreign territory so occupied and controlled by the United States for temporary purposes. That question is not open on this record for examination, and upon it we express no opinion. It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the island of Cuba and its people.

II. It is contended that the act of June 6th, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, *ex post facto* laws, trial by

jury for crimes, and generally to the fundamental guaranties of life, liberty, and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

\*In connection with the above proposition, [123] we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States, and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial,"—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6th, 1900.

III. Another contention of the appellant is that as Congress, by the joint resolution of April 20th, 1898, declared that "the people of Cuba are, and of right ought to be, free and independent," and as peace has existed since, at least, the military forces of Spain evacuated Cuba on or about January, 1899, the occupancy and control of that island under the military authority of the United States is without warrant in the Constitution, and an unauthorized interference with the internal affairs of a friendly power; consequently, it is argued, the appellant should not be extradited for trial in the courts established under the orders issued by the military governor of the island. In support of this proposition it is said that the United States recognized the existence of the Republic of Cuba, and that the war with Spain was carried on jointly by the allied forces of the United States and of that Republic. [124]

Apart from the view that it is not com-



petent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification,—it being the function of the political branch of the government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba,—the contention that the United States recognized the existence of an established government known as the Republic of Cuba, but is now using its military or executive power to displace or overthrow it, is without merit. The declaration by Congress that the people of Cuba were, and of right ought to be, free and independent, was not intended as a recognition of the existence of an organized government instituted by the people of that island in hostility to the government maintained by Spain. Nothing more was intended than to express the thought that the Cubans were entitled to enjoy—to use the language of the President in his message of December 5th, 1897—that “measure of self-control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country.” In the same message the President said: “It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question.” Again, in his message of April 11th, 1898, referring to the suggestion that the independence of the Republic of Cuba should be recognized before this country entered upon war with Spain, he said: “Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country \*now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction, and to assume to it the mere relation of a friendly ally.” To this may be added the significant fact that the first part of the joint resolution as originally reported from the Senate committee read as follows: “That the people of the island of Cuba are, and of right ought to be, free and independent, and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the island.” But upon full consideration the views of the President received the sanction of Congress, and the words in italics were stricken out. It thus appears that both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba. It is true that the co-operation of troops commanded by Cuban officers was accepted by 180 U. S.

the military authorities of the United States in its efforts to overthrow Spanish authority in Cuba. Yet from the beginning to the end of the war the supreme authority in all military operations in Cuba and in Cuban waters against Spain was with the United States, and those operations were not in any sense under the control or direction of the troops commanded by Cuban officers.

We are of opinion, for the reasons stated, that the act of June 6th, 1900, is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offenses charged, the order for his extradition was proper, and no ground existed for his discharge on habeas corpus.

*The judgment of the Circuit Court is therefore affirmed.*

\*CHARLES F. W. NEELY, *Appt.*, [126]  
v.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

(See S. C. Reporter's ed. 126.)

*Extradition—habeas corpus.*

This case follows the decision in the preceding case of the same name.

[No. 406.]

*Decided January 14, 1901.*

See same case below, 103 Fed. Rep. 626.

Mr. Justice **Harlan** delivered the opinion of the court:

The record in this case, it is admitted, shows the same state of facts as in the case just decided, *ante*, 448. This was a second application for a writ of habeas corpus, upon substantially the same grounds as were urged in the other case. The additional allegations in this application for the writ did not materially change the situation.

For the reasons stated in the opinion just delivered, the judgment of the Circuit Court is affirmed.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut, *Plff. in Err.*,

v.

JAMES PEASE.

(See S. C. Reporter's ed. 126-132.)

*Sale of goods—change of possession—effect*

NOTE.—As to when the United States courts follow decisions of state court—see notes to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508, and *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

On the necessity of change of possession to validate a sale as to creditors of the vendor—see note to *Brooks v. Marbury*, 6 L. ed. U. S. 423.

to exempt them from attachment by other creditors.

1. The policy of the law in Illinois, not to permit the owner of personal property to sell it and still continue in possession, so as to exempt it from seizure or attachment at the suit of creditors of the vendor, will be followed by the courts of the United States in a case in which the validity of a sale of such property in that state as against attachment creditors is in question.
2. The findings of a court on questions of fact where a jury has been waived are conclusive in the courts of review.
3. Errors alleged in the findings of a United States circuit court are not subject to revision by the circuit court of appeals or by the Supreme Court of the United States, if there was any evidence upon which such findings could be made.
4. The execution and delivery, by the president of a corporation, of a bill of sale of a stock of goods which was to be sold and the proceeds applied upon its indebtedness to the vendee, was not accompanied or followed by the open, visible, and notorious change of possession required by the law of Illinois to protect the goods from attachment by the creditors of the vendor, where the only acts indicating a change of ownership consisted in insuring the goods in the name of the vendee, opening a new set of books, billing all the goods sold in the name of the vendee, and placing the proceeds of such sales to its credit, while the stock of goods remained in the custody of the same persons as theretofore, and was apparently in the possession of the vendor so far as appeared to the public, and was sold in the same way as theretofore down to the day of the attachment.

[No. 97.]

Argued November 12, 1900. Decided January 21, 1901.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirming a judgment in favor of defendant in an action against a sheriff for trespass. *Affirmed.*

See same case below, 31 C. C. A. 582, 88 Fed. Rep. 446, 60 U. S. App. 248.

Statement by Mr. Justice Shiras:

[127] \*This was an action brought on June 25, 1895, in the circuit court of the United States for the northern district of Illinois, by Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, against James Pease, a citizen of the state of Illinois. The declaration complained of a trespass by the defendant, who was sheriff of Cook county, Illinois, in levying upon and taking possession of a stock of silk goods, in a store room in the city of Chicago, which were claimed by the plaintiff to belong to him. After a plea of not guilty the case was, by consent, tried without a jury.

On May 28, 1897, judgment, under the findings, was entered in favor of the defendant.

The case was then taken to the circuit court of appeals for the seventh circuit, and on July 6, 1898, the judgment of the circuit court was affirmed. A writ of error was thereupon allowed from this court.

Mr. Edward Winslow Paige argued

the cause and filed a brief for plaintiff in error.

Mr. Lockwood Honore argued the cause, and, with Messrs. A. W. Green and F. M. Peters, filed a brief for defendant in error:

The findings of fact by the lower court are conclusive.

U. S. Rev. Stat. § 1011; *Distilling & Cattle Feeding Co. v. Gottschalk Co.* 13 C. C. A. 618, 24 U. S. App. 638, 66 Fed. Rep. 609; *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Martinton v. Fairbanks*, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321; *Stanley v. Albany County Supers.* 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Hathaway v. First Nat. Bank*, 134 U. S. 494, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608; *Runkle v. Burnham*, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Smiley v. Barker*, 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. Rep. 684.

A determination of mixed questions of law and fact cannot be reviewed.

*Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Dennistown v. Stewart*, 18 How. 565, 15 L. ed. 489; *Jewell v. Knight*, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. Rep. 193; *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196; *Fire Ins. Asso. v. Wickham*, 128 U. S. 426, 32 L. ed. 503, 9 Sup. Ct. Rep. 113.

A bill of sale is void unless followed by an open, notorious, and visible change of possession. The United States courts will follow the state law on this subject.

*Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51.

The court's finding in this regard was correct.

*Martin v. Duncan*, 156 Ill. 274, 41 N. E. 43; *Wright v. McCormick*, 67 Mo. 426; *Mead v. Noyes*, 44 Conn. 487; *Kirtland v. Snor*, 20 Conn. 23; *Norton v. Doolittle*, 32 Conn. 405; *Fitzgerald v. Gorham*, 4 Cal. 289, 60 Am. Dec. 616; *Clafin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Mills v. Thompson*, 72 Mo. 367; *Stewart v. Nelson*, 79 Mo. 524; *Ticknor v. McClelland*, 84 Ill. 474; *Gillette v. Stoddard*, 30 Ill. App. 231.

Ever since the passage of Ill. Laws 1844-45, p. 44, it has been the law in Illinois, both as to absolute bills of sale and as to chattel mortgages (unrecorded), that the failure of the grantor to turn over possession to the grantee rendered the deed absolutely void.

*Dexter v. Parkins*, 22 Ill. 143; *Reese v. Mitchell*, 41 Ill. 365; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Lemen v. Robinson*, 59 Ill. 115; *Allen v. Carr*, 85 Ill. 388; *Rozier v. Williams*, 92 Ill. 187; *Bass v. Pease*, 79 Ill. App. 308.

\*Mr. Justice Shiras delivered the opinion [127] of the court:

Among other questions passed upon by the circuit court was whether the alleged sale of goods by the Natchaug Silk Company, through J. D. Chaffee, its president, to Doolley, as receiver of the First National Bank of



Willimantic, either as payment in part, or as security for payment, of the debt of the silk company to the bank, was accompanied or followed by the open, visible, and notorious change of possession required by the law of the state of Illinois.

[128] \*It is conceded, or, if not conceded, we regard it as well established, that the policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor. If, between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, purchase it; and an attaching creditor stands in the light of a purchaser, and as such will be protected. *Thornton v. Davenport*, 2 Ill. 296, 29 Am. Dec. 358; *Jones v. Jones*, 16 Ill. 117; *Martin v. Dryden*, 6 Ill. 187; *Burnell v. Robertson*, 10 Ill. 282.

It is equally well established that the courts of the United States regard and follow the policy of the state law in cases of this kind. "Any other rule," said this court in *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, "would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits."

In *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 671, 23 L. ed. 1003, 1004, it was said:

"It was decided by this court in *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L. ed. 109, that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the state where it is found; and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter state conflict with those of the former.

"The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot \*be right- [129] fully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. . . . Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are 180 U. S.

held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick v. Hadden*, 37 Ill. 370; *Ketchum v. Watson*, 24 Ill. 591." *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 22, 35 L. ed. 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

It being, then, established that, under the policy of the law of Illinois, in order to protect the goods in question from attachment by creditors of the Natchaug Silk Company, an attempted sale must be accompanied by a change of possession, which change must be visible, open, or notorious, did the facts of the transaction between the silk company and Dooley show such a change of possession?

The findings of the circuit court on this feature of the case were as follows:

"Said store had for several years prior to the sale to Dooley been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods, through one H. L. Stanton, who, down to the date of said sale, April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas, said Chaffee directed said Lucas to have the said goods, that were included in said bill of sale, sold, and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

"On the morning of April 26, 1895, an attorney employed by said plaintiff called at said store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and \*remit the pro- [130] ceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons, to whom the said goods were billed in the name of the plaintiff, and the proceeds of said sales, amounting to about \$7,000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the signs on the outside of the store, which signs were 'Natchaug Silk Company.' . . .

"After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons 459



who had theretofore been in charge of them for the silk company, and they were apparently in the possession of the silk company, so far as appeared to the public, and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open, or notorious, down to the date of the attachment, unless the facts hereinbefore and hereinafter specifically stated did, as matter of law, constitute a visible, open, and notorious change of possession.

The signs of the Natchaug Silk Company, on the outside and inside of the store, were not changed between April 24th and the time of the levy of the attachments. There was nothing in the appearance of the store, outside or inside, to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 25th, the time of the attachment. The same persons, being five or six in number, remained in the store performing, \*after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley, and they did not do so, but all the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company. Orders kept coming in addressed to the Natchaug Silk Company after April 25th for several weeks, in all respects as they had come in prior to that, and these orders were appropriated and filled by Stanton out of the stock in the store. The office fixtures were not attempted to be transferred to Dooley, that they were used in conducting the business after April 25th, in all respects as before, by Stanton in the sale of the goods. Stanton's books of account and papers in relation to sales after April 25th were all kept in a safe belonging to the Natchaug Silk Company, and which had its name printed in large letters thereon, and which was standing in the store. No advertisement was made of the transfer to Dooley, nor was any public notice given thereof, unless, as a matter of law, the facts hereinbefore and hereinafter stated constituted such public notice. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless, as matter of law, the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change. The change of ownership was not open, or visible, or notorious, unless, as matter of law, the facts hereinbefore or hereinafter stated constituted open, or visible, or notorious change of ownership."

We have thus stated all the findings of fact relative to the question of the change of possession, shown by the record.

Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Al-*

*bany County Supers.* 121 U. S. 547, 30 L. ed. 1002, 7 Sup. Ct. Rep. 1234.

Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, \*if there [132] was any evidence upon which such findings could be made. *Hathaway v. First Nat. Bank*, 134 U. S. 498, 33 L. ed. 1006, 10 Sup. Ct. Rep. 608; *St. Louis v. Rutz*, 138 U. S. 241, 34 L. ed. 946, 11 Sup. Ct. Rep. 337; *Runkle v. Burnham*, 153 U. S. 225, 38 L. ed. 697, 14 Sup. Ct. Rep. 837.

We agree with the circuit court of appeals in its statement that "the facts stated in the findings were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment. They were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact." 31 C. C. A. 582, 88 Fed. Rep. 446, 60 U. S. App. 248.

Applying, then, the settled law of Illinois to the facts as found, the conclusion reached by the circuit court, and affirmed by the circuit court of appeals, that the sale was void as against the attaching creditors, must be accepted by this court.

This conclusion disposes of the case, and renders a consideration of the other questions presented by the findings unnecessary.

*The judgment of the Circuit Court of Appeals is affirmed.*

#### LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, *Plff. in Err.*,

v.

T. K. KEARNEY and J. W. Wyse, Partners  
as Kearney & Wyse.

(See S. C. Reporter's ed. 132-138.)

*Insurance — construction of policies — provisions as to books of account — safes, inventories, and care of books.*

1. The rules established for the construction of written instruments apply to contracts of insurance equally with other contracts.
2. The words used in a policy of insurance should be interpreted most strongly against the insurer, where the policy is so framed as to leave room for two constructions.
3. Books showing "all purchases and sales, both for cash and credit," within the meaning of a covenant and agreement in a policy of fire insurance requiring the insured to keep a set of books showing a complete record of business transacted, including all such purchases or sales, need only be such as will fairly show these matters to a man of ordinary intelligence.

NOTE.—On construction of insurance contract in general—see *Kratzenstein v. Western Assur. Co.* (N. Y.) 5 L. R. A. 799, and note; *Hoose v. Prescott Ins. Co.* (Mich.) 11 L. R. A. 340, and note. And see notes to *Equitable Life Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 217, and *Fowler v. Metropolitan L. Ins. Co.* (N. Y.) 5 L. R. A. 808.

As to conditions in fire policy with respect to keeping, producing and preserving books and papers—see *Connecticut Fire Ins. Co. v. Jeary* (Neb.) 51 L. R. A. 698, and note.



4. A safe such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, is "a fireproof safe" within the meaning of a clause in a policy of fire insurance requiring the insured to keep their books securely locked in such a safe.
5. The selection by the insured, in good faith and with such care as prudent men ought to exercise under like circumstances, of a place in which to keep their books and last inventory, satisfies the requirements of a policy of fire insurance that such books be securely locked in a fireproof safe, or in some secure place not exposed to a fire which would destroy the house where the business is carried on.
6. Failure of an insured to produce the books and inventory as required by a policy of fire insurance under penalty of forfeiture means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured.
7. The loss of the last inventory of a business in the confusion incident to the exercise, by the insured during a fire, of their right to remove the books from the safe to a secure place, will not invalidate the policy, notwithstanding a provision that a failure to produce the same shall render the policy null and void, where the insured used such care on the occasion as prudent men acting in good faith would exercise.

[No. 85.]

Submitted November 7, 1900. Decided January 7, 1901.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment in favor of plaintiffs in an action on insurance policies. *Affirmed*.

See same case below, 36 C. C. A. 265, 94 Fed. Rep. 314.

The facts are stated in the opinion.

Mr. E. S. Quinton submitted the cause for plaintiff in error:

The stipulations of the iron-safe clause constitute an express promissory warranty in the nature of a condition precedent, and a strict compliance with it was necessary.

*Southern Ins. Co. v. Parker*, 61 Ark. 213, 32 S. W. 507; *Western Assur. Co. v. Altheimer Bros.* 58 Ark. 575, 25 S. W. 1067; 1 Wood, Fire Ins. p. 448; *Laudmann v. Hartford F. Ins. Co.* (La.) 18 Ins. L. J. 813; *American F. Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 227, 28 S. W. 1027; *Western Assur. Co. v. Altheimer Bros.* 58 Ark. 565, 25 S. W. 1069; *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060, dissenting op.; *Ostrander, Fire Ins.* 2d ed. pp. 655, 656.

It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been attempted and agreed upon. It is enough that the parties have made certain terms,—conditions on which their contract shall continue or terminate. The courts cannot make a contract for the parties. Their duty or

function consists simply in enforcing and carrying out the one actually made.

*Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379.

Plaintiffs in this case have utterly failed to show a compliance with the provisions of the clause in the policy requiring them to "keep a set of books showing a record of all business transacted, including purchases and sales for cash and on credit."

*Pelican Ins. Co. v. Wilkerson*, 53 Ark. 352, 13 S. W. 1103; *Ostrander, Fire Ins.* 2d ed. 553.

Messrs. A. C. Cruce and W. I. Cruce submitted the cause for defendants in error:

The principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts.

May, Ins. 3d ed. § 172.

Ordinary judgment and good faith are demanded of the insured, and when this is shown he may be excused from literal performance.

*Ostrander, Fire Ins.* § 303.

A substantial compliance with the requirements of the iron-safe clause is all that is necessary.

*McNutt v. Virginia F. & M. Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61; *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. 399; 3 *Joyce, Ins.* § 2063; *Kemendo v. Western Assur. Co.* (Tex. Civ. App.) 57 S. W. 293; *Pennsylvania F. Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 590; *Sun Mut. Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 591; *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129; *Jones v. Southern Ins. Co.* 38 Fed. Rep. 19; *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. Rep. 708; *East Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720; *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060.

A failure to comply with the iron-safe clause will not work a forfeiture of the policy, as it is without consideration, and does not decrease the risk, and at most only tends to the better preservation of the evidence to show the amount of the loss sustained in the case of fire.

*Phoenix Ins. Co. v. Angel*, 18 Ky. L. Rep. 1034, 38 S. W. 1067; *Mechanics & T. Ins. Co. v. Floyd*, 20 Ky. L. Rep. 1538, 49 S. W. 543; *Citizens' Ins. Co. v. Crist*, 22 Ky. L. Rep. 47, 56 S. W. 658.

\*Mr. Justice Harlan delivered the opinion [134] of the court:

This action was brought to recover the amount alleged to be due on two policies of fire insurance issued by the Liverpool and London and Globe Insurance Company,—one dated June 15th, 1894, for \$2,500, and the other dated February 11th, 1895, for \$1,000,—each policy covering such losses as might be sustained by the insured, Kearney & Wyse, in consequence of the destruction by fire of their stock of hardware in the town of Ardmore, Indian territory.

Each policy contained the following

clause, called the iron-safe clause: "The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory; and in the event of the failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The insurance company insisted in its defense that the terms and conditions contained in this clause of the policies had not been kept and performed by the insured.

There was a verdict and judgment in favor of the plaintiffs in the United States court for the southern district of the Indian territory, and that judgment was affirmed in the United States court of appeals for that territory.

The insurance company sued out a writ of error to the United States circuit court of appeals for the eighth circuit, and that court affirmed the judgment. 36 C. C. A. 265, 94 Fed. Rep. 314.

[135] The controlling facts are thus (and we think correctly) stated in the opinion of Judge Thayer, speaking for the court below: "On the night of April 18th, 1895, between the hours of 1 and 3 A. M., \*a fire accidentally broke out in a livery stable in the town of Ardmore, which was about 300 yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1st, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of plaintiffs, or either of them. The trial

judge charged the jury that the set of books which had been kept and which were produced on the trial 'were substantially in compliance with the terms of the policy upon that subject,' and no exception was taken by the defendant to this part of the charge."

It was also said in the same opinion: "The books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced."

The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policies. But the rules established for the construction \*of written instruments apply to contracts of insurance equally with other contracts. It was well said by Nelson, Ch. J., in *Turley v. North American F. Ins. Co.* 25 Wend. 373, 377, referring to a condition of the policy of insurance requiring the insured, if damage by fire was sustained, to produce a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire, setting forth certain facts in regard to the fire and the insured, that "this clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form,—following words rather than ideas."

To the general rule there is an apparent exception in the case of contracts of insurance; namely, that where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 678, 679, 24 L. ed. 563, 565; *Moulton v. American L. Ins. Co.* 111 U. S. 335, 341, 28 L. ed. 447, 449, 4 Sup. Ct. Rep. 466.

Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement "to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business," should not be interpreted to mean such books as would be kept by an expert book-keeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, "all



purchases and sales, both for cash and credit." There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

[137] \*That of which the company most complains is that the insured did not produce the last inventory of their business, and removed the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe, or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects, and capable of withstanding any fire, however extensive and fierce, it should have used words expressing that thought.

Nor do the words, "or in some secure place not exposed to a fire which would destroy the house where such business is carried on," necessarily mean that the place must be absolutely secure against any fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and, if under such circumstances, they had not removed them to some other place, and the books or inventory had been burned

[138] \*while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory

had been stolen, or if they had been destroyed in some other manner than by fire, although they had been placed "in some secure place not exposed to a fire" that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man acting in good faith would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used, and yet to meet the ends of justice.

We perceive no error in the view taken by the court below; and, having noticed the only questions that need to be examined, its judgment is affirmed.

\*FRED HEWITT, *Plff. in Err.*,  
v.

[139]

EMIL SCHULTZ and Friederika Schultz.

(See S. C. Reporter's ed. 139-167.)

*Railroad land grants—withdrawal of indemnity lands.*

1. The construction given by the Land Department since 1888 to the Northern Pacific land grant act of 1864, that the Land Department was not authorized thereby to withdraw from the settlement laws any lands within the indemnity limits of the grant upon the mere receipt and approval of the map of definite location of the railroad, is not so plainly or palpably erroneous as to justify the Supreme Court of the United States in adopting a different construction, in view of the provisions of § 6 that "the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed except by said company as provided in this act," but that the provisions of the pre-emption and homestead laws "shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."
2. A certificate of the Commissioner of the General Land Office, of a deficiency in the grant of lands to the Northern Pacific Railroad Company, can be given no effect in an action in ejectment in which defendants claim title, as purchasers from the railroad

NOTE.—On conclusiveness and effect of decisions of Land Department—see notes to *Hartman v. Warren*, 22 C. C. A. 38, and *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 344.

As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

company, of lands within the indemnity limits of the grant, where the certificate was not given in any proceeding pending between the parties in the Land Department, and has never been recognized by the department, and the company has not been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant.

[No. 34.]

*Argued October 15, 16, 1900. Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of North Dakota to review a decision reversing a judgment for plaintiff in an action for ejectment. *Reversed.*

See same case below, 7 N. D. 601, 76 N. W. 230.

The facts are stated in the opinion.

Mr. **J. H. McGowan** argued the cause, and, with Messrs. James A. Kellogg and C. D. Austin, filed a brief for plaintiff in error:

"Granted" lands, as that term is employed in the granting act, are those lands within the place limits, and do not embrace "indemnity" lands, or lands within the indemnity limits.

*Atlantic & P. R. Co.* 6 Land Dec. 84; *Northern P. R. Co. v. Miller*, 7 Land Dec. 100; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634.

Since the opinion of Secretary Vilas was pronounced in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, it has stood as the law governing the action of the Land Department in all similar cases, and its rules have frequently been applied in contests before the Department of the Interior.

*Northern P. R. Co. v. Fugelli*, 10 Land Dec. 288; *Spicer v. Northern P. R. Co.* 10 Land Dec. 440; *Northern P. R. Co. v. Davis*, 19 Land Dec. 87.

Nothing passes by a legislative grant but what is conveyed in the act making the grant, in clear and unambiguous terms. Such a grant must be strongly construed against the grantee.

*Northern P. R. Co. v. Sanders*, 46 Fed. Rep. 239.

First come, first served. Prior in time, prior in right.

*Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Southern P. R. Co. v. Meyer*, 9 Land Dec. 250.

The patent relates to the inception of the title, and therefore the person first appropriating land has the best title in equity.

*Taylor v. Brown*, 5 Cranch, 234, 3 L. ed. 88; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925.

The policy of withdrawing lands and withholding them for long terms from sale and settlement has long since become reprehensible to both the judicial and the legislative authorities.

*St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Northern P. R. Co. v. Musser*-

*Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

It is against the settled policy of Congress that the indemnity lands should be withdrawn from entry by actual settlers, for an indefinite time.

*Northern P. R. Co. v. Sanders*, 46 Fed. Rep. 239.

The 6th section of the granting act opens the odd sections within the indemnity belt to pre-emption entry when surveyed, as well as to selection; and as the said lands are appropriated to these two purposes the Land Department cannot defeat either purpose by attempted withdrawals. If these lands are thus appropriated, the following cases distinctly hold that the appropriation cannot be defeated.

*Wright v. Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Davis v. Weibbold*, 139 U. S. 509, 35 L. ed. 239, 11 Sup. Ct. Rep. 628.

Indemnity land within the grant to the Northern Pacific Company was subject to entry regardless of the departmental withdrawal.

*Moore v. Cormode*, 20 Wash. 305, 55 Pac. 217.

Until the line of the railroad was definitely fixed, the usual rights of pre-emption and homestead settlement and entry remained unaffected by the land grant. Upon the filing of the map fixing the line of the road, the law withdrew from settlement the granted lands situated within the place limits.

*Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100.

This grant to the Northern Pacific Railroad Company is limited to such alternate odd sections as have not at that time (the definite location) been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights.

*Ibid.*

Congress intended to give to actual bona fide settlers priority over the railroad company.

*St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563.

The right of the railroad company to make, under certain limitations, selections for the purpose of indemnity, is merely a power which requires actual selection in conformity to the prescribed conditions and limitations in order to vest any right in the company.

*Grandin v. LaBar*, 3 N. D. 446, 57 N. W. 243; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Cape Mendocino Light House Site*, 14 Ops. Atty. Gen. 50; *Portage Land-Grant*, 14 Ops. Atty. Gen. 645; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Barney v. Win-*



*ona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 853, 6 Sup. Ct. Rep. 654; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241; *Jackson v. La Moure County*, 1 N. D. 238, 46 N. W. 449; *Moore v. Cormode*, 20 Wash. 305, 55 Pac. 217.

If such order of withdrawal should be found legal, it must be held that it was liable to revocation, either in whole or in part, and that after revocation the odd sections, free from other claims, were open to settlement.

*Atlantic & P. R. Co.* 6 Land Dec. 84; *Southern P. R. Co. v. Araiza*, 57 Fed. Rep. 102.

*Messrs. J. H. McGowan, George Turner, and George H. Patriek* filed an additional brief for plaintiff in error.

*Messrs. C. W. Bunn and James B. Kerr* argued the cause and filed a brief for defendants in error:

Lands withdrawn from entry by order of the Commissioner of the General Land Office are lands included in a reservation by proclamation of the President, and fall within the first exception to § 2258 of the Revised Statutes.

*Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 918.

Where the executive officers of the government attempt to dispose under the pre-emption law of lands which fall within these exceptions, they act beyond their jurisdiction and their acts are void; and a patent issued upon an entry of land not subject to the jurisdiction of the Land Department does not pass the legal title, and such a patent may be challenged in an action at law.

*Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018.

The conditions apparent to Congress at the time of the passage of the Northern Pacific land grant act must be kept in view in construing the grant.

*Northern P. R. Co. v. St. Paul, M. & M. R. Co.* 26 Fed. Rep. 551.

The requirement of the act of August 8, 1846, that the lands granted should be selected by an agent of the territory, "subject to the approval of the Secretary of the Treasury of the United States," carried along with it by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be ultimately defeated.

*Woleott v. Des Moines Nav. & R. Co.* 5 Wall. 687, 18 L. ed. 691.

For nearly twenty years the construction placed by the Interior Department upon the Northern Pacific grant was uniform, and sustained the power of withdrawal of indemnity lands. This contemporaneous construction of those who have been called upon to carry the act into effect is entitled to great respect.

*United States v. Pugh*, 99 U. S. 269, 25 L. ed. 323; *United States v. Moore*, 95 U. S. 763, 24 L. ed. 589.

The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is

drawal is supported by *Thompson v. St. Paul, M. & M. R. Co.* 83 Fed. Rep. 546; *Southern P. R. Co. v. Groeck*, 31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. Rep. 970.

Where, through an erroneous construction of the law the Land Department awards to one the patent for land to which another has initiated a prior right, the courts will correct the error and hold the patentee a trustee for him who has the better right.

*St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848.

The company selected the land before the plaintiff acquired any right whatsoever, for the land was reserved when he applied to enter, and after the selection made in accordance with the instructions of the Secretary no adverse claim could attach.

*Rudolph Nemitz*, 7 Land Dec. 80; *Southern P. R. Co. v. Meyer*, 9 Land Dec. 250; *Northern P. R. Co. v. Halvorson*, 10 Land Dec. 15; *Lane v. Southern P. R. Co.* 10 Land Dec. 454; *Flippen v. Southern P. R. Co.* 14 Land Dec. 418.

That the selection was made in accordance with the directions of the Secretary of the Interior is clear.

*Sawyer v. Northern P. R. Co.* 12 Land Dec. 450.

There was no specific requirement that losses be arranged tract for tract with lands selected, until 1893.

*St. Paul, M. & M. R. Co. v. Lambeek*, 22 Land Dec. 202.

No doubt can exist as to the authority of the Secretary of the Interior to allow a substitution for lost lands.

*Gamble v. Northern P. R. Co.* 23 Land Dec. 351; *Brown v. Northern P. R. Co.* 24 Land Dec. 370.

But one selection of the tract in controversy was made, and that in 1883, all subsequent lists filed being for the purpose of complying with later instructions of the Secretary.

*O'Brien v. Northern P. R. Co.* 22 Land Dec. 135.

The land in controversy was appropriated to the railroad company without selection for the reason that it appears that the Commissioner of the General Land Office had determined that the total area of lands in the indemnity limits were insufficient to satisfy the losses from the place limits.

*St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

\*Mr Justice Harlan delivered the opinion of the court:

This action is in the nature of ejectment. It was brought to recover the possession of the northeast quarter of section 13, township 132, north of range 57, west of the 5th prin-

eipal meridian, situated in the county of Sargent, North Dakota, and of which the plaintiff Hewitt, now plaintiff in error, claimed to be the owner in fee in virtue of a patent issued to him by the United States.

The present defendants in error, who were defendants below, claimed title as purchasers from the Northern Pacific Railroad Company, which asserted ownership of the land in virtue of the act of Congress of July 2d, 1864, granting public lands to that corporation to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route. 13 Stat. at L. 365, chap. 217.

There was a verdict and judgment in the court of original jurisdiction in favor of the plaintiff. But that judgment was reversed in the supreme court of North Dakota, and the cause was remanded, with directions to dismiss the action. 7 N. D. 601, 76 N. W. 230.

This appeal questions the final judgment of the highest court of North Dakota upon the ground that it denied to Hewitt rights and privileges specially set up and claimed by him under the laws of the United States.

The record contains a voluminous finding of facts based upon the stipulation of the parties. In the view taken of the case by this court many of those facts are immaterial. The precise case to be determined is shown by the following statement, based upon the finding of facts:

On the 30th day of March, 1872, the railroad company, having, by a map, designated its *general* route from the Red River of the North to the Missouri river in the then territory of Dakota, an acting commissioner of the General Land Office transmitted to the register and receiver of the proper local office a diagram showing such route, and, in conformity with instructions from the Secretary of the Interior, directed them "to withhold from sale or location, pre-emption, or homestead entry all the surveyed or unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles" (the place or granted limits) as designated on such map. This order took effect April 22d, 1872, on which day it was received at the local land office.

[141] \*The land in dispute is conterminous with the general route of the railroad as indicated by the above map.

On the 11th day of June, 1873, the railroad company having previously filed a map of the *definite* location of its line from the Red River of the North to the Missouri river in Dakota territory, the General Land Office transmitted to the local land office a diagram showing the 40 and 50-mile limits of the land grant along that line, and that office was directed "to withhold from sale or entry all the odd-numbered sections, both surveyed or unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at \$2.50 per acre within the 40-mile limits, and \$1.25 per acre between the 40 and 50-mile or indemnity limits." This order was

recorded at the local land office June 24th, 1873.

The land in dispute, the finding of facts states, was conterminous with such line of definite location, was more than 40 but within 50 miles of such line, that is, was within the indemnity limits, and was at the date of such location public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, free from pre-emption or other claims or rights, and nonmineral in character.

It may be here observed that the controlling question in this case is whether it was competent for the Secretary of the Interior, upon receiving and approving the map of the definite location of the road, to make the above order of withdrawal in respect of the odd-numbered sections of lands within the *indemnity* limits, that is, of lands between the 40-mile and 50-mile limits. This question will be adverted to after we shall have stated other facts material in the case.

On or about the 10th day of April, 1882,—the railroad company not having at that time made or attempted to make any selection of lands in the indemnity limits to supply losses in the place limits,—Hewitt, being qualified to acquire and hold lands under the pre-emption laws of the United States, settled upon and improved the lands here in dispute with the intention of entering the same under the provisions of the act of Congress approved September 4th, 1841 (5 Stat. at L. 453, chap. 16), and the acts supplemental thereto and amendatory[142] thereof, authorizing the entry and purchase of public lands by citizens of the United States and by those who declared their intention to become citizens.

The township embracing the land in dispute was surveyed in July, 1882, and the plat of survey was filed in the local land office on the 13th day of October of the same year.

On the 2d day of November, 1882, Hewitt presented to the proper United States local land office a declaratory statement for this land, as provided by law, which was received, filed, and placed upon the records of that office.

On the 19th day of March, 1883, the railroad company filed in the local land office a list of selections of land "in bulk" embracing the land in dispute, which, as already stated, was within the indemnity limits of the railroad company.

Having from the day of his settlement upon the land until April 4th, 1883, resided upon and cultivated the same as required by law, Hewitt, on the day last named, submitted his final proofs for the land, and duly tendered to the local land office the government's price for it, together with all required fees. But such final proof was rejected, the reason assigned for such rejection being that the land had been withdrawn from entry under the act of July 2d, 1864, granting lands to the Northern Pacific Railroad Company, and the acts of Congress supplemental thereto and amendatory thereof. From that decision Hewitt appealed to the Commis-



sioner of the General Land Office, and on the 5th of October, 1883, that officer affirmed the decision of the local land office.

On the 21st of June, 1884, while Hewitt was in possession,—he had been in actual possession since April 10th, 1882, and had made valuable improvements on the land,—the defendant Emil Schultz (his codefendant being his wife) made a contract with the railroad company, by which the latter agreed, in consideration of \$1,200, to sell and convey to the former the land in dispute. Thereupon Schultz entered upon the land, ousting Hewitt from actual possession, and taking up his residence thereon, and cultivating the same. Schultz having paid the above consideration, the railroad company conveyed the land to him. But the conveyance was not made until December 18th, 1889.

[143] \*Before that conveyance was made, namely, on the 15th day of August, 1887, the Secretary of the Interior revoked the above order withdrawing the odd-numbered sections of the indemnity lands from sale or entry.

Subsequently, October 12th, 1887, the railroad company filed in the local land office a list designating an amount of lands equal to those "selected" in the list of March 19th, 1883, as having been lost and excepted from the grant, and within its place lands as defined on the map of definite location.

Of the decision of the Commissioner of the General Land Office on the 5th day of October, 1883, Hewitt had no notice whatever until on or about August 1st, 1888. On the latter day he applied for a review by the Commissioner. That review was had with the result that the decision of the local land office against Hewitt was reversed and set aside, his final proofs were admitted, and the selection by the railroad was held for cancellation.

In his opinion delivered September 25th, 1888, the Commissioner said: "Said tract is within the 50-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific Railroad Company, ordered by letter from this office, dated June 11th, 1873, received at the local land office then at Pembina, June 24th, 1873. The township was surveyed July 12th to 27th, 1882, and the plat of survey was filed in your office on the 13th day of October following; the whole of said section was selected by the agent of the railroad company March 19th, 1883, per list No. 6. . . . The final proof submitted by applicant shows that he is a native-born citizen, over twenty-one years of age, and a qualified pre-emptor, July 10th, 1882; his improvements consisted of a frame house, 16x16 feet, stable 10x12 feet, and 20 acres of ground broken, the value of the same being estimated at \$350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor. Under the late decision of the Hon. Secretary of the Interior in the case of the *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, it is held that the withdrawal of the indemnity lands for the benefit of said company was prohibited 180 U. S.

by the 6th section of the granting act, and, \*being in violation of law and without effect,[144] was not operative to defeat the rights of bona fide adverse claimants under the general laws of the United States, who settled on lands within such limits prior to the time when selection by the railroad had been made. In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5th, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation."

The next step was the filing, by the railroad company on the 23d day of February, 1892, of a rearranged list of selections,— "tract for tract" selection,—selecting the tract in dispute for one previously selected in Wisconsin, but which was lost to the company.

The railroad company having appealed from the decision of September 25th, 1888, in favor of Hewitt, the Secretary of the Interior, by a decision rendered August 11th, 1894, sustained Hewitt's right to the land. The Secretary, addressing the Commissioner of the General Land Office, said: "I have considered the appeal of the Northern Pacific Railroad Company from your office decision of September 25th, 1888, holding for cancellation its indemnity selection of the N. E. ¼ sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing upon which he has submitted proof. Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decisions of this Department in the case of *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, and your office decision is therefore affirmed, and the company's selection will be canceled."

In conformity with the decision of the Secretary of the Interior, and based upon the final pre-emption proof made by Hewitt, a patent of the United States was issued to him on the 22d day of June, 1895.

We have seen from the above statement that upon the filing \*and acceptance of the[145] map of the definite location of the line of the Northern Pacific Railroad, the Land Office withdrew from sale or entry all the odd-numbered sections, surveyed and unsurveyed, within both the place and indemnity limits. Was it competent for the Secretary of the Interior, immediately upon the acceptance of the map of definite location, to include in his withdrawal from sale or entry lands within the indemnity limits? Was he invested with any such authority by the act of July 2d, 1864 (13 Stat. at L. 365, chap. 217)? Did Congress intend, by that act, to declare that when the railroad company indicated its line of definite location the odd-numbered sections outside of the 40-mile limit and within the 50-mile limit, on each side of such line, along the whole of the line



thus located, should not be subject to the pre-emption and homestead laws until it was finally ascertained whether the railroad company was entitled, by reason of the loss of lands within the place or granted limits, to go into the indemnity limits in order to obtain lands to meet such loss? An answer to these questions may be found in the act of July 2d, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

By the 3d section of the act Congress granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate [146] sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections . . . *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided. . . ."

This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress "*granted to the Northern Pacific Railroad Company only public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.*"—lands that were not, at that time, free from pre-emption or other claims or rights being excluded from the grant. *United States v. Northern P. R. Co.* 152 U. S. 284, 296, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 598; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 635, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671, and *United States v. Oregon & C. R. Co.* 176 U. S. 28, 42, 44 L. ed. 358, 364, 20 Sup. Ct. Rep. 261; and authorities cited in each case. The cases all speak of the granted lands as those within the place limits.

The 4th section of the act provided: "That whenever said 'Northern Pacific Railroad

Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and conforming with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said Commissioners to the President of the United States, then patents [147] shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided*, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the state of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

But so far as the present case is concerned the most material section of the act is the 6th. That section provided: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land *hereby granted* shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841 [5 Stat. at L. 453, chap. 16], granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May 20th, 1862 [12 Stat. at L. 392, chap. 75], *shall be, and the same are hereby, extended to all other lands* on the line of said road, when surveyed, excepting those *hereby granted* to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

It is contended that, construing the 3d and 6th sections together, it is clear that the words, "the odd sections of land hereby granted," in the first part, and the words, "excepting those hereby granted to said company," in the latter part, of the 6th section,



refer to the lands described in the 1st section of the act,—that is, to the odd-numbered sections in the place limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States \*prior to the definite location of the road; that as to “all other lands on the line of the said road, when surveyed,” the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road, which were unappropriated when the line of the railroad was definitely fixed; and that if, at the time such line was “definitely fixed,” it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40-mile and within the 50-mile line, and, under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the 6th section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

This construction of the act of July 2d, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st, 1870, Congress declared “that the Northern Pacific Railroad Company be, and hereby is, authorized . . . also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many [149] sections of land belonging \*to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, *beyond the limits prescribed in said charter*, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2d, 1864. . . .” 16 Stat. at L. 378.

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Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits.

We do not find from the published decisions of the Land Department that the question of the power of the Secretary of the Interior, simply upon the definite location of the Northern Pacific Railroad, to withdraw from the operation of the pre-emption and homestead laws lands within the indemnity limits, was ever distinctly presented and disposed of prior to the year 1888. It was mooted in the case of the *Atlantic & P. R. Co.* reported in 6 Land Dec. 84, 87. The 3d and 6th sections of the charter of that company were the same as the 3d and 6th sections above quoted, of the charter of the Northern Pacific Railroad Company. From the opinion of Secretary Lamar in that case, we infer that some of his predecessors had assumed that the power to withdraw lands in indemnity limits from sale or entry could be exercised upon the definite location of the railroad even before it had been ascertained by losses in place limits that the company must look to the indemnity limits in order to supply its grant. The Secretary said: “Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, ‘the odd-numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided \*in this act,’ of [150] themselves indicate most clearly the legislative will that there should not be withdrawn, for the benefit of said company, from sale or entry, any other lands except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered,—‘but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled “An Act to Secure Homesteads to Actual Settlers upon the Public Domain,” approved May 20th, 1862, *shall be*, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company,’—it is difficult to resist the conclusion that Congress intended that ‘all other lands excepting those hereby granted to said company’ shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the Executive in the matter of determining what lands shall or shall not be withdrawn. Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the Executive to withdraw said lands; and when such with-



drawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would yet have its right to select indemnity for lost lands, but in so doing it would have no advantage over the settler, as it now has in contravention of the policy of the government in denial of the rights unquestionably conferred upon settlers by the land laws of the country, apparently specially protected by the provisions of the granting act under consideration."

[151] But in 1888 the question was directly presented to Secretary Vilas in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, 120 (referred to in the decision of the Commissioner of the General Land Office of September 25th, 1888, upholding Hewitt's \*claim); and it was there held, in an elaborate opinion, that the Northern Pacific act forbade the Land Department to withdraw from the operation of the pre-emption and homestead laws any lands within the indemnity limits of the grant made by the act of July 2d, 1864. The Secretary said:

"In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits and lands in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well-settled rules upon this subject.

"As to the lands in the primary, or granted, limits: 'The title to the alternate sections to be taken within the limit, when all the odd sections are granted, becomes fixed, ascertained, and perfected in each case by this location of the line of road, and in case of each road the title relates back to the act of Congress.' *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 726, 28 L. ed. 872, 874, 5 Sup. Ct. Rep. 334; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 501, 24 L. ed. 1095, 1098; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456. As to indemnity limits: 'The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road. In *Ryan v. Central P. R.*

*Co.* 99 U. S. 382, 25 L. ed. 305, this court, speaking of a contest for lands of this class, said: 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose;' and the reason given for this is that "when the road was located and the maps were made the right of the company to the odd \*sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed." The same idea is suggested, though not positively affirmed, in the case of *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456. In the case of *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485, this principle became the foundation, after much consideration, of the judgment of the court rendered at the last term. And the same principle is announced at this term in the case of the *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208. The reason for this is that, as no vested right can attach to the lands in place—the odd-numbered sections within 6 miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so, in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.' [*St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 731, 28 L. ed. 872, 876, 5 Sup. Ct. Rep. 334.]

"The consequence of this difference is that, until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands. There is nothing to the line bounding the indemnity limits to distinguish lands within it from any other public lands; the only purpose of that being to place a boundary upon the right of selection in the grantee to make good losses sustained within granted limits. This effect has been most explicitly declared by the Supreme Court in the case of the *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208, and in other cases. In that case, the court said of an order of the Commissioner of the General Land Office similar to this, so far as applicable to indemnity limits: 'The order of withdrawal of lands along the \*probable lines of the defendant's road made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the land, nor in any respect controlled the sub-



sequent grant.' It also said of the indemnity limits under discussion there: 'For what was thus excepted from the granted limits other lands were to be selected from adjacent lands, *if any then remained, to which no other valid claims had originated.* But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the 10-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government, subject to its disposal at its pleasure.'

"It was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.' If lands within the indemnity limits are to be regarded as 'on the line of said road,' this declaration appears to me prohibitory of any withdrawal, for the benefit of this road. It might be that such lands could be withdrawn for some other public purpose, within executive authority to provide for, such, for example, as to constitute a reservation for Indians. But this language was introduced into the same section which declared the granted lands not to be liable to sale, etc., and, immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits as being liable to disposition under those laws.

[154] Having so explicitly declared, \*it was not necessary to add a prohibition upon executive officers against withdrawal for the benefit of the road. It gave to any person entitled under the pre-emption or homestead laws to take any such lands the absolute right to acquire any proper quantity thereof, in accordance therewith; and this right an executive officer could not deprive the settler of. The act as much makes that his right as it makes it the right of the company to take the others.

"I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits 'not liable to sale or entry' for the mere purpose of declaring 'what was already enacted by general laws.' The general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred,

be also made. The aim of this language was, as I am forced to read it, towards the availability to settlement of all lands not granted. It was a vast grant, and, even as so limited, a threatening shadow to fall on the settlement of the Northwest. Well might Congress say, 'The lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'

"It may be claimed that the words, 'all other lands on the line of said road,' do not embrace lands within the indemnity limits. That construction would seem still more to deny the Commissioner's power to withdraw them; since it cannot be supposed Congress intended him to withdraw lands not on the line of the road. But the phrase immediately after employed in the section,—'the reserved alternate sections,'—when speaking of the lands to which the double minimum price must be attached, seems to indicate clearly that Congress had, in the use of the former, a more comprehensive meaning than simply to include by it the lands of the even-numbered sections within the granted limits.

"The Supreme Court appears to have fairly set this question at rest in the case of *United States v. Burlington & M. River R. Co.* 98 U. S. 339, 25 L. ed. 200, where it is said of the similar point raised in respect to the line then under consideration: 'And the land \*was taken along such line in the sense of the (155) statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is 20 miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.'

"The general rule alluded to in the opinion, that lands once properly withdrawn by executive order remain so until restored to market by like order or by statute, is not questioned. But every such general rule yields to the will of the legislature in a particular case; and the considerations presented are designed to show the grounds of my opinion that the legislation is in this case particular and exhaustive."

The same question arose in *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, 90, and Secretary Smith expressed his concurrence in the views announced by Secretaries Lamar and Vilas. Referring to certain passages in the opinion of Secretary Vilas, he said: "These views alone would be sufficient, in my judgment, to sustain the conclusion reached in this case, but I am not left to stand upon them only, for Congress in the same section has gone further. Not content with ordering a withdrawal, that body expressly declared a prohibition against the making of any other withdrawal, when it said, in the next clause of the same sentence, that the provisions of the pre-emption and homestead



laws 'shall be, and hereby are, extended to all other lands on the line of the said road when surveyed, excepting those hereby granted to said company.' Here is an enactment in which the most comprehensive language is used. Having withdrawn the granted sections, 'all other' lands within the grant, along the line of the road, are being legislated for. It would seem, therefore, to follow logically, when it was commanded that the pre-emption and homestead laws be extended to 'all other lands,' it was all those lands within the limits of the grant which had not been otherwise disposed of by the act. The [156] 'other' lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for 'all' other lands surely cannot mean only a portion of the other lands. *Qui omne dicit, nihil excludit* is a maxim well recognized in the construction of statutes, and is applicable here. This aspect of the case is presented and fully discussed by Mr. Secretary Vilas in the *Guilford Miller Case*; and concurring in his reasoning, it is not necessary that there should be further elaboration of the argument. The views which I have herein expressed were entertained also by Mr. Secretary Lamar, and are clearly and tersely stated by him in his opinion, before quoted from, in the case of the *Atlantic & P. R. Co.* in 6 Land Dec. p. 87."

It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done, it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas, and Smith, and upon which the Land Department has acted since 1888. "It is the settled doctrine of this court," as was said in *United States v. Ala-*

*bama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 308, "that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced." These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute.

It is appropriate to refer to one other matter. It appears from the finding of facts that Mr. Lamoreux, when Commissioner of the General Land Office, issued a certificate, dated May 2d, 1896, in which it was stated: "I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2d, 1864, and May 31st, 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres, which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant, which cannot be satisfied from the limits as now recognized by this office."

It does not appear from the finding of facts that this certificate was given in any proceeding pending between parties in the Land Department. On the contrary, the Commissioner of the General Land Office in a supplemental report for the year 1899 referred to the grant to the Northern Pacific Railroad Company, and said: "In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the act of July 1st, 1898, and the right of selection for lands within the Mount Ranier forest reserve under the act of March 2d, 1899, and the prospects of the creation of other forest reserves within the limits of the grant, I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of 1864." Besides, in *Northern P. R. Co.* 25 Land Dec. 511, and in *Northern P. R. Co. v.* 180 U. S.



*Streib*, 26 Land Dec. 589, it was found that there never had been any ascertained deficiency in the grant to the Northern Pacific Railroad Company. In the above case in 26 Land Dec. the Secretary of the Interior, referring to the certificate of Commissioner Lamoreux, said: "Relative to the certification of a deficiency in the grant to this company [the Northern Pacific] made by your predecessor, it is sufficient to say that this Department has never given recognition to that certificate, nor has the company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant." So that, if the question whether there has been deficiency in the grant of lands to the Northern Pacific Railroad Company was at all material in the present case, no effect can be given to the certificate of Commissioner Lamoreux set out in the findings of fact.

In our opinion the plaintiff Hewitt was entitled to a judgment upon the facts found; and the judgment of the supreme court of the state, reversing the judgment of the court of original jurisdiction and directing the dismissal of the action, is itself reversed, and the cause is remanded for further proceedings consistent with this opinion.

*Reversed.*

[159] \*Mr. Justice **White** concurred in the result.

Mr. Justice **Brewer** (with whom Mr. Justice **Shiras** concurs) dissenting:

I am unable to concur in the opinion and judgment just announced, and will state briefly the ground for my dissent.

From the beginning of land grants the Land Department has exercised the power of withdrawing from pre-emption and homestead entry any body of lands which in its judgment might be necessary for the satisfaction of the grant. And the existence of this power has been affirmed by this court in many cases, and without a single exception up to the present decision. The grant for the improvement of the Des Moines river terminated, as finally decided, at the Racoon fork of that river, about half way between the northern and southern boundary of the state of Iowa; yet a withdrawal of lands along that river above that fork, and up to the northern boundary of the state, was sustained. *Wolcott v. Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 915. It was held that as the extent of the grant was doubtful it was within the power of the Land Department, and also proper for it, to withdraw from settlement and sale all lands that might under any construction of the grant be needed to satisfy it. See, among other cases sustaining this power of withdrawal: *Homestead Co. v. Valley R. Co.* 17 Wall. 153, *sub nom. Iowa Homestead Co. v. Des Moines Nav. & R. Co.* 21 L. ed. 622; *Williams v. Baker*, 17 Wall. 144, 21 L. ed. 561; *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.* 109 U. S. 329, 332, 333, 27 L. ed. 952, 953, 3 Sup. Ct. Rep. 188; *Bullard v. Des Moines & Ft. D. R. Co.* 122 U. S. 167, 170, 180 U. S.

171, 176, 30 L. ed. 1123, 1124, 1126, 7 Sup. Ct. Rep. 1149; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 528, 35 L. ed. 1099, 1102, 12 Sup. Ct. Rep. 308; *Hamblin v. Western Land Co.* 147 U. S. 531, 536, 37 L. ed. 267, 271, 13 Sup. Ct. Rep. 353; *Riley v. Welles*, 154 U. S. 578, and 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; *Wood v. Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 54, 57, 40 L. ed. 71, 74, 15 Sup. Ct. Rep. 1020; *Spencer v. McDougal*, 159 U. S. 62, 64, 40 L. ed. 76, 77, 15 Sup. Ct. Rep. 1026; *Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 607, 42 L. ed. 596, 597, 18 Sup. Ct. Rep. 205.

It is to be assumed that when Congress makes a grant of a certain number of sections per mile it intends that its grantee shall obtain that number of sections. And when it provides that, if there be not within the place limits the requisite number \*of sections free from homestead or pre-emption entry, the grantee may go into an indemnity limit and select enough to complete the full amount of the grant, its purpose is that within this territory added for selection the grantee shall receive a full equivalent for the deficiencies in the place limits. Action by the administrative department which tends to accomplish this purpose is, to say the least, not inconsistent with justice. And in order that it be not defeated, it is certainly not unreasonable to temporarily withdraw from private entry a sufficient body of land within such indemnity limits. [160]

That in the actual administration of the Northern Pacific land grant such withdrawals of land within the indemnity limits were proper is clear from the certificate of the Commissioner of the General Land Office, of date May 2, 1896, and in evidence in this case to the effect that there is a known deficiency of 3,559,222 acres of the grant which cannot be satisfied from the limits recognized in the department. As this certificate was the only evidence in the case and was incorporated by the trial court into its findings of fact, it would seem that our inquiry in this direction should be limited thereby. But in the opinion of the majority there is a reference to a report of the Land Department, made a year after the decision in this case, and to two opinions of the Secretary of the Interior, announced about the time of the decision. In these some question is made of the accuracy of this certificate. It will be noticed that in neither report nor opinions is the fact of a deficiency denied, but only a suggestion as to the amount thereof. It is, of course, not a pleasant fact that by reason of the change in the ruling and practice of the Land Department the Northern Pacific Railroad Company fails to receive the full measure of its grant, and I do not wonder at any effort to discredit the fact or minimize the amount of such loss, but I submit that in the disposition of this case we ought to be guided by the evidence before us and not be misled by recent speculations of the Department concerning what may yet be developed.



[161] Much is said about the vastness of this land grant, but it must be remembered that it was a grant of lands within what was then a wilderness. Though it was made in 1864, nothing was \*done towards the building of the road until more than six years afterwards. Capital finds little temptation in a promise, no matter how great, of lands in an unknown wilderness.

The Land Department, believing that the power so constantly exercised by it and so frequently sustained by this court still continued, made orders of withdrawal as from time to time the maps of the line of definite location were filed and approved. Indeed, the question of power in respect to this very Northern Pacific grant was distinctly presented to Secretary Teller on May 17, 1883, and affirmed by him in a letter of instructions to the Commissioner of the General Land Office. 2 Land Dec. 511. See also Id. 506. These withdrawals prior to the ruling hereafter noticed were over forty in number, and included substantially all the odd-numbered sections within the 10-mile indemnity limit from one end of the road to the other. They continued with unbroken regularity until the ruling referred to.

The first section of constructed road of 25 miles in length was accepted by the President on January 6, 1873, as having been finished on October 18, 1872. The last section of constructed road was accepted on July 10, 1888, as having been finished on June 11, 1888. During these years of construction, and of course as inducement to the company to continue the work undertaken, these various withdrawals were made. Not until 1887 was there any question of their validity. The first intimation appears in an opinion announced by Mr. Justice Lamar (then Secretary of the Interior) on August 13, 1887 (6 Land Dec. 84, 87), in which he said:

[162] "Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should, at least, have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said \*company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered,—'but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof,' and of the act entitled 'An Act to Secure Homesteads to Actual Settlers upon the Public Domain,' approved May 20, 1862, 'shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting

those hereby granted to said company,'—it is difficult to resist the conclusion that Congress intended that 'all other lands, excepting those hereby granted to said company,' shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the Executive in the matter of determining what lands shall or shall not be withdrawn."

Following this opinion Secretary Lamar revoked the orders of withdrawal theretofore made in behalf of some twenty-four corporations, the Northern Pacific Railroad Company among the number. Such revocation was undoubtedly legal, for the power which could order a withdrawal could revoke such order whenever in its judgment the appropriate time therefor had arrived. But such revocation did not disturb the rights which had become vested during the continuance of the orders of withdrawal. Thus consistency in the rulings and practice of the Department was preserved.

Subsequently the question was presented to Secretary Vilas, who on August 2, 1888, in the case of the *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, ruled that all these withdrawals were void, thus upsetting that which had been done in the administration of this grant from the time of its inception.

It is unfortunate that during the years of construction, when it seemed important to hold out every inducement to the company to continue its work, the ruling and practice of the Land Department should have been unvarying in the line of securing to it the full amount of its grant, and that as soon as the road was completed and no further inducement to action by the company \*was [163] needed, the ruling of the Land Department should be changed, and that theretofore done with a view of securing to it the full amount of its grant be declared void. A change in the ruling of the Department at that time was inauspicious.

Reference is made in the opinion to the duty of following in doubtful cases the construction placed by the Land Department. I fully agree with this, and I think it is a duty as incumbent upon the Department as on the courts, and that when a construction has been once established in respect to a particular matter it should be followed by the Department, unless plainly wrong; and that this court, when the question is presented, should hold to the original construction, especially if it be one which obtained during a score of years, and during all the time that the company was engaged in doing the work for which the grant was made, and should refuse to uphold a change made after that work was completed, and which has the effect of unsettling and destroying the rights of many created in reliance upon that construction.

Was the power of withdrawal rightfully exercised by the Land Department? It is not pretended that the Northern Pacific act contains any express denial or taking away of such power. The conclusion that it was taken away rests upon a mere implication, but it is familiar law that repeals by implication are not favored. If the old law and the new



are consistent, and can with any reasonable interpretation of the latter be both enforced, they will be; and I respectfully submit that the same rule obtains as to powers belonging to and exercised by a department.

Was there any implied denial of this power to the Land Department? § 6 of the granting act is relied upon by Secretary Vilas and by this court. I quote the section (13 Stat. at L. 369, chap. 217):

[164] "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, \*except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Now, confessedly, every part of this section, except the clause commencing "but the provisions," and ending "to said company," applies solely to lands within the place limits, and has no reference or application to lands within the indemnity limits. By its connection, therefore, the natural application of this clause would be to lands within like limits. This natural application is enforced by the words "when surveyed," near the close of the clause, for there is an express provision (as appears in the first of the section) for a survey of the place limits, and there is no reference in the entire body of the act to any other survey. Further, the clause was seemingly necessary to secure beyond question to pre-emptors and those seeking homesteads a full and continuous right to the even-numbered sections within the place limits. The pre-emption law of September 4, 1841 (5 Stat. at L. 456, chap. 16), defining the classes of lands to which pre-emption rights should not extend, included therein the following:

"No sections of land reserved to the United States alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

The act of March 3, 1853 (10 Stat. at L. 244, chap. 143), which extended the pre-emption right to the alternate reserved sections, contained this provision:

"Provided, That no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office."

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The exact scope of this limitation as applied to grants directly \*to railroad companies may not be entirely clear. Perhaps the limitation began with the approval of the map of definite location which, as frequently held, determines the time at which the right of the company to the odd-numbered sections is established, or perhaps, at least in cases where the grant was to a state, instead of directly to a company, at the date of the official certification to the state of the list of allotted lands. Such at least seems to have been the opinion of the Land Office, as shown by the rules announced. 1 Lester, 509. Be that as it may, some limitation was prescribed, and this clause was unquestionably introduced in order to remove all doubt as to the full and continuous right of pre-emption in respect to the alternate reserved sections. The same provision was found in several land grants, as, for instance, that to the California & Oregon Railroad Company, July 25, 1866 (14 Stat. at L. 239, chap. 242); that to the Atlantic & Pacific Railroad Company, July 27, 1866 (14 Stat. at L. 292, chap. 278); that to the Stockton & Copperopolis Railroad Company, March 2, 1867 (14 Stat. at L. 548, chap. 189); that to the Oregon Central Railroad Company, May 4, 1870 (16 Stat. at L. 94, chap. 69); that to the Texas & Pacific Railroad Company, March 3, 1871 (16 Stat. at L. 573, chap. 122). That it did not apply to lands outside the place and within the indemnity limits is made clear by the fact that the provision was introduced into an act in which there were no indemnity limits, to wit, the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. at L. 94, chap. 182).

Reference is made in the opinion of Secretary Vilas, approved by this court, to *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 25 L. ed. 198, as indicative that the words "on the line of said road" necessarily extend to lands within the indemnity limits. But that case justifies no such inference. There were no place or indemnity limits in terms prescribed. There was simply a grant of ten alternate sections per mile on each side of the road "on the line thereof." When the right of the company attached it was found that the full complement of the grant could not be satisfied by the ten successive alternate sections; and on application of the company patents were issued to it for certain lands beyond the limits of those sections, \*and the court held on a bill to set [166] aside these patents that the action of the Land Department was justified in that the full amount of the grant was intended and that there were no prescribed limits within which the grant must be satisfied. It was said (p. 340, L. ed. p. 200), that the words "do not require the lands to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line;" and again, "and the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end."

It is also suggested that to disturb this decision of the Land Department in 1888 might work confusion in the administration of the grant and entail hardship on many who have acted in reliance upon that ruling. I concede the hardship. Every change in the ruling of the Land Department in the administration of a grant will almost inevitably work hardship upon some; but it is well to note the comparative hardships; and no better illustration can be presented than the case at bar; and this, irrespective of the loss by the company of a large portion of its promised lands. The plaintiff in error, immediately upon his application for an entry of the tract in controversy, was notified that it was withdrawn. He could then easily have changed his settlement to an even-numbered section, and perfected his title thereto. He persevered, however, in his application, and was finally allowed pre-emption, paid his money and received his patent. If that action were now adjudged void he would have a claim for the money paid and a claim against a solvent debtor. Rev. Stat. § 2362. On the other hand, the defendant in error, who purchased from the railroad company in reliance upon the then ruling of the Department, paid to the company the sum of \$1,200, and has placed upon the lands improvements to the value of \$600. All this he loses; and while he may have a claim against the company for the amount of money he paid it, yet if it be true (as I am informed, although not appearing in the record) that mortgages upon the railroad company property have been foreclosed and all its property disposed of, [167] his judgment will be \*simply against an insolvent corporation. In other words, instead of a claim for reimbursement against a solvent debtor, he will have what is tantamount to a judgment against a vacuum; and this will be the experience of all who, during those many years, purchased from the company in reliance upon the then ruling of the Department.

For the reasons thus outlined I dissent from the opinion and judgment, and I am authorized to say that Mr. Justice **Shiras** concurs herein.

J. M. MOORE, *Plff in Err.*,

v.

JOHN CORMODE.

(See S. C. Reporter's ed. 167-172.)

*Railroad land grants—withdrawal of indemnity lands.*

This case is governed by the decision in the case of *Hewitt v. Schultz*, ante, 463.

[No. 49.]

*Argued October 15, 16, 1900. Decided January 7, 1901.*

IN ERROR to the Supreme Court of the State of Washington to review a decision affirming a judgment dismissing an action to

establish a trust in lands held under patent from the United States. *Affirmed.*

See same case below, 20 Wash. 305, 55 Pac. 217.

Statement by Mr. Justice **Harlan**:

This action was commenced in the superior court of the state of Washington for Garfield county. From an amended complaint filed by Moore, now plaintiff in error, it appears that on December 12th, 1883, the Northern Pacific Railroad Company, under authority of the act of Congress of July 2d, 1864 (13 Stat. at L. 365, chap. 217), granting lands to aid in the construction of its road, selected, under the direction of the Secretary of the Interior, the northwest quarter of section 3, in township 13 north, of range 42 east, Willamette meridian, in Garfield county, in the then territory of Washington, as indemnity and in lieu of other specified lands excepted from its grant.

On July 2d, 1895, the railroad company, for a valuable consideration, sold and conveyed to Moore by general warranty deed the north half of the above-described quarter section.

Prior to that transfer, namely, on the 17th day of July, 1890, the defendant Cormode presented for filing in the district land \*office [168] at Walla Walla, Washington, a declaratory statement setting forth that the land in question had been settled on in March or April, 1882, by Mrs. Ora Standiford, and that she and a subsequent purchaser of her improvements had resided continuously thereon until 1889, when the defendant purchased the improvements and moved upon the land.

Upon a hearing ordered before the land office at Walla Walla, to determine the right of the Northern Pacific Railroad Company to the land in dispute, the register and receiver of that office, in January, 1891, held that the settlement upon the premises by Mrs. Standiford, and the occupation of the same thereafter by her and the subsequent purchasers, including the defendant, excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it. The selection made by the company was accordingly recommended to be canceled.

An appeal was taken by the railroad company to the Commissioner of the General Land Office, and that officer rendered a decision on April 25th, 1895, directed to the register and receiver at Walla Walla, in which he said: "I have considered the above-entitled case, involving N. W. 3, 13 N., 42 E., appeal by the R'y Co. from your decision in favor of Cormode. The land is within the indemnity limits of the grant to the Northern Pac. R. Co. and was selected by the Co. Jan. 5th, 1884, list No. 1. Both parties appearing at the hearing held Jan. 6th, 1891, and from the testimony then taken it appears in substance as follows: The land was settled on March or April, 1882, by Mrs. Ora Standiford, who was qualified to enter under the homestead law. Her settlement consisted of the erection of a frame house 16x18 ft., 1 story and a half high, on the

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land, the plowing and cultivating of 3 or 4 acres, and the digging of a well. At that time she established her residence on the land and remained there continuously with her family until the fall of 1885, when she sold her improvements upon and interest in the land to John A. Long, who occupied the land for a short time, and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of 1889, when the present applicant, Cormode, who [169] applied for the same under \*pre-emption law in July, 1890, purchased the improvements and moved onto the land. Since then Cormode continuously resided upon and improved the land. It would thus appear that on Jan. 5th, 1884, when the right of the R'y Co. attached, the land was embraced in the bona fide settlement of a party, Mrs. Standiford, qualified to enter the same under the settlement laws. Your decision is therefore affirmed and the Co.'s selection of that date held for cancellation as invalid."

The decision of the Commissioner was sustained by the Secretary of the Interior on May 20th, 1896.

Thereafter the defendant Cormode made final proof of his claim, and, a final receipt having been issued to him by the district land office, on the 2d of May, 1898, he received a patent from the United States conveying to him the title to the land.

The plaintiff averred that the decisions of the register and receiver of the General Land Office and the Secretary of the Interior were made and rendered under misapprehension of law; that the officers of the Land Department and the Secretary of the Interior were wholly without jurisdiction to consider the application of the defendant to make pre-emption entry of the land, for the reason that the land was not at that time public land of the United States and was not then subject to homestead entry, but before the date of the defendant's application had been withdrawn from entry or sale, and that the decisions allowing the defendant to enter the land were void, and the entry made also void and of no effect; that the Northern Pacific Railroad Company under the grant by the act of July 2d, 1864, became and was the owner in fee simple of the land, and entitled to a patent therefor from the United States; that the defendant's patent constituted him a trustee, holding the legal title for the benefit of the plaintiff, and was a cloud upon the latter's title; and that the defendant wrongfully and unlawfully withheld the possession of the premises, although the plaintiff had at various times demanded the same.

A demurrer to the complaint was sustained; and the plaintiff declined to plead further. Whereupon the court, on motion of the defendant, dismissed the action. That judgment was affirmed in the supreme court [170] of the state, all the members \*of the court concurring in such affirmance. In its opinion in the case that court said: "But, taking a broad view of the question in considering the primary effect of the act [of Congress of July 2d, 1864] as a matter of public policy, which is always permissible where 180 U. S.

there is room for construction and the true intent is a matter of doubt, we are of the opinion that there was no intention to withdraw from actual settlement the immense quantity of lands embraced within the indemnity limits. This phase of the matter has received consideration in a number of cases. Attention is called to the fact that it was expected when the law was enacted that the road would be speedily constructed, and that it would traverse, in the main, a practically unoccupied territory, and that there would be consequently no great loss of lands within the place limits. It might well have been considered that there would be ample lands within the indemnity limits to make good such losses, although these lands were open to settlement at all times prior to their actual selection. See *Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205. And after a consideration of the numerous cases cited in the briefs we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement. It has been the long-continued policy of the government to facilitate the settlement of its unoccupied lands, and so great a restriction as this would have been under the company's contention could hardly have been contemplated. The departmental withdrawal was subsequently set aside, and cannot operate to extend the provisions of the act. Those parts of the discussion or statements in some of the cases most relied upon by the appellant are not in harmony with the later expressions of the court, especially in *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; and *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671. Also the prevailing and long-continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. Many patents have been issued thereunder to settlers who are now occupying the lands, as in this case, and doubtless frequent transfers have \*been made to others who have re-[171] garded the title as perfect, for the issuance of a patent is regarded by the common mind as conclusive; and if it is a matter of doubt the overturning of these rights and the construction of the Land Department should be reserved for the highest court in the land. Furthermore, it is most strenuously insisted by the respondent that the case must be decided in his favor on the ground that it does not appear that there was any finding by the Land Department that there was any deficiency in place lands, and that under the familiar rule applied to judgments, if an affirmative finding that there was no loss of place limits was necessary, then that such finding would be presumed; that all presumptions are in favor of the regularity of the proceedings in the Land Department to sustain a patent. The appellant has undertaken to conclude this matter by averment in his complaint, and contends that the indemnity lands were appropriated without selection by reason of the deficiency in place 477

limits, and that the court is bound by the allegations of the complaint in this particular. There is no allegation, however, that there was a finding by the Secretary of the Interior or in the proceedings before the Land Department that there was a deficiency in place limits. And it seems to us that to enable the company to claim this land there must have been a finding that there was a deficiency within the place limits for which the lands claimed were taken, or that it was conclusively established in the proceedings before the Department. This matter was a question of fact essentially within the jurisdiction of the Land Department, and its judgment should be sustained unless it appears that it is in conflict with the facts therein found or established. It may have been found that there was no deficiency entitling the company to select these lands. It was found that when the selection was made the land was occupied by a qualified settler, and the company therefore not entitled to take it. The contention of the appellant with reference to the allegations of the complaint in this respect are in our opinion overborne by the authorities. *Johnson v. Drew*, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; *Durango Land & Coal Co. v. Evans*, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. Rep. 425; *Gale v. Best*, 78 Cal. 235, 20 Pac. 550; *New Dunderberg Min. Co. v. Old*, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. Rep. 598, 20 Wash. 305, 55 Pac. 217.

**Messrs. C. W. Bunn and James B. Kerr** argued the cause and filed a brief for plaintiff in error.

For contentions of these counsel, see their brief as reported in *Hewitt v. Schultz*, ante, 463.

**Mr. George H. Patrick** argued the cause, and, with **Mr. George Turner**, filed a brief for defendant in error:

The grant attached to place lands on the filing of the map of definite location, and to indemnity lands at the time of their selection with the approval of the Secretary of the Interior.

*Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

All the executive withdrawals or reservations which the plaintiff in error insists operated as a bar to the initiation of a pre-emption right were nullities because in conflict with the true intent and purpose of the granting act.

*Ibid.*; *Northern P. R. Co. v. Miller*, 7 Land Dec. 100; *Northern P. R. Co. v. Davis*, 19 Land Dec. 87; *Cole v. Northern P. R. Co.*, 17 Land Dec. 8; *Northern P. R. Co. v. Fugelli*, 10 Land Dec. 288; *Spicer v. Northern P. R. Co.*, 10 Land Dec. 440; *Southern P. R. Co. v. Kanawyer*, 23 Land Dec. 500; *Missouri, K. & T. R. Co. v. Troxel*, 17 Land Dec. 122; *Northern P. R. Co. v. Lillethun*, 21 Land Dec. 487; *Grunevald v. Northern P. R. Co.*, 24 Land Dec. 195; *Northern P. R. Co. v. Loomis*, 21 Land Dec. 395; *Southern P. R. Co. v. McKinley*, 22 Land Dec. 493; *Northern P. R. Co. v. Flannery*, 20 Land Dec. 138; *Northern P. R. Co. v. Knudson*, 20 Land

Dec. 127; *Stuart v. Southern P. R. Co.*, 22 Land Dec. 61; *Hastings & D. R. Co. v. Christenson*, 22 Land Dec. 257.

The railroad company had no right or title to the indemnity lands prior to their selection, with the approval of the Secretary of the Interior, in lieu of lands in place which had been lost to the company.

*Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Ryan v. Central P. R. Co.*, 99 U. S. 382, 25 L. ed. 305; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020.

There is no allegation in the complaint that the Secretary found any deficiency in the place lands, or that the indemnity land selected could be properly taken for those deficiencies. This omission is fatal to the sufficiency of the complaint.

*Durango Land & Coal Co. v. Evans*, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. Rep. 427; *Stewart v. McHarry*, 159 U. S. 643, 40 L. ed. 290, 16 Sup. Ct. Rep. 117; *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779; *Steel v. St. Louis Smelting & Ref. Co.*, 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Gale v. Best*, 78 Cal. 235, 20 Pac. 550; *New Dunderberg Min. Co. v. Old*, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. Rep. 598.

**Messrs. J. H. McGowan, George Turner, and George H. Patrick** filed an additional brief for defendant in error.

\***Mr. Justice Harlan**, after stating the facts as above reported, delivered the opinion of the court:

The land in controversy is within the indemnity limits of the Northern Pacific Railroad Company as shown by its map of definite location. It was embraced by the order made by the Secretary in November, 1880, whereby the local land office was directed to withdraw and hold reserved "from sale or homestead or other entry" all of the odd-numbered sections "within the place and first indemnity limits" of the Northern Pacific Railroad, as indicated on its map of definite location filed in October, 1880. That order of course proceeded on the ground that under the act of July 2d, 1864 (13 Stat. at L. 365, chap. 217), it was competent for the Secretary of the Interior, immediately upon the filing and acceptance of the company's map of definite location, to withdraw from the operation of the pre-emption and homestead laws all the odd-numbered sections within the indemnity limits of the road and contiguous with the line of such definite location. The act of 1864 has been differently interpreted in the Land Department since the decision in 1888 of Secretary Vilas in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100. For the reasons stated in the opinion just delivered in *Hewitt v. Schultz*, 180 U. S. 139, ante, 463, 21 Sup. Ct. Rep. 309, we accept



that decision as indicating the construction of the act of 1864 to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company. This leads to an affirmance of the judgment without reference to other questions discussed at the bar.

*The judgment of the Supreme Court of the State of Washington must be and is hereby affirmed.*

Mr. Justice **White** concurred in the result.

Mr. Justice **Brewer** and Mr. Justice **Shiras** dissented.

[173]\* **WILLIAM L. POWERS**, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, *Plffs. in Err.*,

v.

**JACOB SLAGHT.**

(See S. C. Reporter's ed. 173-180.)

*Railroad land grants—withdrawal of indemnity lands.*

This case is governed by the decision in the case of *Hewitt v. Schultz*, ante, 463.

[No. 47.]

*Argued and Submitted October 15, 16, 1900.  
Decided January 7, 1901.*

**I**N ERROR to the Supreme Court of the State of Washington to review a decision affirming a judgment dismissing an action to establish a trust in lands held under patent from the United States. *Affirmed.*

See same case below, 20 Wash. 712, 55 Pac. 1103.

Statement by Mr. Justice **Harlan**:

This action was commenced in one of the courts of the state of Washington by the present plaintiffs in error. They alleged in their second amended complaint that on or about December 15th, 1883, the Northern Pacific Railroad Company, under and by virtue of the act of Congress approved July 2d, 1864 (13 Stat. at L. 365, chap. 217), granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific Coast, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof, applied at the United States district land office in the district in which the lands were situated to select, and selected lots 10, 11, 14, and 15 in section 1, township 16, north of range 45 east, Willamette meridian, Washington, with other lands, as indemnity in lieu of lands within the place limits of

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the grant to the company, and which had been reserved, sold, granted, or otherwise appropriated, or to which pre-emption or other claims or rights had attached at the date when the line of the company conterminous therewith was definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office,—a list of the lands selected, prepared in the manner and form prescribed by the rules and regulations of the Interior Department, being filed by the company in the district land office, and tender and payment made to the receiver thereof of the fees required by law to be paid upon the selection of lands. The list was allowed and approved by the register and receiver on December 17th, 1883, the fees accepted, and thereafter the list \*was transmitted to the Commissioner of the General Land Office for approval. These lands were selected as public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, except such reservation, appropriation, claim, and rights as had attached thereto in favor of the railroad company. [174]

On October 26th, 1887, the railroad company, in compliance with other and additional instructions of the officers of the Interior Department, issued and given after the above selection had, as stated, been accepted, allowed, and approved, filed a list designating the losses in lieu of which the lands described in the selection list were selected; and thereafter, in the years 1892 and 1893, the company, in compliance with instructions issued by the officers of the Interior Department subsequently to the acceptance, allowance, and approval of the selection, rearranged the list of losses and the selection list so that the losses for which each tract of land selected by the company had been taken should be specifically designated. It appeared from the rearranged list that the lands in question were selected in lieu of certain lands included in section 7, township 9, north of range 15 east, Willamette meridian, Washington, which last-described land was located conterminous with and within 40 miles of the line of the company as definitely fixed, and was at the date of the grant to the company, and at the date when its line conterminous therewith was definitely fixed, included in a reservation of land set apart for the Yakima Indians.

On or about December 24th, 1885, after the selection of the above-described land, the Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey to him lots 3, 6, 11, and 14 in section 1, township 16, north of range 45 east, upon the payment by him to the company of the sum of \$822; and on August 4th, 1887, payment having been made, the company conveyed the lots to him.

On July 30th, 1887, the company conveyed to Powers lots 2, 7, 10, and 15 in that section.

In the year 1877 A. M. Duffield settled upon lots 2, 3, 6, 7, 10, 11, 14, and 15 in the section in question. Shortly thereafter \*he sold

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and assigned his possessory rights and improvements to L. M. Rhodes, and thereafter, Rhodes having failed to make payment therefor, the property was assigned to the plaintiff Powers, who settled thereon in 1881 with the expectation and intention of purchasing the lands or a portion thereof from the railroad company. Soon after such settlement Powers offered to purchase lots 2, 7, 10, and 15 from the company, and at the same time John G. Powers, a brother of the plaintiff, offered to purchase lots 3, 6, 11, and 14 from the company. Thereafter, as above stated, the plaintiff William L. Powers purchased the lands from the railroad company, having prior thereto taken a relinquishment from his brother of all interest in and to lots 2, 7, 10, and 15.

On or about March 1st, 1883, the defendant Slaght rented and leased lot 10 of the plaintiff Powers, and received and took possession of the same. He paid rental therefor, as agreed, from the date upon which he took possession of the premises until the 31st day of October, 1887.

On the last-named day Slaght presented an application at the United States district land office for the district in which the land was situated, to enter lots 10, 11, 14, and 15 as public lands of the United States, under the act of Congress approved May 20th, 1862 (12 Stat. at L. 392, chap. 75), entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," alleging in his application that he had settled and established his actual residence upon those lands March 4th, 1883, that such residence had been thereafter continuous, and that he had built a house on the land and improved the same. In the complaint in this case the plaintiffs averred that the settlement, occupation, and improvement by Slaght were under and in pursuance of the renting and leasing of and from Powers, as above set forth, and not otherwise.

The Northern Pacific Railroad Company, having been notified of the application of Slaght to enter the land, filed its objections against the allowance thereof on or about December 2d, 1887. A hearing was ordered by the United States district land officers for the district in which the land was situated, to determine the rights thereto of the railroad company and \*Slaght, and such proceedings were had in the contest that the district land officers, in July, 1889, held the land to be excepted from the operation of the selection of the railroad company by reason of the settlement of the plaintiff Powers, and that the defendant Slaght had settled upon the land as the tenant of Powers.

The railroad company appealed from the decision of the district land officers to the Commissioner of the General Land Office. On April 13th, 1895, the Commissioner rendered the following decision, directed to the register and receiver of the district land office at Walla Walla: "I have considered the contest of *Jacob Slaght v. Northern Pacific Railroad Company and William L. Powers, Intervener*, involving lots 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 east, the record in which

was transmitted with your letter of July 10th, 1889, on appeal by Jacob Slaght and said railroad company from your decision in favor of William L. Powers, intervener. The land is within the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed February 21st, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal of which was received at the local office November 30th, 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 Land Dec. 8, and 19 Land Dec. 87. On December 17th, 1883, the company selected the land in question under act of July 2d, 1864 (13 Stat. at L. 365, chap. 217), per list No. 1, and on the same day said company selected the land under acts of July 2d, 1864 (13 Stat. at L. 365, chap. 217), and May 31st, 1870 (16 Stat. at L. 378), for indemnity purposes per amendatory list No. 2. On October 31st, 1887, Jacob Slaght presented an application to make homestead entry for this land, and alleged that he settled and established his actual residence thereon March 4th, 1883, and the same has been continuous; that he built a house 12x14 feet, a kitchen 10x12 feet, a stable, dug a cellar, and broke a garden spot, and built a half mile of fence, and that his improvements are worth about \$275. The company was duly notified of said application and filed its objections against the acceptance of the same December 2d, 1887. Upon the issuance of notice to the parties in interest, a hearing \*in the case was had and concluded April 4th, 1889, at which all parties were represented. The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March, 1883; that he broke and planted a garden; that within a few days after moving in the log house on the land he built an addition thereto; that in September, 1883, he built a house 12x14 feet, a kitchen, a stable, a chicken house, dug a cellar, and fenced about 80 acres; that his residence on the above-described tracts of land has been continuous since March 1st, 1883, and that his improvements are worth \$400, and that he is a qualified settler."

After stating the substance of the evidence adduced, the Commissioner proceeded: "Therefore, in view of this showing, your decision in favor of William L. Powers is hereby reversed; likewise your decision adverse to Jacob Slaght. Your opinion that said company's selection as to this land was improperly allowed, and that the company had no right to the land prior to its selection, and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be canceled, was in accordance with the uniform practice of the Department, and I concur therein. Accordingly, said amendatory list No. 2 of selections of December 17th, 1883, by said company is hereby held for cancellation as to said lots 10, 11, 14, and 15, sec. 1, twp. 16



N., R. 45 E. The usual time, sixty days after notice, will be allowed the railroad company and William L. Powers within which to appeal to the honorable Secretary of the Interior. Should this decision become final, Slaght will be permitted to make homestead entry for this land. You will advise him of this action."

From the decision of the Commissioner the Northern Pacific Railroad Company appealed to the Secretary of the Interior, who, in 1896, affirmed the action of the Commissioner.

In 1897 Slaght received from the Interior Department letters patent of the United States conveying to him lots 10, 11, 14, and 15.

[178] The plaintiffs averred that the letters patent were issued to Slaght under a misconstruction and misinterpretation of the "law; that long prior to the settlement upon the land by Slaght the lands and each and all of them had been reserved for the use and benefit of the railroad company; that the plaintiff Powers had settled upon the lands with the intention of purchasing them from the company; that the lands were subject to selection by the company, and by its selection thereof it acquired the title in and to the same; that at the time Slaght applied to enter the land, and at the date of the hearings in the contest above referred to, and at the date of the issuing of the letters patent to him, the land was not, nor was it at any of those times, public land subject to settlement or entry under the land laws of the United States other than the act of Congress approved July 2d, 1864, above referred to, granting lands to the railroad company; and that the officers of the Interior Department were without authority to issue letters patent purporting to convey the land to Slaght, because the United States had, long prior to the issuing of those letters, parted with the title to the railroad company.

The complaint stated that the other of the above-named plaintiffs in this cause asserted and claimed title to certain portions of the lands in dispute under and by virtue of conveyances from Powers and his grantees.

It was also averred that the plaintiff Powers had conveyed to various parties, with warranty to defend the title thereof, certain other portions of the land; that the questions involved and to be determined in this action were of common and general interest to many persons, who were so numerous that it was impracticable to bring them into court; that the plaintiffs and such other persons were the owners in fee simple, and had an indefeasible title, and were in possession of the lots named, and the defendant claimed an interest or estate therein adverse to the plaintiffs, but that defendant had no estate, right, title, or interest whatever in the same or to any part thereof; that the defendant was threatening to commence divers suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and the other numerous parties of and from the premises or a portion thereof, and unless restrained by an order of court would bring such suits, and 180 U. S.

would also without suit forcibly "enter the [179] premises and without any right whatever eject and dispossess them; and that thereby a multiplicity of suits would be caused and great costs and injuries inflicted upon them, the courts of the state greatly and unnecessarily burdened, and great and irreparable injury wrought to the other parties having common and general interest in the question involved in the cause.

The plaintiff therefore prayed, among other things, that the letters patent issued to Slaght be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of the plaintiffs and of the various persons to whom the plaintiff Powers had conveyed any portion of the land in dispute; that Slaght be decreed to be a trustee holding such right, title, and interest in and to those lands as he acquired under and by virtue of such letters patent, if any, for the benefit of the plaintiff Powers and his grantees, both direct and through mesne conveyances, and that Slaght be required to convey such right, title, and interest, if any, to the plaintiff Powers and his grantees. The plaintiffs also prayed for such other and further relief as was equitable and just.

A demurrer to the amended complaint was sustained, and the plaintiffs electing not to plead further, the action was dismissed.

The judgment of dismissal was affirmed by the supreme court of the state of Washington upon the authority of the decision of that court in *Moore v. Cormode*, 20 Wash. 305, 713, 55 Pac. 217, 1103, just decided upon appeal to this court.

**Messrs. C. W. Bunn and James B. Kerr** argued the cause and filed a brief for plaintiffs in error.

For contentions of these counsel, see their brief as reported in *Hewitt v. Schultz*, ante, 463.

**Mr. U. L. Ettinger** submitted the cause for defendant in error. *Messrs. Charles M. Wyman and Thomas Neill* were with him on the brief:

The lands embraced within the terms of section 6 of the grant are withdrawn by force of the statute. The lands in controversy were not within the 40-mile strip, and were not, therefore, withdrawn by the terms of the statute.

*United States v. Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 26; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Bultz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205;

*Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; *Northern P. R. Co. v. Miller*, 7 Land Dec. 104; *United States v. Oregon & C. R. Co.* 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269; *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *Atlantic & P. R. Co.* 6 Land Dec. 77; *Cole v. Northern P. R. Co.* 17 Land Dec. 8; *Florida C. & P. R. Co.* 15 Land Dec. 529; *Missouri, K. & T. R. Co. v. Troxel*, 17 Land Dec. 122; *Northern P. R. Co. v. Lillethun*, 21 Land Dec. 487; *Northern P. R. Co. v. Davis*, 19 Land Dec. 87; *Southern P. R. Co. v. Kanawyer*, 23 Land Dec. 500; *Grunewald v. Northern P. R. Co.* 24 Land Dec. 195; *Northern P. R. Co. v. St. Paul, M. & M. R. Co.* 25 Land Dec. 67; *Northern P. R. Co. v. Streid*, 26 Land Dec. 589; *Stuart v. Southern P. R. Co.* 22 Land Dec. 61; *Elling v. Thexton*, 7 Mont. 330, 16 Pac. 931; *Grandin v. La Bar*, 3 N. D. 446, 57 N. W. 243; *Moore v. Cormode*, 20 Wash. 305, 55 Pac. 217; *Van Wyck v. Knevals*, 106 U. S. 366, 27 L. ed. 201, 1 Sup. Ct. Rep. 336.

The order of the department directing the withdrawal of lands beyond the 40-mile strip conveyed no interest in the lands to the company and was revocable.

*Atlantic & P. R. Co.* 6 Land Dec. 77-93; *Wood v. Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; *Riley v. Welles*, 154 U. S. 578, and 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; *Wolcott v. Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 915; *Northern P. R. Co.* 2 Land Dec. 516; *Southern P. R. Co.* 18 Land Dec. 315; *Southern P. R. Co. v. McWharter*, 14 Land Dec. 612; *Southern P. R. Co. v. Meyer*, 9 Land Dec. 250; *Northern P. R. Co. v. Miller*, 7 Land Dec. 100; *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *Knight v. United Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779.

The alleged selections preceding the entry were not approved by the Secretary of the Interior, and were insufficient to defeat the entry of the defendant in error.

*Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Northern P. R. Co. v. Miller*, 7 Land Dec. 123; *Northern P. R. Co.* 25 Land Dec. 512; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *Northern P. R. Co. v. Musser-Sauntry* 482

*Land, Logging, & Mfg. Co.* 168 U. S. 605, 42 L. ed. 597, 18 Sup. Ct. Rep. 205; *Northern P. R. Co. v. De Lacey*, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791; *Atlantic & P. R. Co.* 8 Land Dec. 373; *Northern P. R. Co. v. Miller*, 11 Land Dec. 1, 428; *Southern Minnesota R. Extension Co.* 12 Land Dec. 518; *Florida C. & P. R. Co.* 15 Land Dec. 529; *Wood v. Burlington & M. River R. Co.* 104 U. S. 329, 26 L. ed. 772; *Willey v. Northern P. R. Co.* 22 Land Dec. 606; *La Bar v. Northern P. R. Co.* 17 Land Dec. 406; *Northern P. R. Co. v. Lynch*, 22 Land Dec. 609; *Southern P. R. Co. v. McKinley*, 22 Land Dec. 493; *Washington v. Northern P. R. Co.* 22 Land Dec. 482; *Northern P. R. Co. v. Holtz*, 22 Land Dec. 309; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 8 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020; *United States v. Colton Marble & Lime Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163; *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305; *Grunewald v. Northern P. R. Co.* 24 Land Dec. 195.

\*Mr. Justice Harlan, after stating the [179] facts as above reported, delivered the opinion of the court:

The issue as to the validity of the order of withdrawal made by direction of the Secretary of the Interior of lands within the \*in- [180] demnity limits of the Northern Pacific Railroad Company, as indicated by the company's accepted map of definite location, presents the controlling question in this case. Unless such order be sustained as a valid exercise of power by that officer, there is no ground upon which a decree could be rendered against Slaght.

For the reasons stated in *Hewitt v. Schultz*, 180 U. S. 139, ante, 463, 21 Sup. Ct. Rep. 309, just decided, we hold, in conformity with the long-established practice in the Land Department, that that order of withdrawal must be regarded as inconsistent with the true construction of the act of Congress of July 2d, 1864. The judgment of the Supreme Court of Washington is, accordingly, affirmed.

Mr. Justice White concurred in the result.

Mr. Justice Brewer and Mr. Justice Shiras dissented.



J. M. MOORE, *Plff. in Err.*,  
v.

D. B. STONE, Ammwillis Allen, Alma May  
Stone, *et al.*

(See S. C. Reporter's ed. 180-185.)

*Railroad land grants—withdrawal of indemnity lands.*

The Secretary of the Interior is not authorized by the act of July 2, 1864, to withdraw from sale or entry under the pre-emption and homestead laws of the United States the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location, in advance of any selection based on ascertained losses of distinct tracts in the place limits.

[No. 48.]

*Argued October 15, 16, 1900. Decided January 7, 1901.*

IN ERROR to the Supreme Court of the State of Washington to review a decision affirming a judgment dismissing an action to establish a trust in lands held under patent from the United States. *Affirmed.*

See same case below, 20 Wash. 713, 55 Pac. 1103.

Statement by Mr. Justice Harlan:

[180] \*On the 12th day of December, 1883, the Northern Pacific Railroad Company selected the northeast quarter of section 3, in township 13, north of range 42 east, Willamette meridian, in Garfield county, Washington, under the direction of the Secretary of the Interior, as indemnity in lieu of other lands. In making the selection it filed in the district land office at Walla Walla a list showing the tract selected, at the same time tendering to the officers of the district land office the fees required by law. The tract was selected as public land to which the United States had full title, not reserved, sold, [181] granted, or otherwise \*appropriated, and free from pre-emption or other claim or rights. The list was accepted, allowed, and approved by the officers named on January 5th, 1884, and transmitted to the Commissioner of the General Land Office. On October 26th, 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, the railroad company designated the losses for which the above-described lands were selected as indemnity.

On the 30th day of June, 1884, the defendant, Dimon B. Stone, presented an application to make a pre-emption declaratory statement for the lands selected as above stated by the railroad company, to the district land office at Walla Walla, alleging settlement upon the land April 25th, 1882. His application was rejected, and on appeal to the Commissioner of the General Land Office a

hearing in the matter was ordered to determine the condition of the land at the date of its selection, and the respective rights of the defendant and the railroad company. At the hearing the officers of the district land office, in January, 1891, held that the settlement of the defendant and the application to file the pre-emption declaratory statement excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it; and the selection made was recommended to be canceled.

The railroad company appealed to the Commissioner of the General Land Office. In a decision rendered April 30th, 1895, and directed to the register and receiver at Walla Walla, that officer said: "The land is within the limits of withdrawal upon the line of amended general route of said road, the map showing which was filed Feb. 21st, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for withdrawal of which was received at the local office Nov. 30th, 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 Land Dec. 8, and 19 Land Dec. 87. . . . The testimony adduced at the hearing shows that Stone is a qualified settler, and established his actual residence with his family on the land about the middle of April, 1882, in a cabin he built upon the tract; that in the summer of 1882 he built a house 16 x 24 feet, one and a half \*stories high, dug a well, [182] and cultivated a garden; that in 1883 he cropped 15 acres to grain, in 1884 and 1885, 15 acres, and in 1886 and 1887, 40 acres, in 1888, 45 acres, in 1889, 140 acres, and in 1890, 15 acres; that he has fenced the whole place, and that his improvements are worth from \$700 to \$800. You are of the opinion that Co.'s selection as to this land was improperly allowed, and that the Co. had no right to the tract prior to its selection, and that as the land was occupied and improved as the home of a qualified settler at the date of such selection, that such selection as to the land in question should be canceled, and Stone's application to make pre-emption should be overruled; your ruling is in accordance with the uniform practice of the Department, and I concur in same. Therefore your decision is sustained, and the amendatory list No. 1 of selection of Jan. 5th, 1884, by said Co. is hereby held for cancellation as to the above-described tract of land."

On July 2d, 1895, the railroad company, by general warranty deed and for a valuable consideration, sold and conveyed the north half of section 3, in the above-named township, to the plaintiff Moore.

On May 20th, 1896, the Secretary of the Interior sustained the above decision of the Commissioner of the General Land Office.

The amended complaint of the plaintiff Moore, after setting out the foregoing facts, alleged that the above decision by the officers of the Land Department and the Secretary of the Interior were made and rendered under a misapprehension and mistake of law

and were contrary to law; that under the rules and practice of the Department of the Interior the decision of the Secretary finally closed and determined in that Department the controversy as to the tract of land, of which fact the parties received notice, the contest being closed July 10th, 1896; that thereafter the defendant made final proof and received a final receipt for the land, in which it was recited that he was entitled to a patent for the land from the United States; and that in 1897 a patent was issued to him.

[183] The plaintiff averred that the United States district land officers, the Commissioner of the General Land Office, and the Secretary \*of the Interior were wholly without jurisdiction to consider the application of the defendant Stone to make pre-emption entry of the land, for the reason that it was not public land of the United States subject to homestead entry, but at the time of the defendant's application had been withdrawn by order of the Secretary of the Interior from entry or sale under the settlement laws of the United States; that the railroad company was the owner in fee-simple of the premises and entitled to the legal title thereto and to a patent from the United States; that the patent issued to the defendant, or which, if not issued, would be issued to him, constituted the defendant a trustee holding the legal title for the benefit of the plaintiff, and cast a cloud upon his title.

It was set out in the complaint that in 1898 the wife of the defendant Stone died intestate, "leaving as her heirs the defendants herein, who, excepting defendant D. B. Stone, are her children and the only children surviving her, and the only children which she has or ever had; that the premises and property herein described, if any right or interest was ever acquired by defendant D. B. Stone, was acquired after his marriage with the said deceased; that some of said children of said deceased are of age and some are minors; that the names of those who are minors are Sylvia S. Jenks, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone; that the said Ammvillis Allen and Sylvia S. Jenks are married; that said children and defendants other than D. B. Stone have no other rights except as heirs of the said deceased."

The plaintiff therefore prayed that the defendants be declared trustees for the use and benefit of plaintiff; that by decree it be adjudged that defendants or either of them have no right, title, interest, or estate whatever in and to these lands and premises or any part thereof; that the title of plaintiff be decreed good, valid, and a fee-simple title; and that defendants be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to the premises; that any and all pretended claims of defendants or either of them be held for naught and canceled; that the defendants and each of them be enjoined

and debarred from asserting \*any claim what-[184] ever in or to the lands or any part thereof adverse to the plaintiff; that plaintiff have judgment quieting his title against defendants and each of them, and removing the cloud thereon created by the pretended claim or claims of defendants or either of them; that plaintiff be adjudged entitled to immediate and exclusive possession of the premises and the whole and every part thereof and be put into possession thereof by order of the court; and that plaintiff have such other or further relief as should seem meet, proper, and agreeable to equity.

The amended complaint was demurred to, and the demurrer was sustained; and the plaintiff declining to plead further, the action was dismissed. The judgment of dismissal was affirmed in the supreme court of the state, on the authority of *Moore v. Cormode*, 20 Wash. 305, 713, 55 Pac. 217, 1103.

*Messrs. C. W. Bunn and James B. Kerr* argued the cause and filed a brief for plaintiff in error.

For contentions of these counsel, see their brief as reported in *Hewitt v. Schultz*, ante, 463.

*Mr. George H. Patrick* argued the cause and, with *Mr. George Turner*, filed a brief for defendants in error.

For contentions of these counsel, see their brief as reported in *Moore v. Cormode*, ante, 476.

*Messrs. J. H. McGowan, George Turner, and George H. Patrick* filed an additional brief for defendants in error.

*Mr. Justice Harlan*, after stating the facts as above reported, delivered the opinion of the court:

As in the other cases just decided, the plaintiff's right to recover depended upon the validity of the order made by the Secretary of the Interior directing the withdrawal from sale or entry under the pre-emption and homestead laws of the United States of the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location. The order was based wholly upon the filing and acceptance of that map, and in advance of any selection based on ascertained losses of distinct tracts in the place limits.

For the reasons stated in *Hewitt v. Schultz*, 180 U. S. 139, ante, 463, 21 Sup. Ct. Rep. 309, such order must be regarded as not authorized by the act of July 2d, 1864, under which the railroad company and its grantee claimed title; and \*upon that ground the[185] judgment of the Supreme Court of the State of Washington must be and is affirmed.

*Mr. Justice White* concurred in the result.

*Mr. Justice Brewer and Mr. Justice Shiras* dissented.



CITY OF NEW ORLEANS, *Petitioner,*  
v.JOHN FISHER, Tutor, etc., *et al.*

(See S. C. Reporter's ed. 185-199.)

*Accounting by city for school taxes held in trust—statute of limitations—collateral impeachment of judgment—attack on creditors' bill—striking off irregular plea—jurisdiction of Federal court—in ancillary action—refusal of leave to file plea—interest on school tax collected as penalty—liability of city to creditors of school board—running of interest on school taxes held by city.*

1. Judgment creditors of a city school board, whose claims are payable out of the school taxes, are entitled to require the city to account for the amount of such taxes collected and held in trust by the city for the payment of the expenses of the public schools, where the school board declines to compel such an accounting.
2. The ten years' statute of limitations is no bar to a suit by judgment creditors of a city school board, whose claims are payable out of the school taxes, to require the city to account for the amount of such taxes collected and held in trust by it for the payment of the expenses of the public schools, where the bill was filed within ten years after the judgments were rendered.
3. A judgment of the circuit court of the United States as to the competency of the plaintiff's assignors to sue in that court, and the diversity of citizenship between the parties, is not open to impeachment on either ground, either collaterally or on a creditors' bill, where an objection to jurisdiction on the first ground was raised and overruled in the proceedings resulting in the judgment, and the petition alleged diversity of citizenship.
4. The action of the circuit court of the United States in striking off as irregular a plea to the jurisdiction, which was put upon the files without leave of court, is not open to review.
5. Diversity of citizenship between the parties is not necessary to the jurisdiction of the circuit court of the United States in an ancillary action to enforce the payment of a judgment of that court out of a fund which by such judgment was made liable for its payment.
6. The refusal by the circuit court of the United States of an application for leave to file a plea in an ancillary action, alleging that plaintiff was a citizen of the same state with defendant at the time the original action was

NOTE.—As to conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 75; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429, and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to diverse citizenship as ground for Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* (C. C. W. D. Va.) 1 L. R. A. 108, and note; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

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brought, and had so continued down to the filing of the bill, but had fraudulently otherwise represented, and that defendant had no knowledge of these facts until after exceptions to the master's report were filed, is not an abuse of discretion, where nothing was said in the proposed plea as to the citizenship of a coplaintiff who was a necessary or proper party, and who, the record showed, was an alien.

7. Interest collected by a city as a penalty for nonpayment of school taxes forms no part of the city's revenues, but should be included with the taxes, where the city holds them in trust for the purpose of paying the expenses of the public schools.
8. The city of New Orleans cannot be permitted to escape liability to the creditors of the school board for the amount of interest collected by it as a penalty for delayed payment of school taxes, on the ground that school taxes are not within La. Acts 1879, act No. 48, § 9, inflicting such penalty on "all taxes imposed by the city."
9. Interest will not commence to run upon the amount of school taxes collected by a city as agent for its school board and retained by it, until after a failure to pay such sums when required so to do, or failure to account on demand.

[No. 46.]

Argued October 12, 1900. Decided January 28, 1901.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision modifying a decree of the Circuit Court on a creditors' bill against a city. *Decree modified and affirmed.*

See same case below, 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. Rep. 574.

Statement by Mr. Chief Justice Fuller:

\*This was a bill filed by Mrs. M. M. Fisher, [185] joined and authorized by her husband, John Fisher, citizens of the Kingdom of Spain, May 11, 1896, against the city of New Orleans, in the circuit court of the United States for the eastern district of Louisiana, which alleged—

"That she recovered a judgment in this honorable court against the board of school directors, a corporation created by the laws of the state of Louisiana, and a citizen thereof, in the sum of more than \$10,000, as more fully appears by the record of said suit;

"That your oratrix obtained two other judgments against \*the same school board, [186] before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars;

"That all of said judgments are now final; that they are made payable out of the school taxes levied by the city of New Orleans prior to 1879.

"Your oratrix avers that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of the city of New Orleans.

"1st. That the city of New Orleans has

failed to collect the said taxes punctually, and that it was through her fault and negligence that the same remain uncollected, and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

"2d. Your oratrix further complains and says that said taxes, under the law, carried interest at the rate of 10 per cent per annum, and that the city of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

"3d. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into, and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

"That in violation of this constitutional right the state of Louisiana passed act No. 82 of 1884, which directed that the property of delinquent taxpayers should be sold for what it would bring, and that all taxes due thereon should by virtue of said sale be canceled.

"That by reason of said law the city of New Orleans allowed the property on which the school taxes were due to be sold for state taxes, and she caused the city taxes, including the school taxes, to be canceled; that she was thus guilty, 1st, as a delinquent trustee for not having enforced the collection of the said tax; and, 2d, for having failed to protect the interest of your oratrix at said state tax sale; that the cancelations thus made amount to many thousands of dollars.

[187] \*4th. That the said city of New Orleans at various times passed ordinances canceling and annulling the said taxes and remitting the interest thereon;

"That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the city of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

"That the board of school directors to whom the city of New Orleans should account have refused to demand such an account, and will continue so to do, and your oratrix would be left without a remedy.

"That the fund which the city of New Orleans administers seems now to be insufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

"Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879, and she has an equitable lien thereagainst enforceable before a court of equity.

"She further avers that under the law her certificates which are merged in her judgments have been, under the law, received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors.

"That for those reasons your oratrix brings her bill against the city of New Or-

leans and the board of directors of the city schools of New Orleans for an account.

"Your oratrix brings this bill for herself and all parties similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto."

The prayer was that the city school board and the city answer, and "give a full, fair, and perfect account of all the school taxes collected by the city of New Orleans for the years 1873, 1874, 1875, 1876, 1877, and 1878; of all the interest received thereon by said city and never accounted for; of all the taxes which were not collected for want of proper enforcement, and which have since been canceled both by sales made by the state tax collectors and by ordinance adopted by the city council;" and for general relief.

\*Subsequently a supplemental bill was filed [188] in respect of property alleged to have been acquired by the city through seizures for taxes.

The bill was taken as confessed as against the school board, and general demurrers were filed by the city, and overruled.

The city thereupon, March 12, 1897, answered, admitting "that oratrix recovered judgments against the board of school directors, a corporation of the state of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans, as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein; . . . that all of said judgments are now final and are payable as decreed and provided for in the said judgments;" but denying "that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city;" and "that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be."

Also admitting "that the city of New Orleans had never paid to the school board any interest which she may have collected on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent taxpayers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes, and cannot by her be used for school purposes or for any other purpose than that commanded by law;" and denying "that the school board created the obligation against the school taxes, set forth in oratrix's bill of complaint, by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United States herein, [189] and denies that the provisions of the same



regarding impairment of contracts have been in any manner violated by this defendant; . . . that act No. 82 of 1884 was passed in violation of any constitutional rights of oratrix in the premises, and defendant declares that whatever was done by the state of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment, and repeal by the same authority which created them; and defendant shows and avers that the city of New Orleans had no authority or control over the action of the legislature in the premises; . . . that the city of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be canceled; . . . that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes; denies that she ever was a trustee in the matter; denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce; denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales; denies that oratrix had any such interest, and denies that there were any such tax sales; . . . that any cancelations amounting to many thousands of dollars, or to any amount, were made by reason of said sales as set forth in oratrix's bill of complaint; . . . that the city of New Orleans passed ordinances canceling and annulling any taxes, or remitting any interest thereon, but if any taxes were so canceled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys, or appropriations such as are set forth in oratrix's bill of complaint."

[190] The answer further denied "that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And \*further answering defendant says that if any such cause of action for an accounting ever did exist in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exigent in the year 1880, and in the years following the year 1873 up to 1879 inclusive; that said action of accounting was personal to said school board, and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises;" and "that there is any fund now administered, or which ever was administered, by the city of New Orleans, derived either from appropriations, taxes, or moneys said to be due said  
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school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises."

It was admitted "that the judgments of oratrix are payable as stipulated in said judgments," but denied "that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof;" and also "that under the law were the certificates which she alleges have been merged in her judgments ever received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors."

The city further denied the purchase of property "for the taxes due for the years during which oratrix's claim is alleged to have arisen;" any resulting trust if purchases had been made; any statutory lien; and "that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court."

Replication was filed, and the cause referred to a master "to take a full, true, fair, and perfect account of all the funds, principal and interest, received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877, and 1878, of all interest remitted illegally, of all properties purchased for said taxes as more fully prayed in the bill and supplemental bill filed herein, and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises."

\*Numerous persons claiming to have judgments against the school board, similar to the judgments of Mrs. Fisher, intervened and asked to share in the proceeds of any amount found to be due by the city of New Orleans on the accounting. May 22, 1897, the master reported:

"1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of \$23,180.03.

"2d. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is \$48,758.75.

"It is a question of law whether the school board is entitled to any part of the interest. I think it is. The interest as a mere accessory of the principal belongs, in my opinion, to the same person to whom the principal belongs. Accordingly, in my opinion, the amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is, as above stated, \$71,938.78."

That complainant had abandoned the attempt to show that the city owed anything on account of properties purchased for taxes. That the city was not chargeable "with the calculated amount of interest not collected."



And "that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board; in the civil district court for the parish of Orleans, namely:

M. M. Fisher.....	\$11,094 87
" .....	8,802 39
" .....	5,864 64
T. J. Gasquet.....	57,059 69
Jose Venta .....	21,297 72"

Complainants with several interveners filed exceptions to the master's report, and on June 7, 1897, the city of New Orleans filed exceptions as follows:

"Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a mere [192]\*accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the city of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

"1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein; but in the event that the court overrules this exception and holds that such was his duty, then and in that case the city of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

"Defendant excepts to the statement of the master that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board of liquidation at any time since its collection."

June 29, 1897, the city filed an exception to the jurisdiction of the court *ratione materiae et personae*, averring "that plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action;" and on July 1 a plea in abatement "that plaintiff, Mrs. M. M. Fisher, and defendant are both citizens of the state of Louisiana, and that by reason thereof this court is without jurisdiction *ratione personae*." This exception and plea were afterwards stricken from the files as irregular and not filed in accordance with the rules. The city then offered in open court to file a motion and a plea further attacking the jurisdiction of the court, but leave was refused; and thereafter the case came on for final hearing on the bill, answer, replication, exhibits, proofs and testimony, and master's report.

Included in the evidence offered on behalf of complainant were the pleadings and judgment in the cause of Mrs. Fisher against the school board, in which judgment was rendered in the circuit court, May 19, 1892. The petition in that case alleged that Mrs. Fisher and her husband were "both citizens of the Kingdom of Spain residing in the island of Cuba;" counted \*upon a judgment

against the school board rendered by the civil district court of the parish of Orleans; and stated that the claim which formed the basis of the judgment was for salary due petitioner as a school teacher of the public schools of the city, and for the salary of other teachers whose claims had been transferred to petitioner. The defendant filed an exception to the effect that the court was without jurisdiction, as the rights, credits, and school warrants proceeded on were held by petitioner under assignments, and that the assignors were all citizens of the state of Louisiana and without right to sue defendant in the circuit court. This exception was tried before a jury and a verdict rendered in favor of petitioner, whereupon the exception was overruled, and judgment was thereupon rendered in favor of petitioner for \$8,097.17, the amount of the judgment rendered in the state court. It appeared that on this judgment garnishee process had been served on the city treasurer and *ex officio* treasurer of the school board, and the sums of \$1,893.09 and of \$312.56, less costs, realized in 1894 and in 1895.

On February 21, 1898, the court gave judgment in favor of plaintiffs and interveners, and, among other things, decreed: "That the city of New Orleans, trustee of the special school taxes levied and collected for the years 1871 to 1878 inclusive, be condemned to pay plaintiff and interveners the said taxes, received and collected by her, as follows: \$71,938.78 with 5 per cent interest per annum on \$71,139.60 from January 24th, 1881, and on \$799.18 from May 11th, 1896, until paid. And it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary."

Mrs. Fisher died February 25, 1898, and on April 22, 1898, John Fisher was made party complainant as natural tutor of his minor children. April 23, 1898, the city filed a petition for rehearing, which was denied, but the court directed the final decree to be amended so as to only allow interest on the amount recovered, to wit, \$71,139.60 from February 21, 1898, the date of said decree, instead of from January 24, 1881, as theretofore allowed. On the same day, April 23, and prior to the decision on the rehearing, a plea in abatement was put in by the city to the effect that John Fisher, being a citizen of Spain, was unable \*to prosecute the suit [194] and that it should be abated because a state of war existed between Spain and the United States and the subjects and citizens thereof. On the proofs the court was satisfied that complainant was a citizen of Great Britain, whereupon the plea was overruled. From the decree of the circuit court both parties appealed to the circuit court of appeals for the fifth circuit, which modified the decree so as to allow 5 per cent interest on the sum of \$71,139.60 from January 24, 1881, and on the sum of \$799.18 from May 8, 1897, and as so modified the decree was affirmed, with costs. 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. Rep. 574.

The city applied to this court for the writ of certiorari, which was granted.



**Messrs. James J. McLoughlin and Branch K. Miller** argued the cause, and, with **Mr. Samuel L. Gilmore**, filed a brief for petitioner:

Under § 5 of the act of Congress of March 3, 1875 (18 Stat. at L. p. 470, chap. 137), it is the duty of the circuit court to stop all further proceedings in, and to dismiss, any suit in which it shall appear, at any time after the institution of the same, that the parties have been improperly or collusively made or joined either as plaintiffs or defendants. Such fact may be brought to the notice of the court by defendant by a plea in abatement, by the answer, by affidavit, or otherwise. If the court should acquire knowledge of such facts without the action of any party to the suit, or even if the parties should consent to proceed with the case notwithstanding the want of jurisdiction, it is the duty of the court of its own motion in such case to deny its own jurisdiction and dismiss the suit.

*Williams v. Nottawa*, 104 U. S. 211, 26 L. ed. 720; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 325, 32 L. ed. 693, 9 Sup. Ct. Rep. 289; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382, 28 L. ed. 463, 4 Sup. Ct. Rep. 510; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 374, 34 L. ed. 367, 10 Sup. Ct. Rep. 1004; *Ander-son v. Watt*, 138 U. S. 701, 34 L. ed. 1080, 11 Sup. Ct. Rep. 449; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 337, 40 L. ed. 448, 16 Sup. Ct. Rep. 307.

Even if the present suit be considered ancillary to the original one, in which complainant obtained a judgment at law in the circuit court, the jurisdiction of the first case could be attacked here as effectively as it could have been in the former suit.

*Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402; *Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456.

Interest on taxes, imposed as a penalty for delinquency or as an inducement for prompt payment, is not an accessory of the taxes, or a part thereof. The right to such tax does not carry with or include in it a right to such interest.

*Slack v. Ray*, 26 La. Ann. 675; *State v. New England Mut. Ins. Co.* 43 La. Ann. 142, 8 So. 888; *McChesney v. People ex rel. Johnson*, 99 Ill. 216; *People v. Smith*, 94 Ill. 226; *Silsbee v. Stockle*, 44 Mich. 576, 7 N. W. 160, 367; *Flint & P. M. R. Co. v. Saginaw County Treasurer*, 32 Mich. 260; *Scammon v. Chicago*, 44 Ill. 269; *Nance v. Hopkins*, 10 Lea, 508; *Myers v. Park*, 8 Heisk. 550; 2 Desty, Taxn. p. 574.

**Messrs. James B. McLoughlin, and Branch K. Miller**, also filed a supplemental brief for petitioner:

When a plea is filed, accompanied by the affidavit of the mayor of a great city, charging the complainant with obtaining jurisdiction of the court by fraud and imposition, 180 U. S.

and the plea on its face specifies the fraudulent acts and the fact of their discovery only after issue joined, the court should receive and try the plea.

*Gracc v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521.

When a suit is brought on a judgment the court may go behind the judgment for the purpose of ascertaining whether the cause of action on which that judgment was based was such as could give the Federal courts jurisdiction.

*Wisconsin v. Pelican Ins. Co.* 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370.

If such inquiry establishes the fact that the original choses in action were not suable in the Federal court, or that no averment was made that the original holders could sue in the Federal court, the suit should be dismissed for want of jurisdiction.

*New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

A penalty imposed upon a taxpayer for delinquency forms no part of the tax. Taxes are not debts. Interest on taxes is really a penalty.

*Saunders*, Taxn. p. 244; *Cooley*, Taxn. p. 13; *Ryan v. State ex rel. Eller*, 5 Neb. 276; *McInerney v. Reed*, 23 Iowa, 410; *People ex rel. Johnson v. Peacock*, 98 Ill. 172; *Flint & P. M. R. Co. v. Saginaw County Treasurer*, 32 Mich. 260. See also *New Orleans v. Davidson*, 30 La. Ann. 541, 31 Am. Rep. 228; *Shreveport v. Gregg*, 28 La. Ann. 836; *Morris v. Lalaurie*, 39 La. Ann. 53, 1 So. 659.

The present suit, raising, as it does, new and original issues against a new defendant, for the purpose of obtaining relief of a special character, in nowise definable as the execution of a judgment as ordinarily understood, is an independent, original action.

*Anglo-Florida Phosphate Co. v. McKibben*, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529; *Lackawanna Coal & I. Co. v. Bates*, 56 Fed. 737; *Boyd v. Bradish*, 10 Fed. 406; *Pettus v. Georgia R. & Bkg. Co.* 3 Woods, 620, Fed. Cas. No. 11,048; *Bondurant v. Watson*, 103 U. S. 286, 26 L. ed. 449.

An ancillary proceeding in the Federal court has been determined as equivalent to a supplemental bill. A supplemental bill can be brought only where the subject-matter and the parties are the same in both proceedings.

*Root v. Woolworth*, 150 U. S. 411, 37 L. ed. 1125, 14 Sup. Ct. Rep. 136.

Where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind, on a different principle, the latter being the province of a bill of review.

*Story*, Eq. Pl. 9th ed. ¶ 338. See also *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* 47 Fed. Rep. 351.

Wherever a party seeks the aid of a court of equity to enforce either a judgment at law or a decree in equity, he does so at the risk of being called upon to maintain the validity



of the judgment or decree which he thus seeks to enforce.

*Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402; *Guy v. Parpart*, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456; *Wadhams v. Gay*, 73 Ill. 415; *Dan. Ch. Pl. & Pr.* 6th Am. ed. 1586, note (a); *Consolidated Electric Storage Co. v. Atlantic Trust Co.* 50 N. J. Eq. 97, 24 Atl. 229.

Mr. Charles Loque argued the cause and filed a brief for respondents:

The school board should have brought the action for an accounting. They refused to do it; hence the creditors of the trust fund have the right to avail themselves of the powers of a court of equity to reach the funds destined to their payment.

*Webb v. Central Vermont R. Co.* 9 Fed. 793; *Pacific R. Co. v. Atlantic & P. R. Co.* 20 Fed. 277; *Tucker v. Palmer*, 3 Brev. 47; *Brown v. Ricks*, 30 Ga. 777; *Hitchcock v. Linsly*, 17 Hun, 556; *Howard v. Gilbert*, 39 Ala. 726; 2 Perry, Tr. 3d ed. p. 470, §§ 816, 845, 885; 2 Spence, Eq. Jur. pp. 32, 33; *Fowle v. Lawrason*, 5 Pet. 485, 8 L. ed. 204; 1 Story, Eq. Jur. § 454; 2 Story, Eq. Jur. § 648; *Foster*, Fed. Pr. 2d ed. p. 662; *United States v. Myers*, 2 Brock. 516, Fed. Cas. No. 15,844; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *Grant*, Corp. 138; 2 Dill. Mun. Corp. § 729, note; Lord Bacon's Orders, Tothill, p. 50; *Carew v. Johnston*, 1 Sch. & Lef. 305; *Badger v. McNamara*, 123 Mass. 117; *Atty. Gen. v. Foundling Hospital Governors*, 2 Ves. Jr. 45; *Brown v. Higgs*, 5 Ves. Jr. 505; *Atty. Gen. v. Dublin*, 1 Bligh, N. R. 337; *Atty. Gen. v. Carlisle*, 2 Sim. 449; *Atty. Gen. v. Exeter*, 2 Russ. Ch. 45; *Atty. Gen. v. Exeter*, 3 Russ. Ch. 395; *Hill v. Smith*, 1 Swanst. 197 et seq.

Every *cestui que trust* is entitled to the aid of a court of equity.

*Lechmere v. Carlisle*, 3 P. Wms. 222; *Vernon v. Vernon*, 2 P. Wms. 595; *Collinson v. Patrick*, 2 Keen, 134; *Featherston v. Richardson*, 68 Ga. 501; *Robinson v. Mauldin*, 11 Ala. 977; *Jones v. Dougherty*, 10 Ga. 273; *Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479.

The statute of limitations cannot be pleaded in bar to a trust.

*Oliver v. Piatt*, 3 How. 411, 11 L. ed. 657; *Dan. Ch. Pl. & Pr.* p. 642; *Perry*, Tr. p. 508; *De St. Romes v. Levee Steam Cotton Press*, 20 La. Ann. 382; *Hyde v. Erwin*, 12 Rob. (La.) 536; *Neel v. Hibard*, 30 La. Ann. 808.

The circuit court had jurisdiction without regard to the question of citizenship of the parties, inasmuch as this case is ancillary to the original case.

*Krippendorff v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *Root v. Woolworth*, 150 U. S. 413, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136; *Lacassagne v. Chapuis*, 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 659; *Skillern v. May*, 6 Cranch, 267, 3 L. ed. 220; *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. ed. 300; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Kennedy v. Bank of Georgia*, 8

How. 586, 12 L. ed. 1209; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Evers v. Watson*, 156 U. S. 533, 39 L. ed. 522, 15 Sup. Ct. Rep. 430.

If the Federal court erred in assuming jurisdiction, its final decree, being unmodified and unreversed, cannot be treated as a nullity, and cannot be assailed collaterally.

*Dowell v. Applegate*, 152 U. S. 339, 38 L. ed. 467, 14 Sup. Ct. Rep. 611; *Laing v. Rigney*, 160 U. S. 539, 40 L. ed. 527, 16 Sup. Ct. Rep. 366; *Börs v. Preston*, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Mattingly v. Nye*, 8 Wall. 370, 19 L. ed. 380.

The city stands before this court in a very unenviable light. She kept part of the trust fund for her own use, she falsified the account, and now that the facts are clearly proved she still resists by technicalities their just payment. Under the strict rules of chancery, more than simple interest is allowable.

*Dan. Ch. Pl. & Pr.* p. 1369, 5th ed. by Perkins; *Pearse v. Green*, 1 Jac. & W. 135; *Johnson v. Prendergast*, 28 Beav. 480; *Davenport v. Stafford*, 14 Beav. 319, 2 De G. M. & G. 901; *Fay v. Howe*, 1 Pick. 527, 2d ed. 528 and cases cited in note (1); *Boynnton v. Dyer*, 18 Pick. 1; *Hughes v. Smith*, 2 Dana, 253; *Karr v. Karr*, 6 Dana, 3; *Hodge v. Hawkins*, 21 N. C. (1 Dev. & B. Eq.) 566; *Ringgold v. Ringgold*, 1 Harr. & G. 11, 18 Am. Dec. 250; *Re Harland*, 5 Rawle, 323; 2 Kent, Com. 231, note; *Diffendorffer v. Winder*, 3 Gill & J. 311; 2 Story, Eq. Jur. 1277; *Clarkson v. De Peyster*, Hopk. Ch. 424; *Rogers v. Rogers*, Hopk. Ch. 515; *Dornford v. Dornford*, 12 Ves. Jr. 127, note (a); *Evertson v. Tappen*, 5 Johns. Ch. 497.

Where a trustee has employed the trust money in trade, and refuses to account, he will be charged with compound interest.

*Schicffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *McKnight v. Walsh*, 23 N. J. Eq. 137; *Newton v. Bennet*, 1 Bro. Ch. (Perkins' ed.) 361, 362; *Frey v. Demarest*, 17 N. J. Eq. 71; *Barney v. Saunders*, 16 How. 542, 14 L. ed. 1052.

The court has even gone the length of charging an accounting party with interest on the balance in his hands, on further consideration, not only where there was no reservation of the question of interest by the original decree, but even where the original bill did not pray that he might be so charged, and where the circumstances were such that a claim for interest existed, and was known to exist, at the time of the filing of the bill.

*Turner v. Turner*, 1 Jac. & W. 39; *Pearse v. Green*, 1 Jac. & W. 135; *Good v. Blewitt*, cited in 1 Jac. & W. 142; *Wilson v. Metcalf*, 1 Russ. Ch. 530; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Stafford v. Fiddon*, 23 Beav. 386; *Johnson v. Prendergast*, 28 Beav. 480; *Fry v. Fry*, 10 Jur. N. S. 983.

Interest has been allowed against the city of New Orleans in several cases in which the city was sued as a delinquent obligee.



*Creole Steam Fire Engine Co. No. 9 v. New Orleans*, 39 La. Ann. 381, 3 So. 177; *Fernandez v. New Orleans*, 42 La. Ann. 3, 7 So. 57; *Barber Asphalt Paving Co. v. New Orleans*, 43 La. Ann. 474, 9 So. 484.

If the city be an agent, as the supreme court said in the *Labatt Case*, 38 La. Ann. 283, the judgment is correct in allowing interest.

In no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by the force of the judgment or decree. If the judgment is reversed it is the duty of the court to restore the parties to their rights.

*Erwin v. Lowry*, 7 How. 184, 12 L. ed. 660.

Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not and never was a bar to a writ of error where it appeared that the levy was made or the payment was received prior to the service of the writ; and there is no well-considered case which affords the slightest support to any such proposition.

*United States v. Dashiell*, 3 Wall. 702, 18 L. ed. 270; *Embry v. Palmer*, 107 U. S. 8, 27 L. ed. 348, 2 Sup. Ct. Rep. 25; *O'Hara v. McConnell*, 93 U. S. 154, 23 L. ed. 843; *Erwin v. Lowry*, 7 How. 184, 12 L. ed. 655.

*Messrs. Charles Loque and E. Howard McCaleb* filed a brief in opposition to the petition for certiorari.

[194] \*Mr. Chief Justice Fuller delivered the opinion of the court:

Fourteen errors were assigned in the circuit court of appeals, which were considered and disposed of *seriatim*. Many of these alleged errors raised questions not within the exceptions to the master's report, and, in any view, we think the case may be determined without minutely retraversing the ground.

Mrs. Fisher and her husband recovered judgment against the board of school directors in the state district court May 22, 1890, which, on appeal, was affirmed by the supreme court. *Fisher v. New Orleans Directors of City Schools*, 44 La. Ann. 184, 10 So. 494.

February 23, 1892, Mrs. Fisher and husband brought an action against the school board on the judgment so recovered, in the circuit court of the United States for the eastern district of Louisiana. The petition set forth that Mr. and Mrs. Fisher were citizens of the Kingdom of Spain, and that the judgment sued on was recovered on certain claims for school teachers' salaries, including Mrs. Fisher herself. An exception was filed to the jurisdiction of the court on the ground that the assignors \*of the school warrants held by Mrs. Fisher as assignee could not have sued in that court. The matter was submitted to a jury, and a verdict returned in plaintiffs' favor, whereupon the exception was overruled, and afterwards the case went to judgment payable out of the school taxes levied prior to 1879. This judgment was rendered May 19, 1892, and on

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May 11, 1896, the present bill, in the nature of a creditors' bill, was filed on behalf of Mrs. Fisher, joined and authorized by her husband (setting up that judgment and others), and of all others similarly situated, to compel an accounting for their benefit by the city in respect of the school taxes levied prior to 1879, and the interest thereon, collected and not paid over to the school board, as a trust fund for the payment of the expenses of the public schools, it being averred that the school board had refused to require such accounting.

After demurrer filed and overruled, the city answered, admitting the recovery of the judgments as alleged; that they had become final; and that they were payable as provided therein; and denying that the school taxes collected constituted a trust fund; any liability for interest collected; any privity between Mrs. Fisher and the city; and pleading prescription by the lapse of ten years.

The cause was referred to a master, who reported certain amounts of school taxes, and of interest on school taxes, collected by the city. The city filed exceptions to the conclusions of the master that the city was indebted to the school board for interest collected; and that the amount reported as collected out of the school taxes from 1871 to 1878 inclusive was due by the city to the school board "at any time since its collection."

The facts are not in controversy, and the questions raised, or attempted to be raised, are questions of law.

The bill invoked the ordinary exercise of equity jurisdiction in this class of cases. The school taxes collected were held in trust by the city, and, as the school board declined to require an accounting, these creditors, whose claims were payable out of the taxes, were entitled to the interposition of a court of equity to reach the fund. The suggestion of want of privity between complainants and the city, as defeating the jurisdiction, \*is without merit. Nor is the defense [196] of the statute of limitations well founded.

The judgments were rendered since 1890, and were made payable out of these taxes; the school certificates were merged in these judgments; and this bill was filed within ten years.

As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not *animo domini*; and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation. *Oliver v. Piatt*, 3 How. 411, 11 L. ed. 657; *New Orleans v. Warner*, 175 U. S. 130, 44 L. ed. 102, 20 Sup. Ct. Rep. 44.

After the master's report and the exceptions thereto had been filed, the city undertook to raise the question of the jurisdiction of the circuit court on the ground of the want of competency in the assignors of Mrs. Fisher to sue in that court, and of want of diversity of citizenship between Mrs. Fisher and the city. The first of these objections

had been made and, after trial, overruled in the proceedings which resulted in the judgment of May 19, 1892. The petition in that case also alleged that Mrs. Fisher and her husband were citizens of Spain. The judgment was conclusive on both points, and not open to impeachment as to either collaterally or on a creditors' bill. *Mattingly v. Nye*, 8 Wall. 373, 19 L. ed. 381; *Evers v. Watson*, 156 U. S. 533, 39 L. ed. 522, 15 Sup. Ct. Rep. 430; *Laing v. Rigney*, 160 U. S. 539, 40 L. ed. 527, 16 Sup. Ct. Rep. 366.

On July 1, 1897, a plea to the jurisdiction of the court in this case because Mrs. Fisher was a citizen of Louisiana was put upon the files without leave of court, and was stricken off as irregular on December 20. This action of the court is not open to review, and as this bill was merely ancillary the plea was immaterial. *Root v. Woolworth*, 150 U. S. 413, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136.

(197) The city on the same day, December 20, applied for leave to file a plea alleging that Mrs. Fisher was a citizen of Louisiana at the time the original action was brought in the circuit court, and had so continued down to the filing of the bill; that she had fraudulently otherwise represented; and that the city had no information of the facts until after the exceptions to the master's \*report were filed, which was on the 7th of June. This application was denied by the circuit court, and it is impossible for us to say that in this ruling the court abused its discretion.

This was not the proper way to attack the original judgment on the ground of fraud; nothing was said in the proposed plea as to the citizenship of Mr. Fisher, who was a party plaintiff, and a necessary or at least proper party, if the choses in action sued on were community property, and even if paraphernal (La. Civil Code, §§ 2402, 2404, 2385); and the record, so far from indicating fraud, showed that Mr. Fisher was an alien, being a subject of the British Crown residing at Cuba, which had led to a mistake of counsel in framing the pleadings.

It may be added that there was nothing in the case bringing it within the exceptional rule applied in *Lawrence Mfg. Co. v. Jamesville Cotton Mills*, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402, relied on by counsel.

The city excepted to the inclusion of the interest on school taxes collected by the city with the school taxes collected, as part of the amount for which the city was liable.

The circuit court of appeals disposed of this point in these words:

"Under the law, the school taxes carried 10 per cent interest per annum from the day they became delinquent. It was a penalty for nonpayment of the taxes. This interest, or penalty, for delayed payment of school taxes, formed no part of the city's proper revenues. The city in collecting the same was acting as a trustee for the school board. Delay in payment of taxes operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest.

To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master that 'the interest, as a mere accessory of the principal, belongs to the same person to whom the principal belongs.'" 34 C. C. A. 24, 63 U. S. App. 472, 91 Fed. Rep. 583.

We concur in this view, and are, moreover, of opinion that the city, having made such collections, cannot now be permitted to escape liability therefor on the suggestion that school taxes are \*not within the terms of the statute inflicting the penalty on "all taxes imposed by the city of New Orleans." Acts La. 1871, No. 48, § 9. (198)

The only other matter necessary to be referred to is the allowance of interest. The circuit court by its amended decree gave interest on the larger sum found due from the date of the decree. The circuit court of appeals modified that decree so as to award interest on the sum of \$71,139.60, collected prior to January 24, 1881, from the latter date, and on the item of \$799.18, reported by the master May 8, 1897, as having been collected after January 24, 1881, from the date of the report.

The bill did not charge the city with any wilful default, nor did it appear therefrom when the school board was requested to demand an accounting. The bringing of the bill amounted to such demand, and it was filed May 11, 1896, and the appearance of the city entered June 1.

The city occupied the position of agent of the school board to collect and pay over school taxes, as held in *Labatt v. New Orleans*, 38 La. Ann. 283, yet it may fairly be said that, under the legislation upon the subject, it was not the duty of the city to pay the money over immediately, but only as occasion might arise, and that, as no charge of fraudulent conversion was made, interest would not commence to run until after failure to pay when required to do so, or failure to account on demand.

Where interest is sought by way of damages for delay, courts of equity exercise a certain discretion as to its allowance.

In view of the acquiescence of the school board in the retention by the city of the interest collected on school taxes, an acquiescence in good faith so far as appears; the attitude of the city as a public corporation; and the lack of averment or evidence of demand prior to the filing of the bill, or of effort to compel an accounting—we think that interest should not be allowed in this case prior to May 11, 1896.

The decree of the circuit court of appeals is modified so as to provide for 5 per cent interest on the sum of \$71,139.60 from May 11, 1896, and on the sum of \$799.18 from May 8, 1897, and as so modified is affirmed with costs; and the cause is remanded to the circuit court with a direction \*to amend its decree in the particulars above specified, it being affirmed as so modified. (199)

Mr. Justice Peckham and Mr. Justice McKenna took no part in the consideration and disposition of the case.



CITY OF NEW ORLEANS, *Petitioner*,  
v.  
ANN WARNER *et al.*

(See S. C. Reporter's ed. 199-207.)

*Creditors' bill against city—parties allowed to come in after decree and prove claims—appeal from decision of master—no defense set up by exceptions to report—authority of city to issue warrants—warrants in settlement of damages.*

1. Parties holding obligations of the same nature and kind as plaintiff in a suit brought by him on his own behalf as well as on behalf of all such persons may, after a decree in his favor, come in and prove their claims without formal interventions or special leave.
2. No objection as to what a master has done upon a reference can be taken upon an appeal arising on exceptions to his report, where he has followed the decree ordering the reference, and enforced its directions.
3. A new defense cannot be set up by exceptions to the report of a master after the merits of the case have been fully considered and determined.
4. Authority of the city of New Orleans to issue warrants in settlement of the damages claimed by a ship canal company will be deemed to have been conferred by La. act February 24, 1876, empowering the city to "transact and contract" for the purchase and settlement of any rights, franchises, and privileges of such company, and to purchase its dredging plant, in view of the long acquiescence of the city in this construction of that act, and of the impossibility of distinguishing between these warrants and such as were issued in payment of the plant.
5. The issue of warrants by the city of New Orleans as a compromise of drainage taxes collected by the city and misappropriated was authorized by La. act February 24, 1876, providing for the purchase and settlement by the city of all or any rights arising in favor of the Mississippi & Mexican Gulf Ship Canal Company, and by an ordinance providing for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights" arising in favor of the canal company.

[No. 281.]

*Argued December 11, 13, 1900. Decided January 28, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree of the Circuit Court overruling exceptions to a master's report. *Affirmed.*

See same case below, 41 C. C. A. 676, 101 Fed. Rep. 1005.

**Statement by Mr. Justice Brown:**

This was a writ of certiorari to review a decree of the court of appeals, rendered May 1, 1900, affirming a decree of the circuit court for the eastern district of Louisiana,

rendered March 26, 1900, which overruled certain exceptions of the defendant, the city of New Orleans, to a master's report upon the amounts due under a decree rendered by the court of appeals, May 7, 1898, and affirmed by this court January 15, 1900. 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

The decree of the circuit court of appeals, affirmed by this court, contained the following paragraphs:

1. That the city of New Orleans was indebted to John G. \*Warner in the sum of \$6, [200] 000, with interest, and that he was entitled to be paid such sum out of the drainage assessments set forth in the bill.

2. That such drainage assessments constituted a trust fund in the hands of the city for the purpose of paying the claims of the complainant and holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of Louisiana, approved February 24, 1876.

3. That it be referred to a master to take and state an account of all said drainage assessments; that warrant holders be entitled to establish their claims before the master without formal interventions or special leave of the court, and that, upon the coming in of his report, complainant and other claimants would be entitled to an absolute decree for the amounts due them, if the fund established by the accounting be sufficient, but, if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, etc. The other provisions of the decree are immaterial.

Upon this reference warrants to the amount of \$316,000, of a total of \$320,000 (\$4,000 having been paid), were presented by different parties, including Warner, and the master found: (1) That all these warrants were "issued to Warner Van Norden, transferee of the Mexican Gulf Ship Canal Company, by the defendant, the city of New Orleans, in payment of the consideration of the agreement and contract of sale between himself and said city, by act (of sale) . . . dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana No. 16, dated February 24, 1876, as set forth in the complainant's bill, etc.; . . . that each of said warrants was indorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to said claimants, or other parties through whom they have acquired title; and that the said Van Norden has since . . . formally transferred to the complainant, and to all holders of warrants who might intervene in this cause, any and all interest he ever had in said warrants, and subrogated them to all his rights of actions and remedies against the defendant appertaining to the same."

\*Exceptions were filed to this report upon [201] the ground: (1) That the advantages of the decree extended only to such warrants as were issued in payment of the property purchased by the act of sale, which said property, as shown by the inventory and ap-

NOTE.—That judgment creditors may unite in a creditors' bill—see note to *Myers v. Fenn*, 18 L. ed. U. S. 604.

praisement of T. S. Hardee, city surveyor, amounted to \$153,750; "that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the Supreme Court herein; that such balance of said warrants was issued in settlement of a claim for damages urged by the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans." (2) "That of said warrants the sum of \$20,000 were issued, as will appear by the express terms of the act, in payment of work which had been done by said Van Norden; that is, digging canals and building levees which, at the time of the passage of said act, had not been surveyed or measured by the city surveyor; and hence that as to these warrants there could be no recovery or allowance made."

In a supplemental report upon these exceptions the master found that the city issued warrants Nos. 313 to 392 inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to \$300,000, and also issued warrants Nos. 393 to 402 inclusive, aggregating \$20,000, not for work, but as a compromise for drainage taxes collected and misappropriated, as stated in the said act of sale.

**Mr. Branch K. Miller** argued the cause, and, with *Messrs. Samuel L. Gilmore* and *Frank B. Thomas*, filed a brief for petitioner:

Where a person not a party to the suit carries in a claim before the master under the decree, the party representing the estate out of which the claim is made has a right to the benefit of any defense which he could have made if a bill had been filed by the claimant in equity, or an action had been brought to establish such claim.

2 Dan. Ch. Pl. & Pr. 5th ed. p. 1157; 2 Barbour, Ch. Pr. p. 72.

The decree in favor of complainant can be a protection to the interveners only so far as the grounds formerly set up are concerned. It forms no estoppel as against any defense to the warrants of the interveners, which was not set up and passed upon as between complainant and defendant.

*Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Fessenden v. Barrett*, 50 Fed. 692.

A judgment that bonds were illegal and void does not bar a subsequent suit upon coupons of the same bonds, and does not operate as an estoppel except as to the particular matter at issue or the points controverted in the first suit.

*Geneva Nat. Bank v. Independent School Dist.* 25 Fed. 629; *Nesbit v. Independent School Dist.* 25 Fed. 635.

A judgment for defendant in an action for the recovery of instalments of interest on certain bonds, is an estoppel as to a suit for the recovery of subsequent interest upon the

same bonds only as to the matter at issue or points controverted in the first suit.

*Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. 386.

It is a well-established rule that, where a party who has obtained a decree returns to the court of chancery to obtain its aid in executing the former decree, it is at the risk of the opening of such decree as respects the relief to be granted on the new bill; and if the court be of the opinion that it was erroneous it may refuse to execute it.

*Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456; *Wadhams v. Gay*, 73 Ill. 415. See also *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 556, 34 L. ed. 1007, 11 Sup. Ct. Rep. 402.

When the mode in which contracts by corporations should be made is specially and plainly described and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation.

1 Dill. Mun. Corp. 4th ed. § 449; *Addis v. Pittsburgh*, 85 Pa. 379; *Leavenworth v. Rankin*, 2 Kan. 370; *McCoy v. Briant*, 53 Cal. 249; *Argenti v. San Francisco*, 16 Cal. 283; *McCracken v. San Francisco*, 16 Cal. 620; *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96; *Murphy v. Napa County*, 20 Cal. 503; *French v. Teschemaker*, 24 Cal. 550; *Herzo v. San Francisco*, 33 Cal. 145; *People v. Tomlinson*, 35 Cal. 507; *Durango v. Pennington*, 8 Colo. 259, 7 Pac. 14; *Worthington v. Covington*, 82 Ky. 265.

**Mr. Wheeler H. Peckham** argued the cause and filed a brief for respondents:

So far as the liability of the drainage fund to the holders of the same class of warrants as those of complainant is concerned, the only defense permissible must be of a character different from any question of the original liability of the fund to pay the warrant because of something that has since happened.

2 Dan. Ch. Pl. & Pr. p. 1210.

In the thousands of cases of this kind, none can be found where the defendant was allowed, as against one coming in under the decree, to relitigate as to such person questions which had been adjudged by the decree.

See 1 Dan. Ch. Pl. & Pr. pp. 239-246; *Ex parte Jordan*, 94 U. S. 252, 24 L. ed. 125.

Suits of this kind relieve from the objection of want of parties, and are intended to do so. There could be no relief from that objection were the contention of petitioner upheld.

*Nashville & D. R. Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

**Mr. Richard De Gray** filed a separate brief for respondents:

When interveners holding obligations like complainants' appeared and proved their claims, they, from that moment, became complainants, with the same rights and to the same effect as if their names had been originally incorporated in the complaint.

*Hammond v. Hammond*, 2 Bland, Ch. 362; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Brooks v. Gibbons*,



4 Paige, 374; *Thompson v. Brown*, 4 Johns. Ch. 619.

Even the circuit court should disregard any matters, on a consideration of a master's report, not raised by exception filed with said master.

*Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *McMicken v. Perin*, 18 How. 510, 15 L. ed. 506; *Topliff v. Topliff*, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825.

And questions not raised and passed upon in the lower court cannot be assigned as error in the Supreme Court.

*Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. ed. 785; *Klein v. Russell*, 19 Wall. 438, 22 L. ed. 119; *Badger v. Randall*, 106 U. S. 255, 27 L. ed. 194, 1 Sup. Ct. Rep. 346; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437.

Even where the jurisdiction of the Supreme Court is sought under the 5th section of the act of March 3, 1891, it must appear that the constitutionality of a law of the United States was drawn in question and directly passed upon in the lower court, before the Supreme Court can entertain the case; and this question cannot for the first time be raised in the latter court by an assignment of error to the decision of the lower court.

*Ansbros v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969.

Statutory regulations prescribed to secure order, system, and despatch in proceedings, and by the disregard of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that assigned.

Endlich, *Interpretation of Statutes*, §§ 433, 436, 437; *Torrey v. Millbury*, 21 Pick. 67; *French v. Edwards*, 13 Wall. 506, 20 L. ed. 702.

Under the statute pursuant to which the right to review by certiorari is granted, the case, after its removal under said writ, is to be treated in this court just the same as if it had come here by appeal or writ of error.

*Hubbard v. Tod*, 171 U. S. 494, 43 L. ed. 256, 19 Sup. Ct. Rep. 14.

*McSsrs. J. D. Rouse and William Grant* also filed a brief for respondents.

[201] \*Mr. Justice **Brown** delivered the opinion of the court:

[202] \*1. The second assignment of error filed in the circuit court, adopting the substance of the exceptions to the master's report, raises a distinction between the drainage warrants issued for the purchase of the dredge boats, derricks, and other tangible property of the ship canal company, appraised at \$153,750, and such as were issued in the purchase of the franchise and in settlement of the claim for damages urged by the canal company and Van Norden against the city of New Orleans. No such distinction, however, appears in the decree of the circuit court of appeals, affirmed by this court in 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44, which declared that the drainage assessments set forth in the bill should constitute a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Van Norden to the city, and referred the case to a master to state an account of all the drainage assessments, before whom all warrant holders were to be notified to appear and establish their claims, without being required to file intervention or to obtain special leave of the court. Pursuant to this notice the warrant holders did appear and presented their warrants, which were allowed. The decree did not permit of any distinction being made, and none was made, between warrants issued for the purchase of the property and such as were issued in purchase of the franchise or in settlement of damages; and it is difficult to see in what respect the master or the court departed from the decree of this court.

As the bill was brought by Warner on his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind, there was no error in permitting all such parties to come in and prove their claims without formal interventions or special leave. All the warrants allowed belonged to the same class as Warner's and were issued upon the same consideration. This is the method commonly resorted to in bills for the foreclosure of railway mortgages, or other securities, under which bonds have been issued and are widely scattered in the hands of holders, many of whom are unknown and impossible to ascertain except by advertisement. In cases of this character, decrees are treated as decrees in favor of all in like situation as the plaintiff, who come in and claim the benefit of them. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Brooks v. Gibbons*, 4 Paige, 374; *Thompson v. Brown*, 4 Johns. Ch. 619; *Hammond v. Hammond*, 2 Bland, Ch. 362.

Doubtless the validity of these claims in the hands of holders may be examined, except so far as such validity has been already settled by the decree; but where the master upon the reference has followed the decree and enforced its directions, no objection can be taken upon appeal as to what he has done, when the appeal arises upon exceptions to his report. *New Orleans v. Gaines*, 15 Wall. 624, 21 L. ed. 215. The master was powerless to entertain any objection to the decree, or any proposal for its modification. His duty was simply to carry it out according to its terms.

It should be stated in this connection that no such distinction between the different classes of warrants as is now made was called to the attention of this court when the case was here upon questions certified (167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892), or upon the merits (175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44). In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defense as to a part of these warrants,

after the merits of the case have been fully considered and disposed of. This is impossible. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, ante, 395, 21 Sup. Ct. Rep. 240; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260.

But considering the question to be still an open one, and that we are at liberty to inquire whether the court exceeded its authority in decreeing the payment of these warrants, without reference to whether they were given for the purchase of the property or franchises, or the settlement of damages, the result would not be different. It was evident there had been a claim for damages pending a long time against the city. By the act of February 24, 1871, "to provide for the drainage of New Orleans," the former boards of drainage commissioners were abolished, and their assets transferred to a board of administrators, who were "subrogated to all the rights, powers, and facilities" possessed by the commissioners. The ship canal company was authorized to undertake the work of draining the city, and by [204] § 6 it was made the duty of the board of administrators "to locate the lines of the canals and protection levees specified in the various sections of this act, in time to prevent delay in the prosecution of the work of the said company. . . . And should the city council fail to locate the lines of said canal and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay."

By the act of February 24, 1876, authorizing the city to control its own drainage and to purchase the property of the ship canal company, the common council was empowered "to transact and contract" with the ship canal company, and its transferee, "for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of act No. 30 of Acts of 1871; also, for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats, and apparatus belonging to said company or its transferee," etc. It will be observed that the city is invested with a double power: First, to transact and contract for the purchase and settlement of any rights, franchises, privileges, etc.; and the other for the purchase and transfer of the dredging plant. The word "transact," which seems ambiguous here, is explained by article No. 3071 of the Civil Code of Louisiana, which defines "a transaction or compromise" to be "an agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their differences by mutual consent." By the 2d clause of the section the purchase and transfer of the dredging plant was authorized.

Pursuant to this act the city surveyor was authorized by ordinance of April 26, 1876, to examine the condition and value of the dredging plant, making a report to the committee of the whole, "together with a statement of all information in the possession of his office concerning damages claimed by said

. . . canal company, or transferee thereof." In compliance with this ordinance he appraised the value of the dredging plant at \$153,750, and stated that the damages claimed by the transferee were for delays at various times and places, and further stated that he was unable to arrive at a conclusion as to their amount, and \*did not feel called [205] upon to express an opinion, but that he had no doubt the committee, from the facts stated, would be able to arrive at a just and satisfactory conclusion. This left the common council free to settle for the damages without an appraisal. Under these circumstances the failure to appraise the damages would not vitiate their settlement.

By a further ordinance, adopted May 26, 1876, the mayor was authorized to enter into an agreement with the canal company for the purchase of its plant, and "also for the full settlement of all claims for damages, and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights, privileges, and franchises," etc., and upon the execution of the agreement to draw upon the administrator of finance for the sum of \$300,000 in drainage warrants, in full settlement, as above provided.

Conceding that the power given by the act of 1876 to transact and contract with the canal company for the purchase and settlement of all or any rights, franchises, and privileges is somewhat ambiguous as the source of a power to compromise for damages, the practical construction put upon that act by the ordinances of April 26 and May 26, 1876, as including claims for damages, is entitled to great weight, particularly in view of the long subsequent acquiescence of the city in that construction.

By the act of sale executed June 7, 1876, the canal company transferred its dredging plant to the city, as well as its franchises, privileges, contracts, and advantages, and subrogated the city to all its rights, actions, and remedies, in consideration of the sum of \$300,000; and the president and secretary of the canal company, and Van Norden, their transferee, also agreed that the above amount should be in full settlement of "all existing claims for damages" which either of them "ever had, or have now, or may have, against the said city of New Orleans."

It is difficult to see how the intention of the city to settle all these claims could be made clearer, or the terms of the actual settlement more sweeping, than they were by these proceedings. What the items of damages were does not appear. \*As to what in [206] fluences were brought to bear upon the common council to induce it to pay so large a sum as \$146,250 for these damages, we are equally in the dark. Certainly we are not at liberty to impute corrupt motives to the council. The arrangement may have been an unfortunate one, but the arrangement as made is beyond doubt.

It is obviously impossible to distinguish as between these warrants, and to say that such were issued in payment of the plant, and such others for the purchase of franchises and in settlement of the damages.



Granting the position taken by the city to be correct, it would result that all the warrants must be scaled down *pro rata* in the proportion of about 50 per cent, which would obviously be unfair to those who received purchase warrants, or there must be some attempt to classify these warrants. But as the warrants were all alike in form, no such classification is possible. It is suggested by the city that it must be considered that the warrants were issued and applied in the numerical order of their execution: First, for the payment of the price of the property purchased; next, for the claim for the settlement of damages; and lastly, for the payment of work mentioned in the said notarial act. But this would result in the rejection of the Warner warrants, which were expressly allowed by the decree of this court to the amount of \$6,000, since it appears by the report of the master that the warrants issued to Warner and allowed by such decree were Nos. 379, 380, and 381, and did not fall among the first \$153,750 issued, but were payable long after this amount, appraised as the value of the plant, had been exhausted. It would also result in the disallowance of certain warrants to Wilder & Company, upon which a judgment at law was recovered on May 24, 1898, after the case had been remanded from the circuit court of appeals. Obviously the position of the city in respect to these warrants is untenable.

[207] 2. The only other item to which exception is taken is one of \$20,000, for which warrants Nos. 392 to 402 inclusive were issued as a compromise of drainage taxes collected by the city and misappropriated. These were in excess of the \$300,000 allowed in payment of the plant and various claims of the canal \*company, and were especially provided for in the act of sale as follows: "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of \$20,000 in drainage warrants in full satisfaction of the same."

The authority to include this in the act of sale is questioned by the city, but we think it comes within the 1st section of the act of 1876, which provides for "the purchase and settlement of all or any rights . . . arising in favor of said ship canal company or said transferee" under the act of 1871 and within the ordinance of May 26, to which allusion has already been made, which provides for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights . . . arising in favor of the canal company." Money collected by the city, applicable to the drainage funds, and appropriated to the general funds of the city, manifestly creates a *right* in favor of the canal company to a restoration of the amount. If there were doubt of the proper construction of these words the long acquiescence of the city and the failure to raise an objection to this claim until after final decree is sufficient to put the matter at rest.

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*The decree of the Circuit Court of Appeals is affirmed.*

Mr. Justice White and Mr. Justice Peckham took no part in this case.

\*STATE OF MISSOURI, Complainant, [208]  
v.  
STATE OF ILLINOIS and Sanitary District of Chicago.

(See S. C. Reporter's ed. 208-250.)

*Controversy between states—jurisdiction—municipal pollution of water as injury to inhabitants of other state—drainage of sewage into river—remedy by injunction—suit in advance of actual injury—acquiescence in preparations.*

1. The construction by a public corporation, as an agency of the state, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another and adjacent state, furnishes a sufficient basis for a controversy between the states, of which the Supreme Court of the United States can take original jurisdiction.
2. The threatened daily transportation by the Sanitary District of Chicago, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of inhabitants of the state of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory, entitles that state to maintain a suit for equitable relief, in advance of any actual injury sustained thereby.
3. Acquiescence by the state of Missouri in the proceedings of the Sanitary District of Chicago in devising and carrying out a system of sewerage is no bar to relief against the continuous pouring of sewage and filth into the Mississippi river through a drainage canal constructed by the sanitary district, to the detriment of the state of Missouri and her inhabitants.

[No. 5, Original.]

Submitted April 30, 1900. Ordered for oral argument May 21, 1900. Argued November 12, 13, 1900. Decided January 28, 1901.

ORIGINAL BILL by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to prevent the discharge of sewers into the Mississippi river. *Demurrers to bill overruled.*

NOTE.—On *Federal jurisdiction of suits against a state*—see notes to *Tindall v. Wesley*, 13 C. C. A. 165, and *Hans v. Louisiana*, 33 L. ed. U. S. 842.

On *the right of a municipal corporation to drain sewage into waters*—see *Platt Bros. & Co. v. Waterbury* (Conn.) 48 L. R. A. 691, and note. As to *injunction to restrain a threatened wrong*—see note to *Gardner v. Stroeve* (Cal.) 6 L. R. A. 90.

Statement by Mr. Justice Shiras:

[209] In January, 1900, the state of Missouri filed in this court a bill of complaint against the state of Illinois and the Sanitary \*District of Chicago, a corporation of the latter state, in the following terms:

"The complainant, the state of Missouri, and one of the states of the United States, brings this its bill of complaint against the state of Illinois, one of the states of the United States, and the Sanitary District of Chicago, a public corporation organized under the laws of the state of Illinois, and located in part in the city of Chicago and in the county of Cook, in said state of Illinois, and a citizen of the state of Illinois.

"And your orator complains and says that it is a state containing a population of upwards of three millions of people, and lying on the west bank of the Mississippi river, a public, navigable, and running stream, and having a frontage on said stream of over 400 miles.

"And your orator shows that by the act of Congress providing for the organization and admission of Illinois and Missouri as states of the Union it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the middle of the main channel of the Mississippi river; that the shores of the Mississippi river, where its waters form the Missouri and Illinois boundary, and the soil under the waters thereof, were not granted by the Constitution of the United States, but were reserved to the states of Illinois and Missouri respectively.

"And your orator shows that the states of Missouri and Illinois each have concurrent general jurisdiction over the waters of the Mississippi river forming the boundary between them, and each of said states has exclusive territorial jurisdiction over that portion adjacent to its own shore; and your orator shows that the Illinois river empties into the Mississippi river at a point above the city of St. Louis, on the Illinois side of said Mississippi river.

[210] "And your orator further shows that within the territory of your orator, and on the banks and shores of said Mississippi river, and below the mouth of the Illinois river, are many cities and towns in the state of Missouri, and many thousands of persons who are compelled to and do rely upon the waters of said river, in their regular, natural, and accustomed flow, for their daily \*necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes, and for watering stock and animals of all kinds, and that said Mississippi river has been flowing in its regular course and has been used for the purposes aforesaid by the inhabitants of the said state of Missouri for a time whereof the memory of a man runneth not to the contrary, and that said river and its waters and the use thereof for drinking, agricultural, and manufacturing purposes, in their accustomed and natural flow, are indispensable to the life and health and business of many thousands of the inhabitants of the state of

Missouri, and of great value to your orator as a state.

"And your orator shows that cities and towns below the mouth of said Illinois river, within the territory of your orator, do and are compelled, by means of waterworks, water towers, and intakes, built and constructed for that purpose, to supply the inhabitants of said cities and towns with an adequate supply of pure and wholesome water fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi river so flowing in its ancient, accustomed, and natural course.

"And your orator shows that said waterworks systems are constructed with reference to said Mississippi river and for the purpose of taking water therefrom, and not from any other source.

"And your orator shows that heretofore, to wit, in 1889, the state of Illinois enacted a law known as the sanitary district act, together with an act for the improvement of the Illinois and Des Plaines rivers, and that under said act of said state the said corporation known as the said Sanitary District of Chicago was organized and is now existing and operating, and that by the express terms of said act any canal or drain corporation organized in accordance with its provisions may have conditions, restrictions, or additional requirements placed in said corporation, or the act authorizing the creation of said corporation may be amended or repealed, and that by the express provisions of said act, before any water or sewage shall be admitted into any channel constructed under said act the trustees of said channel shall notify the governor of Illinois \*of the [211] completion of said channel, and the governor of Illinois shall appoint three commissioners to examine said canal or channel, and report to the governor if the same complies with the act of the state of Illinois; and if it does, the governor shall authorize the water and sewage to be turned into said channel; and that without the said permit it cannot be so turned in; and that by the general provisions of said act said channel is at all times subject to the control and supervision of the state of Illinois and her authorities.

"And your orator further shows that the Chicago river is situated in the basin of Lake Michigan, and has two forks or branches flowing through the city of Chicago and into Lake Michigan, and that the natural drainage of Chicago, Illinois, is into Lake Michigan, and the sewage and drainage of the territory embraced in the defendant's district, the Sanitary District of Chicago, is led into or flows into the Chicago river and Lake Michigan.

"And your orator further shows that the defendant herein, the Sanitary District of Chicago, with the authority of the state of Illinois, and acting as a governmental agency of said state, and under the supervision and control and subject to the approval of the state of Illinois, has constructed a channel or open drain from the west fork of the south branch of the Chicago river, in the city of Chicago and county of Cook, in the state of Illinois, to a point near Lockport, in



the county of Will, in said state, where said channel or drain connects with and empties into the Des Plaines river, which empties into the Illinois river, and which latter river flows and empties into the Mississippi river at a point distant about 43 miles above the city of St. Louis, Missouri.

"And your orator further states that the channel built by the Sanitary District of Chicago was so built by said sanitary district as one of the governmental agencies of the state of Illinois, and by the pretended lawful authority of said state, and under the direction, supervision, and control and governmental power of the state of Illinois, and which said state has heretofore at all times sanctioned, and now, through its governor and other officers, sanctions, the building of said channel and opening thereof.

[212] "And your orator further shows that in the construction of said channel or drain the defendant, the Sanitary District of Chicago, Illinois, with the sanction and approval of the state of Illinois, cut through the natural bridge or watershed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois rivers and the basin of the Mississippi river, and that having so constructed said channel, and having about completed the same, and having, under the supervision of and with the sanction of the state of Illinois, extended said artificial channel through said natural divide of the watershed, the defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, which embraces nearly the whole city of Chicago and a portion of the county of Cook, and, without any legal authority so to do, has already in part effectuated its said threat and purpose, and threatens to permit and to cause said sewage and filth, by artificial means of pumping and otherwise, to flow through the channel or drain towards and into the said Des Plaines river and eventually into the Mississippi river, thereby, with the approval of and subject to the inspection and control and supervision of the state of Illinois, and by the pretended authority thereof, reversing the natural flow of said Chicago river.

"And your orator further shows that the sewage matter and poisonous filth which it is thus threatened to receive and to permit and to cause to flow through said artificial channel into said Des Plaines river is that which is created by a population of upwards of one and one half millions of people, besides that which is created by a great number of stock yards, slaughtering establishments, rendering establishments, distilleries, and other business enterprises and industries lining both sides of the Chicago river, producing filth and noxious matters; all of which are there discharged into the said Chicago river or drained therein from the surface.

"And your orator further shows that for many years past the said city of Chicago, the greater portion of which is embraced in the limits of the defendant corporation, the Sanitary District of Chicago, as aforesaid, 180 U. S.

has been discharging its sewage matter \*and [213] filth into the Chicago river and into Lake Michigan in such large quantities that much of it has accumulated in the bed and along the sides of the river and upon the bed of said Lake Michigan, near the shores thereof, and that the plan threatened and attempted now to be adopted by the defendant, the Sanitary District of Chicago, acting in conjunction with and subject to the control of the defendant, the state of Illinois, and by the pretended authority of the said state of Illinois, will loosen said accumulated matter and filth, and will also direct it and cause it to flow towards and into said artificial channel or drain, and thence into said Des Plaines river, and finally into the Mississippi river and into the waters thereof within the jurisdiction and under the control of your orator and past the homes of the inhabitants of your orator and the towns and cities within the borders of your orator, and past the waterworks of said cities and towns within the state of Missouri.

"And your orator further shows that the amount of said undefecated filth and sewage and poisonous and unhealthful and noxious matters proposed to be, and now about to be, permitted to be turned into said artificial channel and through said Des Plaines and Illinois rivers into the Mississippi river from the said Sanitary District of Chicago by the defendants, acting jointly, will amount daily to about 1,500 tons, and that if defendants should be permitted to carry their said threats into execution, and should cause said above amount of undefecated sewage and other poisonous and noxious matters, which would otherwise flow into Lake Michigan, to flow into the Mississippi river, that the waters of the Mississippi river within the jurisdiction of your orator will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthful for drinking and domestic uses, and will render wholly valueless and entirely worthless the various waterworks system of towns and cities on the borders of the state of Missouri established and acquired at great cost and expense, and will deprive your orator, the state of Missouri, and its inhabitants, of the right to use of the waters of said river for drinking and all other domestic and manufacturing and agricultural purposes, as said water has been so used in its accustomed and natural flow heretofore \*for the length of time that [214] the memory of man runneth not to the contrary thereof.

"And that said threatened action of the defendants will amount to a direct and continuing nuisance, and be an interference with the use by your orator and its inhabitants of the waters of the Mississippi river flowing in their natural state, polluting and poisoning the same by the means aforesaid, whereby the health and lives of the inhabitants of your orator will be endangered and the business interests of said state will be greatly and irreparably injured, and which said damage to the lives and health and the business interests of said state resulting from said poisoning and polluting of said waters



as aforesaid to your orator cannot be estimated in money value.

"And your orator on information and belief states and charges the fact to be that said 1,500 tons of poisonous undefecated filth and sewage of said Sanitary District of Chicago will be daily carried through said artificial channel and sent through the Des Plaines and Illinois rivers into the Mississippi, and great quantities thereof will be deposited in the bed and soil of said river belonging to your orator and wholly within the jurisdiction thereof, to your orator's great and irreparable damage, and that the 1,500 tons of undefecated sewage and filth now about to be daily injected into the waters of the Mississippi river and into the portion thereof over which the state of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will pollute and poison the said water of the Mississippi river to such an extent as to render it unwholesome and unfit and unhealthful for use for drinking by the said inhabitants in the territory of your orator, and unfit for use for watering stock and for manufacturing purposes.

"And your orator further shows that great quantities of undefecated sewage turned into the Mississippi river in the manner and by the means aforesaid will poison and pollute said water with the germs of disease of various and many kinds. And your orator further shows that the acts herein complained of on the part of the state of Illinois, acting in conjunction with one of her governmental agencies, the said Sanitary District of Chicago, \*will cause a continuing nuisance in the Mississippi river, and that the said state of Illinois has no power or authority to cause, or permit or assist in causing, the commission and continuance of a nuisance in the flowing waters of the Mississippi river, a navigable stream, to the detriment and irreparable and continuing damage and injury of the state of Missouri, and the continuing and irreparable injury to the lives and health of the citizens and inhabitants of the state of Missouri, and that unless restrained by the order and decree of this court the defendants, the state of Illinois and the Sanitary District of Chicago, acting together, will, in accordance with the terms of the act under which said sanitary district is organized, upon the permit and authority of the governor of Illinois and of the state of Illinois, turn said water and sewage aforesaid, by the manner and means aforesaid, into the Des Plaines and Illinois rivers and thence into the Mississippi; all of which your orator says and avers is contrary to equity and good conscience, and would result in the manifest and irreparable injury of your orator and the health of her citizens in the premises; and your orator is wholly without remedy at law and without any adequate remedy to prevent the flowing of said sewage, as aforesaid, save by the interposition of this court.

"Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that

the defendants may make a full, true, direct, and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and to the end that the defendants, their officers, agents, servants, and employees may be restrained by injunction issuing out of this court from receiving or permitting any sewage to be received or discharged into said artificial channel or drain, and from permitting the same to flow or causing the same to be made to flow through said channel or drain towards and into the Des Plaines river, your orator prays that your honors may grant a writ of injunction, under the seal of this honorable court, properly restraining and enjoining the defendants, the officers, agents, employees, and \*serv- [216] ants of the Sanitary District of Chicago and the state of Illinois, from permitting or causing any of said sewage to be discharged into said channel or drain, and from permitting or causing said sewage and poisonous filth thence to flow into said Des Plaines river; that defendant, the state of Illinois, be enjoined and restrained from issuing to its codefendant permission and authority to do and perform the acts aforesaid or to allow them to be done; and your orator also prays for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

"May it please your honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the state of Illinois, the governor and attorney general thereof, and to said Sanitary District of Chicago, its officers, trustees, and agents, commanding them on a day certain to appear and answer unto this bill or complaint, and to abide such order and decree of the court in the premises as to the court shall seem proper and required by the principles of equity and good conscience."

In March, 1900, came the defendants and filed a demurrer to the bill of complaint, in the following terms:

"Now come the state of Illinois by its attorney general, Edwin C. Akin, and the Sanitary District of Chicago by its attorneys, and demur to the bill of complaint filed herein, and say that the said bill of complaint and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said state of Missouri to have and maintain its aforesaid action against the said state of Illinois and the Sanitary District of Chicago, and that said defendants are not bound by the law of the land to answer the same; and the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said bill of complaint:

"First. That this court has no jurisdiction of either the \*parties to or of the subject- [217] matter of this suit, because it appears upon the



face of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the state of Missouri and the state of Illinois, or any of its citizens.

"Second. That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the state of Illinois and a public corporation created under the laws of said state, and certain cities and towns in their corporate capacity as such, in the state of Missouri, and certain persons in said state of Missouri, residing on or near the banks of the Mississippi river, and which matters so stated in said bill of complaint, if true, do not concern the state of Missouri as a corporate body or state.

"Third. That said bill of complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said state of Missouri, situate on the banks of the Mississippi river, and certain persons who reside in said state on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the state of Missouri, said state is, in effect, loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said state.

"Fourth. That it appears upon the face of said bill of complaint that the said state of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said state, in their corporate capacity as such, and of certain private citizens of said state, while under the Constitution of the United States and the laws enacted thereunder the said state possesses no such sovereignty as empowers it to bring an original suit in this court for such purpose.

[218] "Fifth. That it appears upon the face of said bill of complaint that no property rights of the state of Missouri are in any manner affected by the matters alleged in said bill of complaint; \*nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"Sixth. That in order to authorize this court to maintain original jurisdiction of this suit as against the state of Illinois, or against any citizens of said state, it must appear that the controversy set forth in the bill of complaint and to be determined by this court is a controversy arising directly between the state of Missouri and the state of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said state or of particular individuals residing therein.

"Seventh. The said bill of complaint is in other respects uncertain, informal, and insufficient, and that it does not state facts sufficient to entitle the said state of Missouri

to the equitable relief prayed for in said bill of complaint.

"Wherefore, for want of a sufficient bill of complaint in this behalf, the said defendants pray judgment, and that the said state of Missouri may be barred from having or maintaining the aforesaid action against said defendants, and that this court will not take further cognizance of this cause, and that the said defendants be hence dismissed with their costs."

On November 12, 1900, the case came on to be heard on bill and demurrer, and was argued by counsel.

Mr. B. Schnurmacher argued the cause, and, with Mr. E. C. Crow, filed a brief for complainant:

The Supreme Court of the United States has original jurisdiction of all cases in which a state is a party.

U. S. Const. art. 3, § 2; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. ed. 433; *Fowler v. Lindsey*, 3 Dall. 411, 1 L. ed. 658; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed. 67; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290; *Wisconsin v. Duluth*, 96 U. S. 381, 24 L. ed. 669; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 640; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

The only exception made by the 11th Amendment is that denying jurisdiction in actions against states by citizens of another state, or citizens or subjects of any foreign state.

U. S. Const. 11th Amend.; *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644.

It is conceded that to justify such original jurisdiction the cause must be one in which the state is the real, substantial party, seeking to enforce a right of its own. Where the suit, though in the name of the state, is in the interest of others, jurisdiction will not obtain.

*New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

A public nuisance affecting the health or safety of a community may be abated by the state by indictment or by information. Or the state, in discharge of its duty and the exercise of its power to protect the public health, may resort to a court of equity for the more complete and adequate suppression of such nuisances by injunction. The bill in such case may be filed by the attorney general, or other law officer of the state, in its name or in his. The right of the state to maintain such equitable action has been recognized in the following cases, which establish the proposition that such an action is one in which the state is the substantial,



the real, and the proper party complainant, and that the controversy is its controversy:

*State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809, Affirmed in 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Atty. Gen. v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 152, 56 Am. Rep. 80, 4 Pac. 1152; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1; *Atty. Gen. v. Cohoes Co.* 6 Paige, 133, 29 Am. Dec. 755; *People v. St. Louis*, 10 Ill. 367, 48 Am. Dec. 339; *Craig v. People ex rel. Nevill*, 47 Ill. 487; *State v. Mobile*, 24 Ala. 701; *Atty. Gen. v. Blount*, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *United States v. Gear*, 3 How. 120, 11 L. ed. 523; *People v. Third Ave R. Co.* 45 Barb. 63; *Atty. Gen. v. Hackney Local Board*, L. R. 20 Eq. 626; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583; *Atty. Gen. v. Cleaver*, 18 Ves. Jr. 217; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. ex rel. Thames River Conservators v. Kingston-on-Thames*, 12 L. T. N. S. 667; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 147; *Atty. Gen. v. Luton Local Bd. of Health*, 2 Jur. N. S. 180.

And such right of the state to proceed in its name or in the name of its law officer is also announced by the text writers.

High, Inj. § 762; 3 Pom. Eq. Jur. § 1349; Parker & W. Public Health & Safety, § 218; Angell, Highways, § 279; Eden, Inj. 259; 1 Am. & Eng. Enc. Law, 2d ed. pp. 71-73.

And the same principle is announced in many cases where cities and towns have been allowed to maintain bills to restrain public nuisances under grants of power from the state. In all these cases the right of the state to appeal to equity is declared, and the municipal corporation is permitted to proceed as an agency of the state and by virtue of the delegated power.

*Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197; *Demopolis v. Webb*, 87 Ala. 659, 6 So. 409; *Huron v. Bank of Volga*, 8 S. D. 449, 66 N. W. 815; *Belton v. Central Hotel Co.* (Tex. Civ. App.) 33 S. W. 297; *Belton v. Baylor Female College* (Tex. Civ. App.) 33 S. W. 680; *Llano v. Llano County*, 5 Tex. Civ. App. 133, 23 S. W. 1008; *New Castle v. Runcy*, 130 Pa. 564, 6 L. R. A. 737, 18 Atl. 1066; *American Furniture Co. v. Batesville*, 139 Ind. 77, 38 N. E. 408; *Cheek v. Aurora*, 92 Ind. 107; *London v. Bolt*, 5 Ves. Jr. 129; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Winthrop v. Farrar*, 11 Allen, 398; *Atty. Gen. v. Blount*, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *Springfield v. Robberson Ave. R. Co.* 69 Mo. App. 514; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Greenwich Twp. v. Easton & A. R. Co.* 24 N. J. Eq. 217; *Williams v. Smith*, 22 Wis. 594; *Hudson v. Thorne*, 7 Paige, 261; *Eau Claire v. Matzke*, 502

86 Wis. 291, 56 N. W. 874; *Dill. Mun. Corp.* § 405, note 2, § 379, p. 473; Parker & W. Public Health & Safety, §§ 217, 218; Wood, Nuisances, § 777, p. 1120, §§ 785, 789, note 1; 3 Pom. Eq. Jur. § 1349; 1 High, Inj. 2d ed. §§ 768, 769; 6 Lawson, Rights, Rem. & Pr. § 2972, p. 4838; 1 Am. & Eng. Enc. Law, 2d ed. Abatement of Nuisances, p. 74.

The bill contains averments sufficient to entitle the state of Missouri to the relief prayed, if those averments are hereafter shown to be true. A municipal corporation, though authorized by statute to maintain a system of sewerage, cannot thereby justify the pollution of a running stream. The maintenance of such nuisance cannot be legalized. On the contrary, injunction lies to prevent it at the suit of the state or of any person specially damaged.

*Carmichael v. Texarkana*, 94 Fed. Rep. 561; *Jacksonville v. Lambert*, 62 Ill. 520; *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Barrett v. Mount Greenwood Cemetery Asso.* 159 Ill. 385, 31 L. R. A. 109, 42 N. E. 891; *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *People ex rel. Lind v. San Luis Obispo*, 116 Cal. 617, 48 Pac. 723; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Richardson v. Boston*, 19 How. 263, 15 L. ed. 639; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Atty. Gen. v. Hackney Local Board*, L. R. 20 Eq. 626; *Atty. Gen. ex rel. Thames River Conservators v. Kingston-on-Thames*, 12 L. T. N. S. 667; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Watson v. Toronto Gaslight & Water Co.* 4 U. C. Q. B. 158; Gould, Waters, 2d ed. §§ 545, 546; 2 High, Inj. §§ 794, 795; *Dill. Mun. Corp.* 4th ed. § 1047; Wood, Nuisances, §§ 423, 429.

In a proceeding to enjoin the pollution of a watercourse, the right of the plaintiff, rather than the inconvenience of the defendant, is the question to be considered, even though the latter represents a large population. The small village need not suffer a nuisance that a large city may be benefited.

*Atty. Gen. v. Birmingham*, 4 Kay & J. 528.

Nor is it necessary, in a proceeding to abate a public nuisance, to aver or prove actual damage to the public.

*Ibid.*; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; Wood, Nuisances, 3d ed. § 442.

Nor will the rights of parties in cases of this kind be determined by the "balance of injury." The continuance of a nuisance will not be sanctioned because the plaintiff's damage is inconsiderable, or because an injunction might cause great loss or expense to the wrongdoer.

*Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co.* 9 Colo. App. 180 U. S.



407, 48 Pac. 828; *Higgins v. Flemington Water Co.* 36 N. J. Eq. 538; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 209, 28 Atl. 702; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 147; *Wood, Nuisances*, § 435.

The fact that a large population will be affected by an interruption of the use of a system of sewers is immaterial where the rights of an individual are invaded. The inconvenience is one of the public's own creation, and should be borne by it, rather than by the individual.

Gould, Waters, § 546.

It is no excuse for one befouling a stream to show that others are also doing so. Each may be enjoined against the commission of the wrong.

*Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Wood, Nuisances*, § 435.

No right to pollute a stream can be acquired by delay, or even by prescription.

*Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Atty. Gen. v. Luton Local Bd. of Health*, 2 Jur. N. S. 180; *Chapman v. Rochester*, 110 N. Y. 373, 1 L. R. A. 296, 18 N. E. 88; *Wood, Nuisances*, 3d ed. §§ 428-431.

Nor will the fact that the preservation of the public health requires the sewage of a town to be removed justify its discharge into a running stream to the injury of others.

*Wood, Nuisances*, 3d ed. § 434; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583.

Nor will the aid of equity be withheld because of the expensive or extensive character of the work which creates the nuisance.

*Wood, Nuisances*, 3d ed. § 802, p. 1183.

In determining the question of nuisance by the pollution of water, it is immaterial whether the causes producing it are near to or far removed from complainant. The simple question is whether the water coming to complainant has been impaired in value for ordinary domestic uses through the acts of defendant.

*Wood, Nuisances*, 3d ed. § 436, and cases cited.

*Messrs. Charles C. Gilbert and William M. Springer* argued the cause, and, with *Messrs. Edward C. Akin and Samuel M. Burdett*, filed a brief for defendants:

In order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war or enter into treaties, though they may, with consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is a state action; and acts of state officers

in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

*Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

A state cannot create a controversy with another state, or with the citizens of another state, so as to entitle it to invoke the original jurisdiction of this court, by assuming the prosecution of suits for the benefit of its individual citizens.

*New Hampshire v. Louisiana*, 108 U. S. 91, 27 L. ed. 662, 2 Sup. Ct. Rep. 176; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *Re Hartung*, 98 Wis. 140, 73 N. W. 988.

The bill of complaint does not show that any direct issue between the state of Missouri and the state of Illinois has been alleged, which entitles the complainant to invoke the original jurisdiction of this court.

*Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

The acts of the Sanitary District of Chicago have all been done and performed in pursuance of law, as alleged in the bill of complaint. It is a general rule that where the act complained of is not a nuisance *per se*, or may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that a person entering into a legitimate business will conduct the same in a proper way, so that it will not constitute a nuisance.

*Ramsey v. Riddle*, 1 Cranch, C. C. 399, Fed. Cas. No. 11,544; *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245; *Laughlin v. Lamaseo City Trustees*, 6 Ind. 223; *Hahn v. Thornberry*, 7 Bush, 403; *Pfingst v. Senn*, 94 Ky. 556, 21 L. R. A. 569, 23 S. W. 358; *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378; *Butler v. Rogers*, 9 N. J. Eq. 487; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 201; *Rochester v. Curtiss*, Clarke, Ch. 336; *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. C. 472, 4 N. Y. Supp. 414; *Ellison v. Washington Comrs.* 58 N. C. (5 Jones Eq.) 57, 75 Am. Dec. 430; *Ripon v. Hobart*, 3 Myl. & K. 177; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333.

Original jurisdiction in the Supreme Court cannot be exercised if there are other parties in interest who are not made parties, and who, if they were made parties, would oust the court of its original jurisdiction.

*California v. Southern P. R. Co.* 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591.

Where the wrong complained of is one in which the state has no direct interest, any more than it has in any ordinary controversy between individuals, the state is not a proper party plaintiff, and the suit should be instituted by the particular individuals who will be injured.

10 Enc. Pl. & Pr. pp. 903, 904, and cases cited in note 1.

The proper and usual remedy for a nuisance which is purely local in its character



is by indictment brought on behalf of the public by the proper officer.

See 14 Enc. Pl. & Pr. p. 1093, and cases cited.

There is no Federal law making a nuisance a crime, and the Federal government has no jurisdiction of offenses at common law.

*United States v. Lancaster*, 2 McLean, 431, Fed. Cas. No. 15,556.

The Federal courts have no common-law criminal jurisdiction.

See 6 Am. & Eng. Enc. Law, 2d ed. p. 289, and cases cited in note 6.

[218] \*Mr. Justice Shiras delivered the opinion of the court:

This cause is now before us on the bill of complaint and the demurrer thereto.

The questions thus presented are two: First, whether the allegations of the bill disclose the case of a controversy between the

[219] \*state of Missouri and the state of Illinois and a citizen thereof, within the meaning of the Constitution and statutes of the United States, which create and define the original jurisdiction of this court; and, second, whether, if it be held that the allegations of the bill do present such a controversy, they are sufficient to entitle the state of Missouri to the equitable relief prayed for.

The question whether the acts of one state in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent state, would create a sufficient basis for a controversy, in the sense of the Constitution, would be readily answered in the affirmative if regard were to be had only to the language of that instrument.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

. . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to controversies between two or more states, between a state and citizens of another state.

. . . In all cases, . . . in which a state shall be party, the Supreme Court shall have original jurisdiction." Const. art. 3.

As there is no definition or description contained in the Constitution, of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, in all cases wherein one state should institute legal proceedings against another, the original jurisdiction of this court would attach.

But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to its language, but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.

After the Declaration of Independence the united colonies, through delegates appointed

by each of the colonies, considered "articles of [220] confederation, which were debated from day to day, and from time to time, for two years, and were on July 9, 1778, ratified by ten states; by New Jersey on November 26 of the same year; by Delaware on the 23d of February, 1779, and by Maryland on March 1, 1781.

The 1st article was as follows: "The style of this confederacy shall be 'The United States of America.'"

The 9th article contained, among other provisions, the following:

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent, of any state in controversy with another shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the secretary of Congress shall strike in behalf \*of such [221] party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of



the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward; provided, also, that no state shall be deprived of territory for the benefit of the United States.'

It will therefore be perceived that under the confederation the necessity of a tribunal to hear and determine matters in question between two or more states was recognized; that a court was provided for that purpose; and that the scope or field within which it was expected such matters in question or controversies should or might arise for the determination of such court extended to "*all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever.*"

When the Federal convention met in 1787 to form the present Constitution of the United States, several drafts of such an instrument were presented for the consideration of the convention. One of these was offered on May 29 by Edmund Randolph, of Virginia, in the shape of resolutions covering the entire subject of a national government. The 9th resolution prescribed the formation of a national judiciary, to consist of a supreme and inferior tribunals, with jurisdiction to hear and determine, among other things, "questions which involve the internal peace or harmony." 1 Elliot, Debates, p. 143. On the same day Charles Pinckney, of South Carolina, submitted a draft of a Federal government, the 7th article whereof was as follows:

[222] \**"The Senate shall have the sole and exclusive power to declare war and to make treaties, and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court."*

*"They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now subsisting, or which may arise, between the states respecting jurisdiction or territory."* 1 Elliot, Debates, p. 145.

On June 19 the committee of the whole, to which had been referred the several propositions and drafts, reported to the convention for its consideration a draft as altered, amended, and agreed to in the committee. The 13th resolution was as follows:

*"That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony."* 1 Elliot, Debates, p. 182.

On August 6 a committee of five members, to which the various propositions, as originally made and as amended in the committee of the whole, reported to the convention a draft of the Constitution, the 9th article of which was as follows:

*"Sec. 1. The Senate of the United States shall have power to make treaties and appoint ambassadors and judges of the Supreme Court."*

*"Sec. 2. In all disputes and controversies*

*now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers, etc. [And here follows a scheme for a special court, in terms similar to that provided in the articles of confederation.]*

*"Sec. 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdiction, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states."*

The 11th article contained, among other sections, the following:

*\*"Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States."* [223]

*"Sec. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, except such as shall regard territory or jurisdiction; between a state and citizens of another state; between citizens of different states; and between a state or the citizens thereof and foreign states, citizens, or subjects."* 1 Elliot, Debates, p. 224.

It may be observed, in passing, that, in this draft, all disputes and controversies between two or more states respecting jurisdiction or territory are to be determined by a special court to be constituted by the Senate; and controversies between two or more states, except such as shall regard territory or jurisdiction, are determinable by the Supreme Court. It is therefore apparent that other disputes or controversies between states were regarded and provided for besides those respecting territory or jurisdiction.

This draft, together with numerous suggestions and amendments, was on August 7 submitted to the committee of the whole.

On September 12 a committee on revision reported a draft of the Constitution as revised and arranged. This draft, which, as respects our present subject, was in the terms of the Constitution as finally adopted, took from the Senate the power to constitute a court to try disputes between the states respecting territory or jurisdiction, and struck out the provision excluding from the jurisdiction of the Supreme Court disputes between the states in matters respecting jurisdiction and territory. The entire jurisdiction of controversies between states was bestowed upon the Supreme Court, in the

2d section of article 3, in the following terms:

[224] The judicial power shall extend to all cases in law and \*equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

As in this section power is conferred on Congress to make regulations affecting the exercise by the Supreme Court of its jurisdiction, it may not be out of place to quote the provisions in this respect of the judiciary act of 1789:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687.

The case of *New York v. Connecticut*, 4 Dall. 3, 1 L. ed. 715, in 1799, was the first instance of an exercise by the Supreme Court of its jurisdiction in a controversy between two states. It was a case of a bill in equity filed by the state of New York against the state of Connecticut and certain private persons who were grantees of the latter state of lands, the jurisdiction over which was claimed by both states. The object of the bill was to obtain an injunction to stay proceedings in ejectment pending in the circuit court of the United States for the district of Connecticut.

[225] The court was of opinion that, as the state of New York was not a party to the suits below, nor interested in the decisions \*of those suits, an injunction ought not to issue. No argument was made that the court had not jurisdiction, and the court proceeded on the assumption that it possessed jurisdiction, although, under the facts of the case, it refused the injunction prayed for.

*New Jersey v. New York*, 5 Pet. 285, 8 L. ed. 127, was the case of a bill filed by the state of New Jersey against the state of New York for the purpose of ascertaining and settling the boundary between the two states. In an opinion awarding the process of subpoena Chief Justice Marshall said:

"The Constitution of the United States de-

clares that 'the judicial power shall extend to controversies between two or more states.' It also declares that 'in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.' . . . It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the Constitution and existing acts of Congress."

In March, 1832, the state of Rhode Island filed in this court a bill against the state of Massachusetts, for the settlement of the boundary between the two states, and moved for a subpoena to be issued, according to the practice of the court in similar cases. An appearance was entered for Massachusetts, and a motion was made to dismiss the bill for want of jurisdiction. In support of the motion it was contended that this court had no jurisdiction because of the character of the respondent independent of the nature of the suit, and because of the nature of the suit independent of the character of the respondent. It was not denied that Massachusetts had agreed, by adopting the Federal Constitution, to submit her controversies with other states to judicial decision, but it was claimed that Congress had passed no law establishing a mode of proceeding, the character of the judgment to be rendered, and means of enforcing it. As respects the nature of the suit, it was argued that it was in its character political, brought by a sovereign, in that avowed character; that the judicial power of the United States extended, by the Constitution, only to cases of law and equity, \*and that questions of jurisdiction over territory were not cases of that kind, nor of "a civil nature."

The court held that jurisdiction was conferred by the Constitution and the judiciary act, and that, as Massachusetts had appeared, submitted to the process, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court was asked, all doubts as to jurisdiction over the parties were at rest.

As respected the power of the court to hear and determine the subject-matters of the suit, it was held that jurisdiction existed; that the dispute was a controversy between two states within the judicial power of the United States. 12 Pet. 657, 9 L. ed. 1233; 13 Pet. 23, 10 L. ed. 41.

Before leaving this case it is to be remarked that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more states, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite; that the intention of the Constitution was only to apply to questions in which the sovereign and political powers of the respective states were in controversy.



In *Florida v. Georgia*, 11 How. 293, 13 L. ed. 702, leave was given by this court to the state of Florida to file a bill against the state of Georgia, and process of subpoena was directed to be issued against the state of Georgia. The object of the bill was to ascertain and establish the boundary between the two states, which was in controversy. The state of Georgia answered, and the cause was proceeded in, in pursuance of the prayers of the bill. Subsequently an application was made by the Attorney General of the United States, alleging that the latter were interested and concerned in the matter in controversy, and moving the court that he be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court should order. This motion was opposed by the states, and the matter was argued at length. The judges [227] \*differed, but neither in the opinion of the majority, granting the motion of the Attorney General, nor in that of the dissenting minority, was any doubt expressed of the existence of the jurisdiction of the court over the controversy between the two states.

*Pennsylvania v. Wheeling & B. Bridge Co.* 9 How. 647, 13 L. ed. 294; *Idem v. Idem*, 11 How. 528, 13 L. ed. 799; *Idem v. Idem*, 13 How. 518, 14 L. ed. 249; *Idem v. Idem*, 18 How. 429, 15 L. ed. 436, was a case in equity, in which the state of Pennsylvania filed a bill against the Wheeling & Belmont Bridge Company, a corporation of Virginia, and certain contractors, charging that the defendants, under color of an act of the legislature of Virginia, were engaged in the construction of a bridge across the Ohio river at Wheeling, which would, as was alleged, obstruct its navigation to and from the ports of Pennsylvania, by steamboats and other crafts which navigated the same. Many different questions were discussed by counsel and considered by the court, respecting the nature and extent of the jurisdiction of this court, the right of the complainant state, whether at law or in equity, and the character of the decree which could be rendered. Several observations made in the opinion of the court will be hereafter adverted to when we come to consider the second ground of demurrer urged in the case before us. It is sufficient for our present purpose to say that the original jurisdiction of the court was sustained, a commissioner was appointed to take and report proofs, and a decree was entered declaring the bridge to be an obstruction of the free navigation of the river, that thereby a special damage was occasioned to the plaintiff, for which there was not an adequate remedy at law, and directing that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

*South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782, was a suit in equity brought in this court, whereby the state of South Carolina sought an injunction to restrain the state of Georgia, the United States Secretary of War, the Chief Engineer of the United States Army, their agents and subordinates, from obstructing the navigation of the

Savannah river, in violation of an alleged compact subsisting between the states of South Carolina and \*Georgia, and which had [228] been entered into on April 24, 1787. This court, not denying, but assuming, jurisdiction in the case, held that, by adopting the Federal Constitution, and thereby delegating to the general government the right to regulate commerce with foreign nations and among the several states, the compact between the two states in respect to the Savannah river ceased to operate, and that the acts complained of, being done in pursuance of congressional authority, and designed to improve navigation, could not be deemed an illegal obstruction, and accordingly the special injunction previously granted was dissolved and the bill dismissed.

*Wisconsin v. Duluth*, 96 U. S. 381, 24 L. ed. 669, was the case of a bill in chancery filed in this court by the state of Wisconsin, by virtue of the constitutional provision which confers original jurisdiction of suits between the states and between a state and citizens of other states. The city of Duluth, a corporation and citizen of the state of Minnesota, was defendant; and, after answer, replication, and the taking of a large amount of evidence, the case came on for a final decree. The nature of the case and the reasoning upon which this court proceeded in disposing of it will sufficiently appear in the following quotations from the opinion delivered by Mr. Justice Miller:

"The present suit was brought by the state of Wisconsin on the ground that the channel of the St. Louis river, as it flowed in a state of nature, was the common boundary between that state and the state of Minnesota, and that she has an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course; that the canal cut by Duluth across Minnesota point, deeper than the natural outlet of the St. Louis river at its mouth, has diverted, and will continue to divert, the current of that river through Superior bay into the lake by way of that canal; that the result of this is that, while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet, causes it to fill up, and thus destroys the usefulness of the river and bay as an aid of commerce, on which the state had a right to rely. The bill, after reciting the facts which we have already detailed, \*insists that the city of Duluth can [229] not, by any right of her own, nor by any authority conferred on her by the state of Minnesota, thus divert the waters of the stream—the St. Louis river—from their natural course, to the prejudice of the rights of the state of Wisconsin or of her citizens; declares that this canal at Duluth does this in violation of law; and it prays of this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made.

"The answer, while admitting the con-



struction of the canal, denies almost every other material allegation of the bill. It denies especially that the canal has the effect of changing the course of the current of the river, or does any injury to the southern entrance to Superior bay, or diminishes the flow of water at that point. A large amount of testimony, professional and nonprofessional, is presented on that subject.

"The answer also sets up, as an affirmative defense to the relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the great system of lake navigation.

"Many interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defense deny that the state of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a state in her political or sovereign character; that to sustain this suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a state, in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable [230] to the case before us. "Nor shall we address ourselves to the consideration of the mass of conflicting evidence as to the effect of the canal on the flow of the waters of Superior bay.

"We will first consider the affirmative defense already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for."

The court then proceeded to inquire into the action of the general government in the matter of the canal in question, and found that, as matter of fact, the United States had taken possession and control of the canal as a public work. The opinion concluded as follows:

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of 300 or 400 feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates \$10,000 to improve, protect, and secure this canal, this court can have no power to require it to be

filled up and obstructed. While the engineering officers of the government are, under the authority of Congress, doing all they can to make this canal useful to commerce and to keep it in good condition, this court can owe no duty to a state which requires it to order the city of Duluth to destroy it.

"These views show conclusively that the state of Wisconsin is not entitled to the relief asked by her bill, and that it must therefore be dismissed with costs."

The court therefore did not decline jurisdiction, but exercised it by inquiring into the facts put in issue by the bill and answer, and by dismissing the bill for want of equity.

In *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed. 67, a bill was filed in this court to settle the boundaries between the two states. \*There was a demurrer to the bill. In delivering the opinion of the court Mr. Justice Miller said: [231]

"The first proposition on which counsel insist in support of the demurrer is that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two states to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute. This proposition cannot be sustained without reversing the settled course of decision in this court, and overturning the principles on which several well-considered cases have been decided."

And, after citing *Rhode Island v. Massachusetts*, 12 Pet. 724, 9 L. ed. 1260; *Missouri v. Iowa*, 7 How. 660, 12 L. ed. 861; *Florida v. Georgia*, 17 How. 478, 15 L. ed. 181; and *Alabama v. Georgia*, 23 How. 505, 16 L. ed. 556, the conclusion of the court was thus expressed:

"We consider, therefore, the established doctrine of this court to be that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceeding."

In *New Hampshire v. Louisiana*, and *New York v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176, it was found that, in view of the 11th Amendment to the Constitution of the United States, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens and subjects of any foreign state," as matter of fact, under the pleadings and testimony, the suits were commenced and were prosecuted solely by the owners of the bonds and coupons to collect which was the object of the suits, and it was accordingly held that "the evident



[232] purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states or aliens, without the consent of the \*state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

In *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, the nature of the case and of the question involved was thus stated by Mr. Justice Gray, in delivering the opinion of the court:

"This action is brought upon a judgment recovered by the state of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the state, as required by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

"The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the states of the Union, and the defendant a corporation of another of those states."

After citing and considering the cases, the justice expressed the following conclusions:

"The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. . . . From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state or of a foreign country does not extend to a suit by a state to recover penalties for a breach of her own municipal law. . . . The statute of Wisconsin, under which the state recovered in one of her

[233] own courts the \*judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. . . . The cause of action was not any private injury, but solely the offense committed against the state by violating her law. . . . This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine."

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And consequently judgment was entered for the defendant on the demurrer that had been interposed to the declaration.

*Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, was an action brought in the circuit court of the United States for the eastern district of Louisiana, against the state of Louisiana, by Hans, a citizen of that state, to recover the amount of certain coupons annexed to bonds of the state. The circuit court, on motion of the attorney general of the state, dismissed the case for want of jurisdiction. This court affirmed the judgment of the circuit court, and held that the judicial power of the United States did not extend to the case of a suit brought against a state by one of its own citizens.

In the course of the opinion, delivered by Mr. Justice Bradley, the following observations were made:

"The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn v. Baltimore*, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. 1. appx. The establishment of this new branch of jurisdiction seemed to be \*necessary from the extinguish-[234]

The last case which we have had occasion to examine is that of *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251, 256. The case was brought before us by a bill in equity filed by the state of Louisiana against the state of Texas, her governor, and her health officer. The bill alleged that the state of Texas had granted to its governor and its health officer extensive powers over the establishment and maintenance of quarantines over infectious and contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas, which were business rivals of the city of New Orleans, and prayed for a decree that neither the state of Texas, nor her governor, nor her health officer, has the right, under the cover of an exercise of police or quarantine powers, to declare and enforce an embargo against interstate commerce be-



tween the state of Louisiana, or any part thereof, and the state of Texas, or the right to make discriminative rules affecting the state of Louisiana, or any part thereof, and different from and more burdensome than the quarantine rules and regulations applied to other states and countries; and the bill asked for an injunction restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. To this bill a demurrer was filed, assigning the following causes:

[235] "First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the states of Louisiana and Texas. Second. Because the allegations of said bill show that the only issues presented by said bill, arise between the state of Texas or her officers, and certain persons in the city of New Orleans, in the state of Louisiana, who are engaged in interstate \*commerce, and which do not in any manner concern the state of Louisiana as a corporate body or state. Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the state of Louisiana, said state is in effect loaning its name to said individuals and is only a nominal party, the real parties at interest being said individuals in the city of New Orleans who are engaged in interstate commerce. Fourth. Because it appears from the face of said bill that the state of Louisiana in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said state possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose. Fifth. Because it appears from the face of said bill that no property right of the state of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

In the opinion of the court, delivered by Mr. Chief Justice Fuller, after a consideration of the cases hereinbefore mentioned and of others, it was said:

"In order, then, to maintain jurisdiction of this bill of complaint, as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in the vindication of the grievances of particular individuals.

"By the Constitution the states are forbidden to 'enter into any treaty, alliance, or confederation, grant letters of marque and reprisal,' or without the consent of Congress 'keep troops or ships of war in time of peace, enter into any agreement or compact with

another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.' . . .

"Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, \*though, [236] with the consent of Congress, they may be composed by agreement. . . .

"In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this court would be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives. . . .

"But in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, involving a case in the circuit court, in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

"It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the state of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens. She does this from the point of view that the state of Texas is intentionally absolutely interdicting interstate commerce as respects the state of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate \*commerce is not committed to the [237] state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these



states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained."

After quoting the provisions of the statute of the state of Texas regulating the subject of quarantine, the Chief Justice proceeded to say:

"It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved powers comes into collision with it the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. . . . The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the state of Louisiana and the state of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the state of Texas, and the city of Galveston in particular, at the expense of the state of Louisiana, and especially of the city of New Orleans.

[238] "But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

"In our judgment, this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the meaning of the Constitution.

"Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy 'between a state and citizens of another state.' Jurisdiction over controversies of that sort does not embrace the determination of political questions, and,

where no controversy exists between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states, and such a controversy, as we have said, is not presented."

Accordingly the demurrer was sustained and bill dismissed.

From the language of the Constitution, and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this court in controversies between two or more states?

"From the language, alone considered, it [239] might be concluded that whenever and in all cases where one state may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant state, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining state, or to affect the rights of its citizens, the jurisdiction of this court would attach.

Chief Justice Marshall in the case of *Ochen v. Virginia*, 6 Wheat. 364, 392, 5 L. ed. 281, 288, said:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdic-

tion is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and [240] in all cases \*arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party; and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law."

But it must be conceded that upon further consideration, in cases arising under different states of facts, the general language used in *Cohen v. Virginia* has been, to some extent, modified. Thus, in the cases of *New Hampshire v. Louisiana*, and *New York v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176, jurisdiction was denied to this court where the cause of action belonged to private persons who were endeavoring to use the name of one state to enforce their rights of action against another; though, perhaps, it may be said that jurisdiction was really entertained, and that the bills were dismissed because the court found that, under the pleadings and testimony, the states complainant had no interest of any kind in the proceedings.

So, too, in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, the court held that, notwithstanding the action was brought by a state against the citizens of another state, and was thus within the letter of the Constitution, yet that the court had a right to inquire into the nature of the case, and, when it found that the object of the suit was to enforce the penal laws of one state against a citizen of another, to refuse to exercise jurisdiction.

In the case of *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, the bill was dismissed because a controversy between the two states was not actually presented; that what was complained of was not any action of the state of Texas, but the alleged unauthorized conduct of its health officer, acting with a malevolent purpose against the city of New Orleans. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief prayed for.

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the [241] property \*rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state.

That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

It is further contended, in support of the demurrer, that even if the state of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the state of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained.

\*It can scarcely be supposed, in view of the [242] express provisions of the Constitution and of the cited cases, that it is claimed that the state of Illinois is exempt from suit because she is a sovereign state which has not consented to be sued. The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the state of Illinois, it therefore follows that the state, as such, is not interested in the question, and is improperly made a party.

We are unable to see the force of this suggestion. The bill does not allege that the sanitary district is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of,—thus distinguishing this case from that of *Louisiana v. Texas*, where the acts sought to be restrained were alleged to be those of officers



or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation formed for purposes of private gain, but a public corporation whose existence and operations are wholly within the control of the state.

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance dangerous to the health of a neighboring state and its inhabitants. Surely, in such a case, the state of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.

It is further contended that, even if this court has original jurisdiction of the subject-matter, and even if the respective states have been properly made parties, yet the case made out by the bill does not entitle the state of Missouri to the equitable relief prayed for.

[243] This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of the city of Chicago into the "Mississippi river may or may not become a nuisance to the inhabitants, cities, and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?

The bill charges that the acts of the defendants, if not restrained, will result in the transportation, by artificial means and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago and in the bed of the Illinois river, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory.

In such a state of facts, admitted by the demurrer to be true, we do not feel it necessary to enter at large into a discussion of this part of the defendants' contention, but think it sufficient to cite one or two authorities.

*Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361, was a proceeding in equity in the supreme judicial court to enjoin the defendants from lowering the water in one of the public ponds of Massachusetts. It was claimed that the necessary effect of such lowering would be to impair the rights of the people in the use of the pond for fishing, boating, and other lawful purposes, and to create and expose upon the shores of the pond a large quantity of slime, mud, and offensive vegetation, detrimental to the public health. The defendants demurred, claiming that no case was stated which came within

the equity jurisdiction of the court, and questioning the power of the attorney general, on behalf of the commonwealth, to maintain the proceedings. Speaking for the court the Chief Justice said:

"The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation exercising the right of eminent domain under a power delegated to it by the legislature, from any abuse \*or per-[244] version of the powers, which may create a public nuisance or injuriously affect or endanger the public interests,"—citing many cases, and proceeding:

"The information in this case alleges, not only that the defendant is doing acts which are *ultra vires*, and an abuse of the power granted to it by the legislature, but also that the necessary effect of such acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one an information by the attorney general is the appropriate remedy.

. . . This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance by partially draining the pond and exposing its shores, thus endangering the public health."

And replying to the claim that resort to equity was unnecessary, the court further said:

"The defendant contends that the law furnishes a plain, adequate, and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land, and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan, speaking for the court in the case of *Mugler v. Kansas*, 123 U. S. 623, 673, 31 L. ed. 205, 214, 8 Sup. Ct. Rep. 273, 303:

"The ground of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They can, not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future; whereas courts of law \*can only reach existing nuisances, leaving fu-[245] ture acts to be the subjects of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."



In *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689, it was said by this court, through Mr. Justice Harlan, after citing English and American cases:

Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the state of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of Coosaw river."

It is finally contended that, if the bill was not prematurely filed, then it was filed too late; that, by standing by for so long a period, the complainant was guilty of such laches that a court of equity will not grant relief.

The inconsistency between these contentions is manifest, and, on consideration, we are of opinion that the suggestion that the complainants' remedy has been lost by delay is not founded in fact or reason.

In *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161, answering a similar contention, it was said by Romilly, M. R.:

"If he [the plaintiff] comes to the court and complains very early, then the evidence is that 'it [the pollution] is not perceptible'—'it is wholly inappreciable'—and you get evidence after evidence for the defendants (the pollution being slight and perhaps only observable at some times and on some occasions), saying: 'You have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say, 'You have come too late, you have allowed this to go on for twenty years, and we have acquired an easement over your property, and the right of pouring the sewage into it.' My opinion is that any person who has a watercourse flowing through his \*land, and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him.

"This is a matter of very great importance, and it has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject, and I apprehend that the observations which were quoted to me of Vice Chancellor Sir William Page Wood, in *Atty. Gen. ex rel. Thames Conservators v. Kingston-on-Thames*, 13 Weck. Rep. 888, are perfectly accurate, and that private rights are not to be interfered

with. But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of individuals are not only compatible with, but identical with, the interests of the public; and although in this case I have only to consider an injury to a private individual,—the plaintiff on the present occasion,—yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the public and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera, and typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance. . . . I am of opinion\*that Mr. Goldsmid was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks; and the result is that . . . he is entitled to a decree for an injunction to restrain the defendants from causing or permitting the sewage and other offensive matters draining from the town of Tunbridge Wells to be discharged into the Calverly Brook, or stream, in such manner as injuriously to affect the water of the brook as it flows through the plaintiff's land."

This decree of the Master of the Rolls was subsequently affirmed on appeal. L. R. 1 Ch. 348.

Similar views prevailed in *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88, where a bill was filed to enjoin the defendant city from polluting, by the discharge of sewage by artificial means, a natural stream flowing through his lands.

In the opinion of the New York court of appeals, it was said by Danforth, J., after citing *Goldsmid v. Tunbridge Wells Improv. Comrs.*:

"In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its system of sewerage. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced



the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or corporation, who causes that pollution."

[248] Cases cited by defendants' counsel, where injunctions were refused to aid in the suppression of public nuisances, were cases where the act complained of was fully completed, and where "the nuisance was not one resulting from conduct repeated from day to day. Most of them were cases of purpresture, and concerned permanent structures already existing when courts in equity were appealed to.

The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring of sewage and filth through it, by artificial arrangements, into the Mississippi river, to the detriment of the state of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day. The relief prayed for is against, not merely the creation of a nuisance, but against its maintenance.

Our conclusion, therefore, is that the demurrers filed by the respective defendants cannot be sustained. We do not wish to be understood as holding that, in a case like the present one, where the injuries complained of grow out of the prosecution of a public work authorized by law, a court of equity ought to interpose by way of preliminary or interlocutory injunction, when it is denied by answer that there is any reasonable foundation for the charges contained in the bill. We are dealing with the case of a bill alleging, in explicit terms, that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill.

We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which it is apprehended will create a nuisance of which its complainant may complain the proofs must show such a state of facts as will manifest the danger to be real and im-

[249]mediate. \*But such observations are not relevant to the case as it is now before us.

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*The demurrers are overruled, and leave is given to the defendants to file answers to the bill.*

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan** and Mr. Justice **White**, dissenting:

Controversies between the states of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the states are in direct antagonism as states. Clearly this bill makes out no such state of case.

If, however, on the case presented, it was competent for Missouri to implead the state of Illinois the only ground on which it can be rested is to be found in the allegation that its governor was about to authorize the water to be turned into the drainage channel.

The sanitary district was created by an act of the general assembly of Illinois, and the only authority of the state having any control or supervision over the channel is that corporation. Any other control or supervision lies with the lawmaking power of the state of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the state of Illinois or control its action.

The governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

Assuming that a bill could be maintained against the sanitary \*district in a proper case [250] I cannot agree that the state of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

The act complained of is not a nuisance *per se*, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the sanitary district, if authorized by the state of Missouri.

My brothers **Harlan** and **White** concur with me in this dissent.

*In re* THE DISTRICT OF COLUMBIA, *Petitioner*.

*In re* THE DISTRICT OF COLUMBIA, *Petitioner*.

(See S. C. Reporter's ed. 250-253.)

*Court of claims—new trial—for error of law.*

A new trial cannot be granted by the court of claims on the ground that the decision is shown by a later decision of the Supreme Court to have been erroneous, under U. S. Rev. Stat. § 1088, providing for new trial in case "any fraud, wrong, or injustice in the premises has been done to the United States," since this refers to matters of fact whereby fraud, wrong, or injustice has been done.

[Nos. 13 & 14, Original.]

*Argued January 21, 1901, and leave granted to submit brief on behalf of interested parties. Decided February 11, 1901.*

PETITIONS for mandamus to judges of Court of Claims. *Dismissed.*

The facts are stated in the opinion.

Mr. Robert A. Howard argued the cause, and, with Assistant Attorney General Pradt, filed a brief for petitioner:

It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court.

*Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739; *Bank of United States v. Halstead*, 10 Wheat. 55, 6 L. ed. 265.

This power to regulate practice may be exercised by Congress itself, or delegated to the courts.

*Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253.

There is no repugnancy between U. S. Rev. Stat. § 1088, and the proviso in § 4 of the jurisdictional statute of 1880. The latter refers to the common-law proceeding of a new trial; the former to a distinct, peculiar, anomalous proceeding wholly different in its characteristics from the usually designated new trial.

*District of Columbia v. Johnson*, 165 U. S. 330, 41 L. ed. 734, 17 Sup. Ct. Rep. 362.

Section 1088 is a good deal more than a motion for a new trial.

*Belknap v. United States*, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183.

It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

*Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632.

The purpose of a bill of review for errors apparent is to have the court rendering the decree give the same relief that the appellate court might give under like circumstances.

*Prentiss v. Paisley*, 25 Fla. 927, 7 L. R. A. 640, 7 So. 56; *Evans v. Clement*, 14 Ill. 206.

If the court of claims has jurisdiction, there can be no question but that it will correct the judgments.

*Foreman v. Carter*, 9 Kan. 674; *Outhwaite v. Porter*, 13 Mich. 533; *Hervey v. Edmunds*, 68 N. C. 243; *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789.

Mr. A. A. Hoehling, Jr., was granted leave to submit a brief on behalf of interested parties:

The court of claims has jurisdiction of cases and to render judgments therein, only by virtue of acts of Congress granting such jurisdiction.

*De Groot v. United States*, 5 Wall. 419, 18 L. ed. 700.

There is attached to the final judgments of that court a conclusiveness which the common law ascribes to the final judgment of all courts of competent jurisdiction.

*Spicer v. United States*, 5 Ct. Cl. 34.

The relief contemplated by U. S. Rev. Stat. § 1088, was clearly in respect of matters of fact whereby some fraud, wrong, or injustice has been done the defendant. It clearly authorizes the granting of such motion only upon evidence, cumulative or otherwise.

*Re McKay*, 30 Ct. Cl. 1.

Resort to said § 1088 cannot be had to perform the office of an appeal; and mere error of law, where the right of appeal existed, is not a fraud, wrong, or injustice within the meaning of said section.

*Ealer v. United States*, 5 Ct. Cl. 708.

The act of June 16, 1880, as enlarged and extended by the act of February 13, 1895, under which the judgments herein were rendered, requires all motions for new trials to be made by either party within twenty days after rendition of judgment.

*Childs v. District of Columbia*, 19 Ct. Cl. 332.

The payment of a judgment is a waiver and release of all errors, and is an irrevocable discharge.

*Russell v. United States*, 15 Ct. Cl. 168.

The jurisdiction of the court of claims in respect of District of Columbia cases, founded upon the act of February 13, 1895, was taken away by the repealing act of March 3, 1897, and hence that court no longer has any power to further proceed in said cases.

*Re Hall*, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723.

Mandamus will not be awarded under such circumstances.

*Com. ex rel. Springfield v. Hampden County Highway Comrs.* 6 Pick. 500.

\*Mr. Chief Justice Fuller delivered the [251] opinion of the court:

These are petitions for mandamus. The petition in No. 13 sets forth in substance that the court of claims rendered judgment in favor of Thomas Kirby and against the District, June 10, 1895, due and payable as of January 1, 1876, under the provisions of two acts of Congress, of June 16, 1880 (21 Stat. at L. 284, chap. 243), and of February 13, 1895 (28 Stat. at L. 664, chap. 87). No motion for new trial was made, and no ap-



peal was taken, and the judgment, principal and interest, was paid.

From the petition in No. 14, it appears that Henry L. Cranford and Lindley M. Hoffman obtained judgment November 15, 1895, under the aforesaid acts, payable as of January 1, 1876, which, principal and interest, was paid. No new trial was asked for, but an application for an appeal was made and withdrawn.

February 15, 1897, on an appeal by the District of Columbia from similar judgments in favor of other claimants, this court decided that no interest was recoverable on the amounts claimed until from the passage of the act of February 3, 1895. *District of Columbia v. Johnson*, 165 U. S. 330, 41 L. ed. 734, 17 Sup. Ct. Rep. 362. Thereupon on February 25, 1897, the District filed motions for new trial in the cases involved here under § 1088 of the Revised Statutes, brought forward from the act of June 25, 1868 (15 Stat. at L. 75, chap. 71), which provides: "The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of the judgment, the same shall be payable and paid as now provided by law."

The ground of these motions was error in the allowance of interest from January 1, 1876, or except from the date of the judgments. The motions were denied for want of jurisdiction.

[252] The act of June 16, 1880, provided for the settlement of all outstanding claims against the District of Columbia, including "claims arising out of contracts made by the board of public works, and conferred jurisdiction on the court of claims to hear the same, applying all laws then in force relating to the prosecution of claims against the United States, and giving the District of Columbia the same right to interpose counterclaims and defenses, and a like power of appeal, as in cases against the United States tried in said court, and containing the express proviso that "motions for new trials shall be made by either party within twenty days after the rendition of any judgment." The jurisdiction so conferred was afterwards enlarged by the act of February 13, 1895, which authorized the court to allow on claims like these the rates established and paid by the board of public works, and added that whenever those rates had not been allowed in prior cases, the claimants should be entitled on motion made within sixty days after the passage of the act to a new trial thereof.

Applications for leave to file petitions requiring the judges of the court of claims to show cause why writs of mandamus should not be issued directing them to hear, try, 180 U. S. U. S., Book 45.

and adjudge the motions for new trial, having been presented to this court, leave was granted, and rules to show cause were entered thereon, to which the respondents made answer that the motions were overruled because the court had no jurisdiction to consider the same, as the statute required motions for new trials to be made within twenty days after the rendition of judgment.

In *Euler's Case*, 5 Ct. Cl. 708, it was ruled that under the act of June 25, 1868, now § 1088 of the Revised Statutes, it could not be held that fraud, wrong, or injustice had been done by an error of law when there existed an ample measure of redress by appeal, and Nott, J., delivering the opinion, said: "The judgment in this case was deliberately considered by the court after its merits had been elaborately argued by counsel. If the court committed an error of law, the defendants had a sufficient remedy, by appeal to the Supreme Court. If an error of fact was committed, arising from inadvertence or mistake, the court was willing to correct its oversight. But the motion now made is grounded on a supposed error of law, or \*rather upon a decision of the Supreme Court, pronounced in another case since the judgment in this was rendered." [253]

We concur in this view. It seems to us clear that the relief contemplated by § 1088 was in respect of matters of fact whereby some fraud, wrong, or injustice had been done to defendants. Indeed, the section provides that such new trials shall be granted "upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises had been done." *Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *Belknap v. United States*, 150 U. S. 588, 591, 37 L. ed. 1191, 1193, 14 Sup. Ct. Rep. 183. This being so, it is unnecessary to consider whether the twenty-day limitation of the act of 1880 operated in amendment of § 1088, for that section does not authorize motions for new trial on the grounds upon which those in question rested. As the court of claims was right in denying the motions, the rules hereinbefore granted must be discharged and the petitions dismissed, and it is so ordered.

Mr. Justice Harlan concurred in the result.

W. H. ANSLEY, M. H. Gleason, and R. O. Edmonds, Appts.,

v.

N. B. AINSWORTH, L. C. Burriss, O. E. Woods, James Elliott, and Ola Coal & Mining Company.

(See S. C. Reporter's ed. 253-260.)

*Appeal—from court of Indian territory.*

Appeal to the Supreme Court of the United States from the United States court for the

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. State ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

central district of the Indian territory, in a case in which the constitutionality of an act of Congress is brought in question, but which is not affected by the Indian appropriation act of July 1, 1898, is not authorized by the act of Congress of March 3, 1891, § 13, providing for appeals from the United States court in that territory to the Supreme Court of the United States, or to a circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, but the appeal should be prosecuted to the court of appeals in the Indian territory.

[No. 136.]

*Submitted December 20, 1900. Decided February 11, 1901.*

**A** PPEAL from a decision of the United States court in the Indian Territory. *Dismissed.*

Statement by Mr. Chief Justice **Fuller**:

This was a bill filed in the United States court in and for the central district of the Indian territory by W. H. Ansley, M. H. Gleason, and R. O. Edmonds against N. B. Ainsworth,\* L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company, alleging: That Ansley was by blood a member and citizen of the Choctaw Nation of Indians; that Gleason and Edmonds were citizens of the United States by birth, who by intermarriage with members of the Choctaw Nation had become citizens of that nation; that Ainsworth was a citizen of the Choctaw Nation and Burriss a citizen of the Chickasaw Nation; that Woods and Elliott were citizens of the United States; and that the mining company was a corporation organized under the laws of Kansas, engaged in operating a mine in the Choctaw Nation, Elliott being president, and Woods general manager, thereof.

The bill averred that in November, 1890, Gleason and Edmonds and one Riddle, a citizen by blood of the Choctaw Nation, discovered coal, and acquired an exclusive and perpetual right to a coal claim to themselves and their assigns under § 18 of art. 7 of the Choctaw Constitution; the laws, usages, and customs of that nation; and acts of the Choctaw Council; and that in February, 1898, Riddle conveyed his undivided one-third interest in the coal claim to Ansley.

That Gleason, Edmonds, and Riddle, in 1896, contracted with Woods to work the mine, and that Woods contracted with the mining company for the working of the same, and that under the agreements Gleason, Edmonds, and Riddle were to receive a royalty.

That Ainsworth and Burriss were coal trustees designated by the governors of the Choctaw and Chickasaw Nations, respectively, and appointed by the President, under the act of Congress of June 28, 1898 (30 Stat. at L. 510, chap. 517), which act ratified an agreement with the Choctaw and Chickasaw Nations, known as the "Atoka Agreement," also afterwards ratified by the people of said

nations, and operated to annul all individual leases and to prohibit the payment to or receipt by individuals of any royalty on coal, and provided that all royalties should be paid into the Treasury of the United States for the benefit of the tribes, to be drawn therefrom under such rules and regulations as should be prescribed by the Secretary of the Interior, and that all leases for the working of coal lands entered into by and \*between persons or corporations desir- [255] ing to mine coal and the mining trustees of the Choctaw and Chickasaw Nations should be approved by the Secretary of the Interior.

The bill was filed to enjoin Woods, Elliott, and the mining company from entering into a lease with Ainsworth and Burriss, mining trustees of the Choctaw and Chickasaw Nations, and denied on various grounds the constitutionality and validity of the provisions of the act of Congress.

The United States court for the central district of the Indian territory, Clayton, J., presiding, held that there was no equity in the bill, and sustained a demurrer thereto, and, complainants declining to plead further, dismissed the bill with costs, whereupon an appeal was allowed to this court.

*Mr. Yancey Lewis* submitted the cause for appellants. *Mr. J. H. Gordon* was with him on the brief.

*Mr. J. W. McLoud* submitted the cause for appellees:

The appeal in this case should have been taken to the court of appeals in Indian territory.

*Brown v. United States*, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56.

The decision of the court of appeals of Indian territory, if the appeal had been taken there, would have been final.

*Ibid.*; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Re Heath*, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615; *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.

Appeals direct from the trial court to the Supreme Court of the United States are authorized by the act of 1898 only in citizenship cases between either of the five civilized tribes and the United States, and these two classes of cases can only be heard in the Supreme Court on the question of the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian territory.

*Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

\*Mr. Chief Justice **Fuller** delivered the [255] opinion of the court:

The objection of want of jurisdiction over this appeal meets us on the threshold.

By the act of March 1, 1889, entitled "An Act to Establish a United States Court in the Indian Territory, and for Other Purposes," 25 Stat. at L. 783, chap. 333, a court was established with a single judge, whose jurisdiction extended over the Indian territory, and it was provided that two



terms of said court should be held each year at Muscogee in that territory, and such special sessions as might be necessary for the despatch of business in said court at such time as the judge might deem expedient.

May 2, 1890, an act was passed "To Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, and for Other Purposes," 26 Stat. at L. 81, 93, 94, chap. 182, §§ 29, 30, and 31, which defined the Indian territory; gave additional jurisdiction to the court in that territory as therein set forth; and, for the purpose of holding terms of the court, divided the territory into three specified divisions.

[256] \*By § 5 of the judiciary act of March 3, 1891, chap. 517 (26 Stat. at L. 826), as amended, appeals or writs of error might be taken from the district and circuit courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By § 6 the circuit courts of appeals established by the act were invested with appellate jurisdiction in all other cases.

The 13th section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act."

March 1, 1895, an act was approved entitled "An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory." 28 Stat. at L. 693, chap. 145. This act divided the Indian territory into three judicial districts, to be known as the northern, central, and southern districts, and provided for two additional judges for the court, one of whom should be judge of the northern district, and the other judge of the southern district, and that the judge then in office should be judge of the central district. The judges were clothed with all the authority, both in term time and in vacation, as to all matters and causes, both criminal and civil, that might be brought in said districts, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of habeas corpus, etc., as by law vested in the judge of the United States court in the Indian territory, or in the circuit and district courts of the United States. The judge of each district was authorized and empowered to hold court in any other district, for the trial of any case which the judge of such

[257] other district was disqualified from \*trying,  
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and whenever on account of sickness, or for any other reason, the judge of any district was unable to perform the duties of his office, it was provided that either of the other judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian territory, as defined by law, as to offenses committed within the territory, were repealed, and their jurisdiction conferred after September 1, 1896, on the "United States court in the Indian territory."

Section 11 of this act read as follows:

"Sec. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian territory, and such general superintending control over the courts thereof, as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said state, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian territory; and appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit \*court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States. Said appellate court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thousand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

The Indian appropriation act of June 10, 1896 (29 Stat. at L. 321, 339, chap. 398),

in respect of the proceedings therein referred to, provided that "if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, that the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It has been ruled that the court thus described as the "United States district court" was the United States court in the Indian territory. *Stephens v. Cherokee Nation*, 174 U. S. 477, 43 L. ed. 1052, 19 Sup. Ct. Rep. 734.

By the Indian appropriation act of June 7, 1897, chap. 3 (30 Stat. at L. 84), provision was made for the appointment of an additional judge for the United States court in the Indian territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided*, That no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act it was also provided:

"That on and after January first, eighteen hundred and ninety-eight, the United States courts in said territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes [259] in law and equity thereafter instituted, \*and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said territory, and the United States commissioners in said territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said territory; and the laws of the United States and the state of Arkansas in force in the territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

The Indian appropriation act of July 1, 1898 (30 Stat. at L. 591, chap. 545), contained the following:

"Appeals shall be allowed from the United States courts in the Indian territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to

this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

In *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, it was held that the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or allotment of land in the Indian territory.

Thus, it is seen that the act of March 1, 1895, created a court \*of appeals in the Indian territory, with such superintending control over the courts in that territory as the supreme court of Arkansas possessed over the courts of that state by the laws thereof; and the act also provided that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit-courts of the United States," which necessarily deprived that court of jurisdiction of appeals from the Indian territory trial court under § 13 of the act of 1891.

Prior to the act of 1895, the United States court in the Indian territory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them, and we held, in *Brown v. United States*, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56, that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court of the Indian territory.

In *Stephens v. Cherokee Nation* we thought it unnecessary to determine whether the effect of the act of 1895 was to render the 13th section of the act of 1891 wholly inapplicable, as the judgments of the United States courts in the Indian territory in the cases there considered were made final below by the act of 1896, and the appeals were regarded as having been in terms granted from those judgments by the act of 1898.

But this case is not affected by the act of 1898, and we are of opinion that it does not come within the 13th section of the act of 1891. In accordance with the legislation subsequent to 1891, the appeal should have been prosecuted to the court of appeals in the Indian territory. The question whether or not an appeal would lie to this court from that court does not arise on this record.

*Appeal dismissed.*



[261] \*EUTEMIO MONTOKA, *Appt.*,  
v.  
UNITED STATES.

(See S. C. Reporter's ed. 261-270.)

*Indian depredations—tribes in amity—independent hostile band.*

Depredations committed by Indians who belonged to a tribe in amity with the United States before they joined an independent band made up of Indians from different tribes, which was separate and distinct in its organization and action from the several tribes to which its members had belonged, and which was itself not in amity with the United States, will not sustain a claim against the United States under the act of Congress of March 3, 1891, for depredations by Indians belonging to any band, tribe, or nation in amity with the United States.

[No. 43.]

*Argued December 14, 17, 1900. Decided February 11, 1901.*

ON APPEAL from a decision of the Court of Claims dismissing a petition on claims for Indian depredations. *Affirmed.*

See same case below, 32 Ct. Cl. 349.

Statement by Mr. Justice **Brown**:

This was a petition by the surviving partner of the firm of E. Montoya & Sons against the United States and the Mescalero Apache Indians for the value of certain live stock taken in March, 1880, by certain of these Indians, known as Victoria's Band.

The court of claims made the finding of facts set forth in the margin.†

[262] \*Upon these findings of fact the court decided as a conclusion of law that the petition be dismissed. 32 Ct. Cl. 349. Claimant appealed.

†*Finding of Fact.*

1. At the time of the depredation hereinafter found Estanislao Montoya, Desiderio Montoya, and Eutimio Montoya were partners, doing business in Socorro county, New Mexico, under the name and style of E. Montoya & Sons, and were at the time, and long prior thereto, citizens of the United States, residing at San Antonio, in said county and territory.

Thereafter, and long prior to the passage of the act of March 3, 1891 (26 Stat. at L. 851, chap. 538), the said Estanislao and Desiderio Montoya died, leaving the claimant herein surviving.

2. On the 12th of March, 1880, the said firm of E. Montoya & Sons were the owners of the horses, mules, and other live stock described in the petition, then being herded and cared for by their agents at a place called Nogal, about 8 miles west of San Antonio, which were stolen by Indians in the manner set forth in finding 3. Said stock was at the time and place reasonably worth more than three thousand dollars (\$3,000).

3. Prior to 1876 the Chiricahua Apache Indians were living on what was known as the Chiricahua reservation, in southeastern Arizona, and numbered from 300 to 500 warriors. They had been a terror to the community and surroundings, and had met with success in their engagements with the troops of the United

*Messrs. William B. King and W. H. Robeson* argued the cause and filed a brief for appellant:

The word "band" is to be construed in the light of the general meaning of its associated words, as possessing the characteristic common to them,—separate nationality.

*Nesbitt v. Lushington*, 4 T. R. 783; *Cotton v. James*, Moody & M. 273; *Black*, Interpretation of Laws, p. 135.

The act of 1891 does not grant rights, but gives a remedy.

*Corralitos Stock Co. v. United States*, 33 Ct. Cl. 345; *McKinzie v. United States*, 34 Ct. Cl. 285.

The ground of the freedom of the tribe from responsibility in war rests upon belligerent rights as recognized in international law.

*Leighton v. United States*, 29 Ct. Cl. 288, *Affirmed* in 161 U. S. 291, 40 L. ed. 703, 16 Sup. Ct. Rep. 495; *Love v. United States*, 29 Ct. Cl. 332.

The amity of the band, tribe, or nation with the United States is alone involved under the act of 1891; and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations.

*Leighton v. United States*, 29 Ct. Cl. 326.

The recognition of political right devolves upon the political department of the government.

*Holden v. Joy*, 17 Wall. 211, 21 L. ed. 523; *Fellows v. Blacksmith*, 19 How. 366, 15 L. ed. 684; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182; *Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket v. Johnson County Comrs.* 18 L. ed. 667.

Mr. **Kie Oldham** argued the cause for appellee.

Assistant Attorney General **Thompson**

States Army. (Report Commissioner Indian Affairs, 1876, p. 10.)

In 1876 an effort was made by the authorities having charge of Indian affairs to remove said Indians and locate them on the San Carlos reservation, where they could be more certainly restrained from hostile acts, but they resisted, and the result was that only 322 Indians, of whom 42 were men under Chief Taza, were removed thither. Of those remaining 140 went to the Warm Springs agency in New Mexico, and about 400, including Victoria, became hostile, and roamed about in Old and New Mexico, committing depredations and killing citizens. (Report Secretary Interior, 1875, p. 711, and *Id.* 1876, p. 4.)

Later these Indians were aided in their acts of hostility by Apache Indians from the Warm Springs agency (Report Secretary Interior, 1877, p. 416), and from this time until December, 1878, they continued their hostile acts.

In February, 1879, Victoria, a Chiricahua, who had previously rebelled against being placed on the San Carlos reservation, came near the military post of Ojo Caliente with 22 followers and agreed to surrender on condition that Nama's band, then at Mescalero, be allowed to join him, but only a few of that band surrendered, and in April following Victoria, with his followers, escaped and went to the San Mateo mountains. (Report Secretary Interior, 1879, p. 100.)

also argued the cause, and, with *Mr. Lincoln B. Smith*, filed a brief for appellee:

A "band," within the meaning of the act of March 3, 1891, must be a band capable of being in hostility against the United States, and must be in a measure independent; but it need not possess the capacity of making peace and war in the strictest sense of international law.

*Marks v. United States*, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476.

The different divisions of Indians have not usually originated from the conventional mode which organizes white persons into political communities, but have originated as a condition in fact, and when so existing they are recognized by the laws and treaties as a separate entity, and held responsible as such.

*Herring v. United States*, 32 Ct. Cl. 536.

The name "Apache" is one indicating racial, rather than political, affinity, and the various tribes and bands of Apaches have always been independent of each other, in every respect, and often at war among themselves.

*Dobbs v. United States*, 33 Ct. Cl. 308.

The fact that courts must recognize bands, tribes, or nations as such when treaties have been made with them does not preclude the court from determining the status of the band or tribe from other factors, where no treaty has been made.

*Graham v. United States*, 30 Ct. Cl. 333; *Tully v. United States*, 32 Ct. Cl. 1.

The act of March 3, 1891, is in derogation of the sovereignty of the United States, and as such should be strictly construed.

*Leighton v. United States*, 161 U. S. 291, 40 L. ed. 703, 16 Sup. Ct. Rep. 495.

The Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit.

*Marks v. United States*, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476.

The military forces pursued him into Arizona, where he recruited his forces from the members of his tribe then being held as prisoners of war at the San Carlos reservation, and he subsequently escaped into Old Mexico. (Record of Engagements with Hostile Indians, by General Sheridan, p. 84.)

On the 30th June following, Victoria, with 13 men, came into the Mescalero reservation, where there were at the time a few Gila, Mimbres, and Mogollen Apaches, known as Southern Apaches, and at his request the families of those Indians (Chiricahuas) who had been kept on the San Carlos reservation were sent for.

Victoria was soon thereafter indicted in New Mexico for murder and horse stealing, and he became fearful of arrest and conviction therefor and suddenly left the reservation (in July), taking with him those he had brought and also all the Southern Apaches on that reservation. (Report Secretary Interior, 1879, p. 100.)

They went west and began marauding, destroying property, and killing citizens, and so continued during the latter part of winter and early spring of 1880 within 40 miles of the Mescalero reservation, Victoria in the meantime using his influence to induce the Mescaleños to join his forces, and by April, 1880, some 200 to 250, of whom 50 or 60 were men, left their reservation and joined him. (Report

How much more should this just and beneficent principle be applied in the interpretation of a statute which is in derogation of the ordinary principles of law and of the rights of the Indian tribes considered as semi-independent nations under the general principles of international law.

*Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

\*Mr. Justice **Brown** delivered the opinion of the court: [263]

The first section of the act of March 3, 1891 (26 Stat. at L. 851, chap. 538), vests the court of claims with jurisdiction to inquire into \*and finally adjudicate: "First. [264] All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

To sustain a claim under this section, it is incumbent upon the claimant to prove that the Indians taking or destroying the property belonged to a band, tribe, or nation in amity with the United States. The object of the act is evidently to compensate settlers for depredations committed by individual marauders belonging to a body which is then at peace with the government. \*If the depredation be committed by an orga- [265] nized company of men constituting a band in itself, acting independently of any other band or tribe, and carrying on hostilities against the United States, such acts may amount to a war for the consequences of which the government is not responsible under this act, or upon general principles of law. *United States v. Pacific R. Co.* 120 U. S. 227, 234, 30 L. ed. 634, 636, 7 Sup. Ct. Rep. 490.

The North American Indians do not, and never have, constituted "nations" as that

Secretary of Interior, 1880, p. 251.) They continued their warfare until driven by the troops under Colonel Hatch, United States Army, across the Rio Grande river into the San Andres mountains in April, 1880, where he had a severe fight with them, and several of his men were wounded and a number of Indians, including a son of Victoria, were killed. They finally retreated into Mexico.

Under the leadership of Victoria they again crossed and recrossed the line to and from the United States, but were driven out twice by the forces under Colonel Grierson, United States Army, and their forces diminished, until finally the few remaining were driven by General Buell some time after October 1, 1880, into Mexico, where Victoria and nearly all of his followers were killed. (Report Secretary of War, 1880, pp. 86 and 118.)

During all the period of hostilities as aforesaid Victoria had under him a minority of the Chiricahua tribe of Apache Indians. At his solicitation he was re-enforced from time to time during said period by a minority of the Indians from the Mescalero and Southern Apache tribes; besides he had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found.

These Indians were allied together under the



word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as tribes. Indeed, in negotiating with the Indians the terms "nation," "tribe," and "band" are used almost interchangeably. The word "nation" as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word "nation" a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word "nation" as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.

[266] \*We are more concerned in this case with the meaning of the words "tribe" and

"band." By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership, and concert of action.

Whether a collection of marauders shall be treated as a "band" whose depredations are not covered by the act may depend, not so much upon the numbers of those engaged in the raid, as upon the fact whether their depredations are part of a hostile demonstration against the government or settlers in general, or are for the purpose of individual plunder. If their hostile acts are directed against the government or against all settlers with whom they come in contact, it is evidence of an act of war. Somewhat the same distinction is applicable here which is noticed by Hawkins in his Pleas of the Crown, and other ancient writers upon criminal law, as distinguishing a riot from a treasonable act of war. Thus it is said in Wharton on Criminal Law, § 1796, summing up the early authorities (though never accepted as a definition of treason in this country): "That constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force; as where the object is, by force to obtain the repeal of a statute; to obtain the redress of any public

name of Victoria's band for the purpose of aiding Victoria and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States.

The alliance thus formed, as well as the hostile acts committed by the band, were without the consent of the several tribes from which the members of the band came and to which they had previously belonged.

From the reports referred to in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer for 1879 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed as aforesaid.

On the 12th of March, 1880, the property set forth in finding 2 was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victoria's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

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But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

Said property was taken without any just cause or provocation on the part of the owners or their agents in charge, and has never been returned or paid for in whole or in part.

4. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band, known as Victoria's band, of Apache Indians, which was at and long before that time known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States at the date of said depredation.

5. The claim which is the subject of this suit was presented to the defendant Indians in council on or before June 8, 1880, by S. A. Russell, agent for the Mescalero Apache Indians, under the direction of the Commissioner of Indian Affairs.



grievance, real or pretended; to throw down all inclosures, pull down all bawdy houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally;" but if these acts were directed against a particular individual they would amount to nothing more than an assault or riot.

[267] \*While, as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe. In his concurring opinion in *Bas v. Tingy*, 4 Dall. 37, 1 L. ed. 731, recognizing France as a public enemy, Mr. Justice Washington recognized war as of two kinds: "If it be declared in form, it is called solemn, and is one of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons, and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers." Indian wars are of the latter class. We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war. *Marks v. United States*, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476.

In determining the liability of the United States for the acts of Indian marauders, the 5th and 6th sections of the Indian depredation act should be considered as well as the first. By the 5th section "the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified."

[268] Of course, if the \*tribe to whom the Indians belong cannot be ascertained, this will not prevent a judgment against the United States, but if their connection with a particular tribe can be established, judgment shall also go against the tribe. By § 6 "the amount of any judgment so rendered against any tribe of Indians shall be

charged against the tribe by which, or by members of which, the court shall find the depredation was committed, and shall be deducted and paid" from annuities or other funds due the tribe from the United States, or from any appropriation for the benefit of the tribe.

It is not altogether easy to reconcile the language of these sections, which seem to contemplate that the government may be liable for depredations committed by a *tribe*, with that of § 1 under which the jurisdiction of the court of claims is limited to the acts of "Indians *belonging* to any band, tribe, or nation, in amity with the United States;" but the main objects of §§ 5 and 6 would seem to be to impose upon the tribes the duty of holding their members in check or under control, and for a failure so to do to fix upon the tribe the responsibility for the acts of individual members acting in defiance of the authority of their tribe or band, upon the same principle that, by sundry statutes in England and in several of the United States, the hundred or the municipality is made responsible in damages for the acts of rioters. Like the English statutes, too, many of the Indian treaties provide that if the property be restored or the guilty members be delivered up for punishment, no pecuniary indemnity shall be required. On the other hand, if the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control.

Gauged by these considerations it is clear that the court of \*claims was justified in its [269] ultimate finding that Victoria's band was, at and long before the occurrence complained of, "known and recognized as a band separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States." Conceding that the accuracy of this ultimate finding may be reviewed by this court by a reference to the special facts found as a basis for such finding (*United States v. Pugh*, 99 U. S. 265, 25 L. ed. 322), in our opinion those facts amply support the finding.

It appears that prior to 1876 the Chiricahua Apache Indians, who numbered from three to five hundred warriors of a particularly savage type, were living on a reservation of their own in Arizona; and that during that year the department determined to remove these Indians and locate them upon another reservation, where they could be



more easily restrained from hostile acts. A part of them resisted, and about 400, under the leadership of Victoria, began roaming about Old and New Mexico, committing depredations and killing citizens. These hostile demonstrations continued until December, 1878, soon after which Victoria made an offer of surrender on a condition that was not performed, and in the following spring he again took the field, pursued by the military forces into Arizona, and subsequently escaped into Mexico. Soon thereafter he was indicted in New Mexico for murder and horse stealing, when he went west and began marauding, destroying property, and killing citizens, and so continued during the latter part of the winter and early spring of 1880. The operations against them continued until they were driven by the troops across the Rio Grande river, where a severe engagement ensued and a number of Indians, including a son of Victoria, were killed. The band appears to have been of sufficient strength and consequence to have been made the object of a military expedition, which operated upon both sides of the Mexican line, and finally resulted in a battle in Mexico in the autumn of 1880, where Victoria and most of his followers were killed. The Indians constituting this band seem to have belonged to different tribes of Apaches, and were about

[270] 200 \*in number at the time this depredation was committed. They were evidently carrying on hostile acts against the settlers and military authorities of the United States, and the court expressly finds that such acts were "without the consent of the several tribes from which the members of the band came and to which they had previously belonged;" that they were denominated in various reports of military officers to the Secretary of War as "Victoria's band," and under that name were pursued for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed. The property in question was stolen and driven away, or destroyed, by certain Mescalero Apache Indians, who were at that time allied with Victoria's band for the purpose of hostility and war as aforesaid, and the band so constituted was not in amity with the United States, although the Mescalero tribe, which was then upon its reservation about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

As it appears that the Mescaleros who committed the depredation were a part of Victoria's band, operating with them, and that such band was carrying on a war against the government as an independent organization, we think they were the band—the unit—contemplated by the act, and not the Mescalero tribe then living in peace upon their reservation near Fort Stanton, although the particular marauders in question had belonged to that tribe before they

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joined Victoria's band. If the Mescalero tribe were held responsible for their acts it would follow that every tribe, members of which allied themselves with Victoria and shared in his acts of hostility, would be pecuniarily liable for all damages inflicted by a band over whom they could have no control. Such consequences would be so inequitable we cannot suppose them to have been contemplated by Congress.

*The judgment of the Court of Claims is affirmed.*

\*MILTON C. CONNERS, Jr., Appt., [271]  
v.

UNITED STATES *et al.*

(See S. C. Reporter's ed. 271-276.)

*Indian depredations—tribes in amity—dependent hostile band.*

Depredations committed by a band of Indians belonging to a tribe in amity with the United States, but who were peacefully making their way back to a former reservation, and committed no depredations until after they had been fired upon by the United States troops, whereupon they went upon the warpath, do not make the United States and the tribe liable therefor.

[No. 44.]

*Argued December 17, 1900. Decided February 11, 1901.*

ON APPEAL from a decision of the Court of Claims dismissing a petition on claims for Indian depredations. *Affirmed.*

See same case below, 33 Ct. Cl. 317.

Statement by Mr. Justice Brown:

This was also, as in the last case, a claim for live stock taken and destroyed in October, 1878, by certain bands of the Cheyenne and Arapahoe Indians, the suit being against the United States and Dull Knife's and Little Wolf's bands of Northern Cheyennes and the Northern and Southern Cheyennes and Arapahoe Indians. Defendants disclaimed responsibility upon the ground that the depredation was committed by an independent band of Indians, not then in amity with the United States.

The court of claims made a finding of facts, the material article of which is set forth in the margin.†

†*Finding of Facts.*

In May, 1877, 937 Northern Cheyennes, men, women, and children, were removed from the Red Cloud reservation at Fort Robinson, in Nebraska, to the Southern Cheyenne and Arapahoe reservation at Fort Reno, in the Indian territory. The Cheyennes went voluntarily, though reluctantly, relying in part upon representations made to them that the southern reservation would be a desirable home, and in part upon what they understood to be assurances that, if dissatisfied with it, they should be brought back. The body of Indians was composed of subdivisions of the Cheyenne tribe known as the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow. These so-called bands



[272] \*Upon these findings of fact the court decided as a conclusion of law:

The bands of Dull Knife and Little Wolf, [273] at the time when the \*depredation was committed, were independent bands of Indians, within the intent and meaning of the Indian depredation act, 1891; and the tribe of Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed. 33 Ct. Cl. 317.

Mr. William H. Robeson argued the cause, and, with Mr. William B. King, filed a brief for appellant.

Mr. Kie Oldham argued the cause for appellee.

Assistant Attorney General Thompson also argued the cause, and, with Mr. Lincoln B. Smith, filed a brief for appellee.

For contentions of counsel, see briefs as reported in *Montoya v. United States*, ante, 521.

[273] \*Mr. Justice Brown delivered the opinion of the court:

The opinion of the court of claims sets forth with more fullness than the findings the details of one of the most melancholy of Indian tragedies—a shocking story of nearly 1,000 of the Northern Cheyenne tribe removed from the Red Cloud reservation in Nebraska to the Southern Cheyenne and Arapahoe reservation, at Fort Reno in the Indian territory; of the profound dissatisfaction of Dull Knife's and Little Wolf's bands, who lived apart from the other Indians on the reservation, and made repeated applications to the government to be returned to what they termed their native country in

had no autonomy, and had not been recognized either by the government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders or spokesmen, commonly called head men. The Indians so removed were about one-half of the entire tribe.

On the reservation at Fort Reno, the Cheyennes of Dull Knife's and Little Wolf's bands lived apart from other Indians on the reservation. They were dissatisfied, and made repeated applications to the government to be brought back to what they termed their native country in the Northwest. No notice being taken of their request, 320 of them broke away from the reservation on September 9, 1878. The commanding officer at Fort Reno sent a military force in pursuit. "The officer in command was particularly instructed if he could induce the Indians to come back without resort to force to do so."

The Cheyennes were overtaken at a point 120 miles distant from Fort Reno. The officer in command summoned them to yield and return to the reservation. Little Wolf, as spokesman for the Cheyennes, replied in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon the Cheyennes, who returned the fire, and then fled and escaped. They made their way across Kansas and Nebraska, twice fighting United States troops and likewise a body of armed citizens who attacked them. In the northern part of Nebraska they were in-

the Northwest; of no notice being taken of their request, when over 300 of them broke away from the reservation; of a military force from Fort Reno sent in pursuit of them with particular instructions to induce the Indians to come back without resort to force, if possible; of their being overtaken 120 miles from Fort Reno; of an order to return to the reservation and a reply in substance that they did not wish to make war but that they would rather die than go back. The troops immediately fired upon them; they returned the fire, fled, and escaped; made their way across Kansas and Nebraska, twice fighting the troops as well as a body of armed citizens who attacked them. They were finally intercepted by other troops, and, after some fighting, surrendered on October 3, 1878, \*and were taken to Fort Robinson, [274] their former reservation in Nebraska. It was two days before the surrender, October 1, 1878, that the property of the claimant is found to have been taken or destroyed by these Indians. Up to the time they were fired upon by the pursuing troops in the Indian territory, they had committed no atrocity, were in amity with the United States, and desired to remain so. After they were fired upon their flight was characterized by the usual excesses of Indian warfare. The leading chief was Dull Knife, who was accompanied by Old Crow and Wild Hog with some of their bands, but, regarded as a military force, they were under the command of Dull Knife. The band at the time of the surrender consisted of 49 men, 51 women, and 48 children.

The main body of the Northern Cheyennes, to which these bands seem to have originally belonged, both in the Indian territory and

intercepted by other troops, and after some fighting they surrendered on the 3d of October, and were taken to Fort Robinson. Shortly before this surrender, Little Wolf with about half of the party had separated from Dull Knife, and he and his party were not included in the surrender. Old Crow and Wild Hog, with some of their bands, accompanied Dull Knife's party in this escape from the Indian territory. The leading chief was Dull Knife, and the Indians, regarded as a military force, were under his command. The band at the time of the surrender consisted of 49 men, 51 women, and 48 children.

Up to the time these Cheyennes were fired upon in the Indian territory by the pursuing troops they had committed no atrocity and were in amity with the United States and desired to remain so. After they were fired upon, as before described, their flight was characterized by the usual characteristics of Indian warfare. During the period of this flight—that is to say, between the 9th of September and the 3d of October, 1878—the Northern Cheyennes, both in Indian territory and on the northern reservations, were in amity with the United States.

On these specific facts the court finds the ultimate facts, that at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United States, with the exception of those who composed the bands of Dull Knife and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity.



on the Northern Reservation, were in amity with the United States. Although these bands, under the leadership of Dull Knife, were evidently driven into hostility with the United States by the action of the troops in firing upon them pending a peaceful effort to induce them to return to their reservation, and thereby instituting an Indian warfare, the fact still remains that this was an independent band which had broken away from the main body of the Cheyennes, and was acting in hostility to the United States and to all the frontiersmen along their path of retreat. As stated in the opinion of the court: "They fought and fled, and scattered and reunited. They fought other military commands and citizens who had organized to oppose them, and in like manner they again and again eluded their opponents, making their way northward over innumerable hindrances. They had not sought war, but from the moment when they were fired upon they were upon the warpath—men were killed, women were ravished, houses were burned, crops destroyed. The country through which they fled and fought was desolated, and they left behind them the usual well-known trail of fire and blood."

[275] While the ghastly facts of this case, which are set forth with much greater detail in the opinion of the court of claims, appeal strongly to the generosity of Congress to recompense those who \*have suffered by the inconsiderate and hasty action of the troops in driving these Indians into hostility, they afford no ground whatever for a judgment against the tribes to which these Indians originally belonged, but from which they had separated and carried on independent operations. In fact, it would be highly unjust to add to their manifest sufferings the payment of these damages from their annuities, or from other funds standing to their credit. Nor does the claim make a case against the United States under the act vesting jurisdiction in the court of claims. We are not at liberty to consider the circumstances under which these Indians were driven into hostility to the United States. That the band was not in amity from the moment it was fired upon by the troops is entirely clear. That the band itself was beyond the control of the tribes to which it originally belonged is equally clear. As stated by the court below: "It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States; but it was the case of an entire body waging armed resistance, with all its might and with all the ferocity of Indian warfare, against whatever power the United States could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States, on the assumption that they were escaping prisoners of war, refutes the idea of pre-existing conditions of amity and renders it preposterous." The fact that they were treated as prisoners of war also refutes the

idea that they were murderers, brigands, or other common criminals.

To constitute a "band" we do not think it necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings.

The opinions of the court below in both of these cases are so thorough and satisfactory that a prolongation of this opinion \*would be but a mere repetition of those. The law which controlled the disposition of the case just decided is equally applicable here, and the judgment of the Court of Claims dismissing the petition is therefore affirmed. [276]

CITY OF LAMPASAS, Plff. in Err.,  
v.

JAMES M. BELL.

(See S. C. Reporter's ed. 276-284.)

*Appeal—constitutional question—who may raise.*

1. The contention that a new incorporation of a city, bringing in people who were not formerly in the city, without giving them any opportunity to be heard, is in violation of their constitutional rights, cannot be made by the city on behalf of such people, who have not objected to the incorporation on that ground, so as to raise a constitutional question for the purpose of a direct appeal to the Supreme Court of the United States from a circuit court under the judiciary act of 1891, § 5 (26 Stat. at L. 828, chap. 517), in an action against the city on unpaid coupons for interest on bonds issued after the new incorporation.
2. Questions which can be raised under any of the subdivisions of § 5 of the judiciary act of 1891 (26 Stat. at L. 828, chap. 517), for the purpose of a direct appeal to the Supreme Court of the United States from a circuit court, must be real, and must present controversies that are substantial, not only from the nature of the principles invoked, but from the relation to them of the party by whom they are invoked.

[No. 115.]

*Argued December 3, 1900. Decided February 11, 1901.*

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a decision in favor of the plaintiff against a city for interest on bonds. *Dismissed.*

Statement by Mr. Justice McKenna:

This suit is brought to recover the amount of certain unpaid coupons for interest on "Lampasas City Waterwork Bonds." The main controversy on the merits depends upon whether the plaintiff in error is the same

municipal corporation which issued the bonds, or is its successor in liability. There are minor questions turning upon the provisions of ordinances and the observance of their requirements. Besides, a question under the Constitution of the United States is [277] claimed to have been raised \*in the circuit court by the plaintiff in error, and upon this is based the right to bring the case here rather than take it to the circuit court of appeals. The facts are stipulated and are very voluminous, but the view we take of the constitutional question enables us to omit much detail.

The city of Lampasas was incorporated by special act of the legislature in 1873, under the name of the "Corporation of the City of Lampasas," with boundaries containing an area of 553 acres. Its officers were to be elective, and consist of a mayor, a board of aldermen of eight members, five of whom should constitute a quorum. Their term of office was to be two years and until their successors should be elected and qualify. The act made no provisions for the dissolving of the corporation. The city was given power to construct waterworks, impose and collect taxes, not exceeding 1 per cent per annum, and to issue bonds for public improvements.

Officers were elected, and the municipal government was exercised by them from 1873 to 1876. In 1876 a mayor and aldermen were elected who favored abolishing the municipal government. They formally resolved to resign and did so, and abandoned their offices. What municipal government, if any, existed between 1876 and 1883 the record does not show. It is, however, stipulated that the city was the "county seat of Lampasas county and had a population in 1876 of about 800; that until the year 1882 the said town was without railroad facilities, when upon advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4,500 people with street railroad and other improvements. About 1884 the population began to decline, and continued to decline until about 1890." Until 1882 the business part of the city was generally confined to the courthouse square and to streets laid out from it, and was within the territorial limits as originally incorporated. In 1882 and afterwards business houses were built outside of said limits but inside the boundaries as incorporated in 1883, hereinafter mentioned, and business has been transacted there since.

In February, 1883, under the provisions of the general laws of Texas, Title XVII. of the Revised Statutes, a petition of [278] \*more than fifty qualified voters, living in and around the limits of the city, was presented to the county judge who, in accordance with the prayer thereof, ordered an election to determine whether the persons living within the limits in the petition set out should incorporate as a city of more than 1,000 inhabitants. The election was held, resulting in a majority vote for incorporation—persons voting who lived inside and outside of the limits of the special char-

ter. Upon the return of the election the county judge declared the result, and declared the city duly incorporated within the limits petitioned for, which embraced practically all of the lands within the special charter, and extended nearly one half mile west, north and east thereof, to and including the railroad depot—an area of 1,495 acres.

A municipal government was organized with the officers prescribed by the law—some of the aldermen residing outside of the limits contained in the special charter—and exercised all of the functions of a city of 1,000 inhabitants organized under the general laws of the state without anyone contesting or disputing the validity of its lawful right to do so, until November 4, 1889, when proceedings in the nature of quo warranto were instituted to declare the incorporation of 1883 invalid on the ground that the special charter of 1873 had never been repealed.

The suit was instituted without the direction of the attorney general of the state or other executive officers, and without making any of the creditors of the corporation parties. The judgment of ouster was entered against the officers of the city, which was affirmed on appeal by the supreme court of the state. *Largen v. State ex rel. Abney*, 76 Tex. 323, 13 S. W. 161.

The ousted officers thereafter ceased to act, and upon authority of the county judge officers were elected on the 22d of March, 1890, as provided in the charter of 1873, and by persons living within the limits defined by said charter, and the mayor and aldermen so elected organized March 19, and on the 22d by unanimous vote resolved to accept the provisions of "Title XVII. of the Revised Statutes of the state of Texas in lieu of the charter granted by the legislature." A copy of the resolutions was duly certified and recorded, as required by law, \*and the city at once assumed to act under [279] the general charter provided in Title XVII. and is now acting thereunder.

On December 26, 1890, there was added to the city by a vote of the citizens of the added territory a greater part of the lands west which were included within the limits of 1883, and one tier of blocks additional, and the city assumed, and has since exercised jurisdiction over that part lying north and east of the limits of 1873, and which was included within the limits of 1883. The area added contained 428 acres, and embraced the greater part of the residence property of the city outside of the original charter limits of 1873. The property lying north and east of the original limits, and not included within the incorporation of 1890, contains seventy-seven residence houses, occupied by persons, 90 per cent of whom follow some kind of business within the town as defined by the limits of 1873.

The books and papers of the city government under the charters of 1873 and 1883 were lost, except the assessment rolls of 1889, from which it appears that the assessed value of all lands within the city lim-



its of 1889 was \$664,420, personal property about \$400,000, and that the assessment was divided as follows: As to lands, no division being shown as to personal property, viz., within the limits of 1873, \$452,444; within that part added in December, 1890, \$157,915; and within the parts north and east, \$68,970. The assessment roll also showed the names of 438 voters, divided as follows: Old limits of 1873, 175; part added in December, 1890, 167; parts north and east, 96.

In January, 1885, acting under the then charter, and not under the charter of 1873, the city, in good faith, upon the demand of the business men of the city for fire protection, and to furnish water to the city, then having a population of 4,500, determined to build a system of waterworks, and to pay for the same by the sale of bonds, and to this end, after full and fair discussion, passed the ordinances under which the bonds in controversy were issued.

[280] The other facts relate to the passage of the ordinance providing for the building of the waterworks for which the bonds were issued; the advertisement of bids under the ordinance; the inability of the city to get other than cash bids; the awarding, in consequence, \*of the contract to a bidder who was willing to build a system for \$40,000, whereas the actual cost of the work, allowing nothing for profits to the contractor, was \$26,276; the location of the works, some portion being shown to be inside the limits of the new incorporation, and some portion outside such limits; the payment of interest on the bonds for 1889; the decision of the city in 1892, by vote, to take charge of the public schools and maintain them, and in 1893 to build a school building, and the issuing of bonds therefor amounting to \$18,000, bearing interest at 6 per cent, and by the proceeds of which a school building was erected, it being believed and the fact certified to the state comptroller, that the city had no outstanding bonds; the form of the bonds and their indorsements, and the formalities of their execution, and what appeared as to their registration in the office of the state comptroller and what appeared as to the assessed value of the property of the city.

It was also stipulated that the defendant in error is the owner and holder of 102 coupons each, for the sum of \$35, maturing at different dates, which coupons except as to due date and number of bond are of the following form:

\$35. The City of Lampasas \$35.  
will pay the bearer thirty-five dollars at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office in the city of Lampasas, on the 1st day of —, 189—, being six months' interest on bond No.—. S. S. Potts, Secretary.

And it was further stipulated that of those coupons, "forty-two in number, being numbers 9 to 15 inclusive on bonds Nos. 8 to 180 U. S.

13 inclusive, became due more than four years before the institution of this suit, and if plaintiff is entitled to recover in this action he is entitled to recover the sum of \$2,100 principal and \$452.70 interest due on the remaining sixty coupons mentioned in his petition."

From the facts the circuit court found the following:

"That within the city of Lampasas, as now organized and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city \*as it existed under the [281] charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them as a valid city government from its adoption until the quo warranto proceedings against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same."

And as conclusions of law found:

"1. The coupons in suit constitute a valid and existing liability against the present city of Lampasas, except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation, and the remaining 60 coupons sued upon, not being barred by the statute, are valid, and the defendant should be required to pay the same. *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957; *Lampasas v. Talcott*, decided by circuit court of appeals, fifth circuit, on the 9th day of May, 1899, 36 C. C. A. 318, 94 Fed. Rep. 457.

"2. Judgment is therefore rendered in favor of the plaintiff against the defendant, the city of Lampasas, for the sum of \$2,552.70, with interest thereon, at the rate of 6 per cent per annum, from the date hercof, and all costs of suit. To the judgment rendered and the additional conclusion of fact the defendant in open court excepts."

The circuit court then allowed this writ of error.

*Messrs. John C. Chamberlain and J. C. Matthews* argued the cause, and *Messrs. Clarence H. Miller, Franz Fiset, J. C. Matthews, and W. H. Browning*, filed a brief for plaintiff in error.

*Mr. Henry B. B. Stapler* argued the cause, and, with *Messrs. Robt. G. West and T. B. Cochran*, filed a brief for defendant in error:

A party who has assented to the taking of his property under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property. *Cooley, Const. Lim. 6th ed. p. 196.*

A court will not listen to an objection to the constitutionality of an act, made by a party whose rights it does not affect, and

who therefore has no interest in defeating it.

*Ibid.*; *Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284.

[281] \*Mr. Justice McKenna delivered the opinion of the court:

The principle and contention of the assignments of error, \*which are based on the Constitution of the United States, are expressed in the fourth assignment, as follows:

"The court erred in its last conclusion of facts, its conclusions of law, and the judgment rendered thereon because the organization formed in 1883 under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable, but wholly void, for the reason that such organization was attempted to be formed under the general laws of the state of Texas, with power to levy and collect taxes, which general laws of the state of Texas then in force and embraced in Title XVII. of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, were in violation of § 1 of the 14th Amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation."

The same claim was made in substantially the same words in the answer of the plaintiff in error in the court below, and the specific injury alleged was "that the taxpayers residing within the boundaries fixed by said act of 1873 will be required to pay more than one half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law."

This court has only jurisdiction by appeal or writ of error directly from the circuit court in certain cases, one of which is when "the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." Sec. 5 of the Judiciary Act of 1891, 26 Stat. at L. 828, chap. 517. But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination \*of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or

controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

It is contended that the residents of the territory incorporated in 1883 were not given an opportunity to be heard "whether they should or should not be included in or made subject to taxation in the proposed corporation." It is hence deduced that the incorporation of 1883 was wholly void, and in consequence the bonds sued on were also wholly void, because the law of the state under which the incorporation was made, to wit, Title 17 of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, was in violation of § 1 of the 14th Amendment to the Constitution of the United States. But what concern is it of the plaintiff in error whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in "territory proposed to be incorporated;" it was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits. And the record shows that there was no question of its validity for six years. When questioned it was not on the ground that it was incorporated under an unconstitutional statute—not on the ground that it was imposed without a hearing on unwilling subjects—but on the ground that the prior incorporation of 1873 had not ceased to exist.

We said in *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284 (quoting from *Cooley*, Const. Lim. § 196), that "a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and \*who has therefore no interest in defeating [284] it." That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. "To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." *Wellington, Petitioner*, 16 Pick. 87, 96, 26 Am. Dec. 631, 635.

It follows necessarily that the plaintiff in error has no legal interest in the constitutional question which it raised, and upon which it claims the right to come directly to this court from the circuit court under section 5 of the act of 1891, *supra*. To permit it to come here directly from the circuit court would make a precedent which would lead to the destruction of the statute. We repeat, the questions which can be raised



under any of the subdivisions of section 5 of the act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked.

*Writ of error dismissed.*

JAMES HOLLY, *Petitioner,*  
v.

DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH and E. Walter Roberts.

(See S. C. Reporter's ed. 284-295.)

*Misappropriation by executor—payment of bequest out of funds of stranger—rule where equities are equal.*

1. A payment of a bequest by an executor to a missionary society, out of funds that have been paid to him as an attorney by a client to be used in completing a purchase of land, but which the attorney misappropriates to cover up his defalcation as executor, does not make the society liable as a trustee *ex maleficio* to such client for the amount received by it from such attorney, where the society has no knowledge of the misappropriation and proceeds to expend the money in good faith before it has any notice thereof.
2. A court of equity will not transfer a loss that has already fallen upon one innocent party, to another party equally innocent, where the equities are equal.

[No. 138.]

*Argued December 21, 1900. Decided February 25, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing a decree of the Circuit Court in an action to recover money misappropriated by an executor and paid to a legatee. *Affirmed.*

See same case below, 34 C. C. A. 649, 92 Fed. Rep. 745.

Statement by Mr. Justice Shiras:

[285] \*This was the case of a bill in equity filed in January, 1891, in the circuit court of the United States for the southern district of New York, by James Holly, a citizen of the state of Pennsylvania, against the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation of the state of New York, and E. Walter Roberts, treasurer of the same.

The case came to issue on bill, answer, and replication. Evidence was adduced by the respective parties, and certain exhibits and stipulations were filed.

NOTE.—On trusts *ex maleficio*—see notes to Brown v. Doane (Ga.) 11 L. R. A. 381; Curdy v. Berton (Cal.) 5 L. R. A. 189, and Angle v. Chicago, St. P. M. & O. R. Co. 38 L. ed. U. S. 55.

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The principal facts disclosed by the pleadings and evidence were these:

On December 23, 1887, the last will of Rev. James Saul, D. D., was duly proved, and letters testamentary thereon granted by the register of wills in and for the city and county of Philadelphia to Rev. Benjamin Watson, D. D., and Henry C. Thompson, executors named in said will. In and by said will the testator bequeathed the whole of his estate to "the following institutions and in the following proportions, viz., to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, three fourths of the whole of my said estate, conditioned that the amount thus bequeathed shall be appropriated by said society in equal proportions of one third to domestic missions, one third to foreign missions, and one third to the benefit of the colored people in the southern or formerly slave states for the support of schools and missions." The remaining one fourth of the whole of the \*said estate he gave and bequeathed to the Theological Seminary near Alexandria, Virginia. By a codicil the bequest to the theological seminary was revoked, the testator having substituted therefor a donation of 100 shares Pennsylvania Railroad stock, and which he had transferred to the trustees of the seminary; and by a later codicil the testator further gave and devised to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America all the residue of his estate.

Neither the amount of the estate nor the property of which it consisted was mentioned in the will or codicils; but it appeared that, in addition to about \$2,493.03 cash, the testator was possessed of bonds of the North Pennsylvania Railroad Company and of the United Railroads of New Jersey, and in their account filed in the orphans' court of Philadelphia county the executors charged themselves with \$17,268.03 as the amount of the estate. This account was confirmed on November 5, 1889, showing a balance in the hands of the executors of \$14,927.54, which was awarded by the court to the Domestic and Foreign Missionary Society.

On June 19, 1890, the executor, Henry C. Thompson, called at the office of the defendant society in New York city, and handed to Roberts, the treasurer, a memorandum showing the above balance \$14,927.54 awarded to the society by the decree of the orphans' court, from the Saul estate, and \$650 dividends received since and not included in the account, making a total of \$15,577.54. For this sum Thompson gave a check in the following words and figures:

\$15,577.54.

Philadelphia, June 19, 1890.

The Union Trust Company,

Nos. 715, 717, 719 Chestnut Street.

Pay to the order of the Domestic and Foreign Miss. Soc. of the P. E. Church fifteen thousand five hundred seventy-seven <sup>54</sup>/<sub>100</sub> dollars.

H. C. Thompson.

No. 623.

Roberts, the treasurer, handed Thompson a receipt, as follows:

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\*New York, June 19, 1900.

Received from executors estate of James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred seventy-seven  $\frac{54}{100}$  dollars (\$15,577.54).

George Bliss, Treasurer,  
per E. Walter Roberts,  
Assistant Treasurer.

Thompson's check was deposited by Roberts, treasurer, in the Bank of New York, for general account of the Foreign and Domestic Missionary Society of the Protestant Episcopal Church in the United States of America, by which bank the check was forwarded for collection to the Bank of North America of Philadelphia, and was to that bank paid, on June 21, 1890, by the Union Trust Company of Philadelphia.

The proceeds of this check were deposited in the general bank account of the missionary society, and were applied, with other moneys of the society, to domestic, foreign, and colored missions, before the society was notified of the claim asserted in the bill of complaint.

In May, 1890, James Holly, a resident of Philadelphia, bought at auction for \$12,000 a house and lot situated upon North Fifteenth street in that city. He took the title papers to H. C. Thompson, who had previously been employed by him, and requested Thompson to have proper conveyances made. As some of those interested in the sale resided elsewhere there was some delay in getting the papers signed. Finally, on June 19, 1890, Holly called on Thompson, who told him that the papers were ready, and asked for a check to meet the purchase money. Thereupon Holly gave him a check in the following form:

Philadelphia, June 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co., pay to Henry C. Thompson, attorney, or order, twelve thousand dollars.  
\$12,000. James Holly.

And Thompson gave Holly a receipt, as follows:

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\*Philadelphia, June 19, 1890.

Received from James Holly twelve thousand dollars, and J. A. Freeman's receipt for \$200, to be applied to purchasing house, No. 643 North Fifteenth street.  
\$12,000. (Signed) H. C. Thompson.

Holly never afterwards saw Thompson, but on July 15, 1890, was informed by Morgan, one of the vendors of the property purchased, that Thompson was lying at a hospital in Jersey City, where he had attempted suicide.

Taking alarm, Holly consulted Mr. Burton, as an attorney, and it was discovered that Holly's check on the Fidelity Insurance, Trust & Safe Deposit Company in favor of Thompson for \$12,000, dated June 19, 1890, had been by Thompson that day deposited in

the Union Trust Company, Philadelphia, and that, by a check of June 19, 1890, in favor of the Domestic and Foreign Missionary Society of the P. E. Church in the United States of America, Thompson had drawn out \$15,577.54, leaving a balance in his favor of \$72.41.

According to the finding of the circuit court this check in favor of the Domestic and Foreign Missionary Society was, to the extent of \$10,028, paid by the Union Trust Company out of the moneys realized from Holly's check to Thompson; and that court decreed against the missionary society in favor of the complainant for that amount. 85 Fed. Rep. 249.

Upon appeal the decree of the circuit court was reversed by the circuit court of appeals for the second circuit, and the bill directed to be dismissed (34 C. C. A. 649, 92 Fed. Rep. 745); and thereupon the case was brought to this court by a writ of certiorari.

Mr. John G. Johnson argued the cause, and, with Messrs. Matthew Verner Simpson and Cephas Brainard, filed a brief for petitioner:

The doctrine of a conclusive election of one of several remedies by personal action rests on an equitable estoppel, but at any time previous to an adjudication the plaintiff may discontinue the first action and proceed with the second.

*Johnson v. Frew*, 33 Hun, 193; *Powers v. Benedict*, 88 N. Y. 605; *Equitable Co-Op. Foundry Co. v. Hersee*, 33 Hun, 169; *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177; *Webb v. Buckelew*, 82 N. Y. 555.

So long as no judgment was rendered, the plaintiff's act in suing both did not constitute an election to hold the principal and to discharge the agent.

*Mattlage v. Poole*, 15 Hun, 556.

The commencement of an action by attachment to recover the price of goods does not preclude the maintenance of a subsequent action for the recovery of the goods on the ground that they were obtained by false representations.

*Bach v. Tuch*, 47 Hun, 536; *Conrow v. Little*, 41 Hun, 395; *Hayes v. Midas*, 39 Hun, 460.

The money handed by Thompson to the missionary society was not, under any aspect, the payment of a debt.

*Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 899; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 23, 26 L. ed. 65; *Wilson v. Smith*, 3 How. 763, 11 L. ed. 820; *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679; *Decan v. Shipper*, 35 Pa. 239, 78 Am. Dec. 334.

A cestui que trust may follow his money through various forms of mingling and change, and recover the same as against every person not paying value therefor.

2 Story, Eq. Jur. § 1258; *Pennell v. Defell*, 4 De G. M. & G. 372; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Van Alen v.*



*American Nat. Bank*, 52 N. Y. 1; *Swift v. Williams*, 68 Md. 236, 11 Atl. 835.

No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a bona fide purchaser.

2 Pom. Eq. Jur. 1892 ed. § 918, pp. 1302, 1303; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *Swan v. North British Australian Co.* 7 Hurlst. & N. 603; *Taylor v. Great Indian Peninsula R. Co.* 4 DeG. & J. 559; *Donaldson v. Gillot*, L. R. 3 Eq. 274; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 28, 55 N. Y. 456.

Mr. **Julien T. Davies** argued the cause, and, with Mr. **Herbert Barry**, filed a brief for respondent:

The complainant, having elected to sue Thompson for the \$12,000 as a debt, has conclusively established the facts as to the character of the relationship, and is estopped from maintaining this suit against the defendant missionary society, as it is wholly inconsistent with such facts.

*Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 88; *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Moller v. Tuska*, 87 N. Y. 166; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145, 21 N. E. 172.

Payment of an existing indebtedness constitutes a sufficient consideration to support a transfer of negotiable paper, and *a fortiori* a payment.

*Mayer v. Heidelberg*, 123 N. Y. 332, 9 L. R. A. 850, 25 N. E. 416; *Stedman v. Carstairs*, 97 Pa. 234; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61.

By the filing of the executors' accounts and their confirmation, they became personally liable for the legacy to the defendant missionary society, and an action at law could be maintained against them, or either of them, individually as well as in their representative capacity.

*Wilson v. Wilson*, 3 Binn. 557; *Griffith v. Chew*, 8 Serg. & R. 17; *Bialer v. Kunkle*, 17 Serg. & R. 298, 11 Am. Dec. 556; *Morrow use of Isett v. Brenizer*, 2 Rawle 185; *Foulk v. Brown*, 2 Watts, 209; *Geddis v. Irvine*, 5 Pa. 508; *Richardson v. Richardson*, 9 Pa. 428; *Pringle v. Pringle*, 130 Pa. 565, 18 Atl. 1024. See also *Solliday v. Bissey*, 12 Pa. 347.

Even assuming the defendant to have had notice of the embezzlement of the assets of the Saul estate, the defendant was charged with no notice that Thompson had committed any further embezzlement or misappropriation of funds when he settled his indebtedness to the society. It is not to be presumed that, because a man embezzles the proceeds of one estate, therefore when he makes restitution he is doing so with funds which he has embezzled elsewhere. The presumption is of innocence, not of guilt.

*State Nat. Bank v. United States*, 114 U. S. 401, 29 L. ed. 149, 5 Sup. Ct. Rep. 888.

The defendant missionary society, having received Thompson's check for value and

without notice, is not liable to refund to the complainant any of the proceeds thereof.

*Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *McMurray v. Moran*, 134 U. S. 150, 33 L. ed. 814, 10 Sup. Ct. Rep. 427; *State Nat. Bank v. United States*, 114 U. S. 401, 29 L. ed. 149, 5 Sup. Ct. Rep. 888; *Stephens v. Brooklyn Bd. of Edu.* 79 N. Y. 183, 35 Am. Rep. 511; *Newhall v. Wyatt*, 139 N. Y. 452, 34 N. E. 1045; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403; *Dike v. Drewel*, 11 App. Div. 77, 42 N. Y. Supp. 979, Affirmed in 155 N. Y. 637, 49 N. E. 1096; *Nassau Bank v. National Bank*, 159 N. Y. 456, 54 N. E. 66; *Stedman v. Carstairs*, 97 Pa. 234.

\*Mr. Justice **Shiras** delivered the opinion of the court: [288]

This is a case in which a court of equity is called upon to decide \*upon which of two [289] innocent parties is to fall a loss caused by the dishonesty of a third person. The relation that existed between Thompson and the missionary society was that of executor and legatee; between Thompson and Holly, that of attorney and client. As between themselves, Holly and the missionary society were absolute strangers.

Our examination of the pleadings and evidence fails to show any such dereliction of duty or supine negligence on the part of the missionary society in demanding and enforcing payment of the Saul legacy as would show, or even tend to show, that the society knew, or had reason to believe, that Thompson was insolvent or had been guilty of any misappropriation of the property or funds of the Saul estate. It is true that the legacy was not paid as promptly as the society had reason to expect, but there was nothing unusual about such a delay.

The very fact that Rev. Dr. Saul had selected Thompson to be one of his executors authenticated him to the society as a trustworthy person, and while it is true that Rev. Mr. Watson, who was a co-executor, in letters answering inquiries by the secretary of the society in April and May, 1890, admitted that Thompson was dilatory in settling the estate, there was nothing to justify suspicion on the part of either Mr. Watson or of the society that there was anything wrong in Thompson's dealings with the estate. Accordingly we are fully satisfied that, when Thompson called upon the society at the New York office, on June 19, 1890, and paid the amount shown to be due the society by the account of the executors in the orphans' court of Philadelphia county, approved November 23, 1889, together with the additional sum of \$650 received after and not included in the account, there was nothing, either in the previous transactions, or in the form of the payment by Thompson's check, to put the society upon notice, or to have justified the treasurer in refusing to accept the payment. When Thompson's check was paid the following day, and the proceeds had gone



into the bank account of the missionary society, the matter was fully closed between the executors of Saul's estate and the society.

Beyond this, we think the evidence fairly shows that the missionary society had appropriated and expended the money so received \*to the purposes appointed by the testator, before any notice was given of the complainant's claim. While such use and application of the money might not exonerate the society from liability, if they had received the money in circumstances that visited them with notice of Thompson's dishonest conduct towards Holly, yet if the money, received in good faith by the legatee, had actually and bona fide been applied and expended for the use of the beneficial purposes appointed in the will, without knowledge of Holly's claim, or, indeed, that such a man existed, we think a court of equity would refuse to hold the society as a trustee *ex maleficio*.

The learned judge of the circuit court, speaking of this aspect of the case, does indeed say:

"Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond reach, and cannot be recovered. But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in the furtherance of its objects, nor that any of this particular money was applied to any of its purposes."

If this statement is to be understood to mean that the money, bank notes, or specie, actually received on Thompson's check, was not immediately and in form applied to the beneficial purposes named in Saul's will, it may be true; indeed, it appears that the proceeds of Thompson's check were paid into the Bank of New York for general account of the missionary society, and that thus the identity of the bank notes or specie was lost in the credit account of the society in that bank. But it is not perceived that such a state of facts disabled the society from having the advantage of showing that money to an equal amount was appropriated and applied by them, out of their general account, to the purposes appointed by the testator. To demand that such a society should make special deposits of legacies received, so as to be able to trace the application of such deposits into the hands of beneficiaries in the same form as when received, would be in the highest degree unreasonable.

If, however, the meaning of the learned judge was that it did not distinctly appear that the missionary society had appropriated [291] \*and applied an amount of money equal to that received from the Saul estate to the purposes appointed in the will, before any notice was received of Holly's claim, we are constrained to decidedly dissent from such a view.

In the bill of complaint the defendants were explicitly called upon to answer under oath whether and in what circumstances they had received money from Thompson,

and particularly whether such money had been received as coming from the estate of James Saul, deceased, and whether they had not received a letter from plaintiff's attorney, on or about July 17, 1890, notifying them that the moneys so received by the defendants through Thompson's check came from moneys belonging to Holly. To these allegations and interrogatories the defendants answered, denying any knowledge or belief on their part of the transaction between Thompson and Holly "until long after the receipt by defendants and expenditure of the \$15,577.54 referred to; and these defendants, further answering, alleged that, at the time of the notification hereinbefore referred to and the receipt by the defendant society of the letter from plaintiff's attorney, these defendants had expended, in the usual course of their business and according to the will of the said Rev. James Saul, the said sum of \$15,577.54."

To this portion of the answer the plaintiff filed exceptions for insufficiency, as follows:

"In not stating how the defendants have expended the \$15,577.54, what the items of expenditure were and the respective dates of such items of expenditure, and how and in what respect the said moneys were expended according to the will of the Rev. James Saul, deceased, and what was the usual course of business of defendant's society in making said expenditure of said moneys, whether the same was expended by standing order or special resolution of the board of managers of the society defendant, or otherwise."

Thereupon the defendants, responding to these exceptions, filed a supplemental answer as follows:

"These defendants, further answering, allege that the moneys received as aforesaid from Henry C. Thompson, executor, were expended by the defendant society for domestic missions, \*foreign missions, and for the [292] benefit of colored people in the southern or formerly slave states, for the support of schools and missions, through its officers, acting partly under the general direction of the board of managers and partly under a resolution of said board passed on the 10th day of June, 1890, authorizing the treasurer to apply such legacies as might be received before September 1, 1890, to the payment of appropriations to September 1, 1890,—of which resolution a copy is hereto annexed and marked 'P.'"

The copy of the resolution was as follows:

"Resolved, that the treasurer be instructed to apply so much of the gross amount received from domestic and general legacies to September 1, 1890, as may be required toward the appropriations for corresponding work to same date."

It was also made to appear that on June 20, 1890, the balance in bank to the credit of the missionary society was \$43,569.83. On that day the balance was increased by the proceeds of Thompson's check, \$15,577.54, and other money, to \$60,110.09; and that, by checks drawn between June 20 and July 18, the day on which the letter of Hol-



ly's attorney was received, the sum of \$88,589.74 was drawn out; aggregating more than the sum of Thompson's check and the balance on hand when it was received; and it was shown that these payments were on account of domestic, foreign, and colored missions and office expenses.

It is true that, owing to further receipts between June 20 and July 18, 1890, there was a balance on hand in bank on the latter day, but those receipts were themselves trust funds, contributed and held for the charitable purposes of the society. It need scarcely be said that a court of equity will not interfere with the proper application of such funds by constraining the society to divert them to relieve Holly. This, of course, was not the case of a running account between debtor and creditor, where the general rule is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. Here there was no relation of [293] debtor and creditor between the \*missionary society and Holly, and the latter cannot be heard to complain of the application by the society of the money received from Thompson, executor, to the purposes prescribed by the testator, nor to demand that moneys subsequently received by the society from third persons for specific charitable purposes shall be used to indemnify him from loss occasioned by trusting his money with his attorney.

From the numerous cases cited we think it sufficient to refer to two or three which resemble in their facts the case in hand, and in which were laid down principles now applicable.

*Stephens v. Brooklyn Bd. of Edu.* 79 N. Y. 183, 35 Am. Rep. 511, was a case where one Gill, who was a member of the board of education of the city of Brooklyn, had converted to his own use the money of the board, and so became indebted to it in the amount thus subtracted. Gill forged a mortgage upon the land of another and sold it to Stevens, receiving from him the proceeds and depositing them to his own credit. He then drew a check for the amount of his debt to the board of education, and with it paid that debt in full. The court held that Stevens could not recover the money from the board, saying:

"It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the paper. Money has no earmark. The purchaser of a chattel or a chose in action may by inquiry in most cases ascertain the right of the persons from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him [294] 180 U. S.

by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests a title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good between the parties, it is good as to all the world. 'Money,' said Lord Mansfield \*in *Miller v. Race*, 4 [294] Burr. 452, 'shall never be followed into the hands of a person who bona fide took it in the course of currency and in the way of his business.'"

In *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403, the agent of Hatch procured a loan upon stock which he had fraudulently converted. He then, with the money thus procured, paid an antecedent debt which he owed to the bank. The court said:

"This doctrine goes upon the broad ground that money has no earmark, that in general it cannot be identified as chattels may be, and that to permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."

In *State Nat. Bank v. United States*, 114 U. S. 401, 29 L. ed. 149, 5 Sup. Ct. Rep. 888, it was held that where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and to replace it pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank.

The case made out for the appellant Holly does not require extended notice.

Let it be conceded that he was not, in the circumstances, estopped from following his money into the hands of the missionary society, by having entered an attachment against Thompson for a fraudulent conversion of his money; let it also be conceded that, by trusting his money with Thompson, who had theretofore been his attorney, and whose standing in the community was good, he was not guilty of conduct so reckless and negligent as to, of itself, deprive him of a remedy; yet his case fails in the essential particular that he has not shown that the missionary society, in receiving from Thompson, executor, the \*money due from the estate [295] of Rev. Dr. Saul, and in applying it in accordance with the appointments in the will, acted with any notice or knowledge, actual or imputable, that Thompson was misapplying funds intrusted to him by a third person with whom the society had no relations

whatever. As against the missionary society, Holly, in the circumstances disclosed, has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent.

*The decree of the Circuit Court of Appeals of the Second Circuit is affirmed.*

Mr. Justice **Brewer** did not hear the argument or take part in the decision.

F. WINDSOR ROBINSON, Receiver of the  
State National Bank of Vernon, Texas,  
*Plff. in Err.,*

v.

SOUTHERN NATIONAL BANK OF  
NEW YORK.

(See S. C. Reporter's ed. 295-310.)

*National banks—pledgee as stockholder of.*

A bank which receives as collateral security for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt.

[No. 137.]

*Argued December 20, 21, 1900. Decided  
February 25, 1901.*

**I**N ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming a judgment for defendant in an action against an alleged stockholder of a national bank. *Affirmed.*

See same case below, 36 C. C. A. 584, 94 Fed. Rep. 964.

Statement by Mr. Justice **Shiras**:

[296] \*This was an action brought in the circuit court of the United States for the southern district of New York by Robinson, as receiver of the State National Bank of Vernon, Texas, a national banking association, against the Southern National Bank of New York, likewise a national banking association, to recover the amount of an assessment made by the Comptroller of the Currency upon the stock of the State National Bank, of which the defendant bank was alleged to be the owner of 180 shares.

The principal facts out of which the controversy arose were as follows:

On January 20, 1893, one W. G. Curtis was the owner of 180 shares of the capital stock of the State National Bank, of the par value of \$100 each, and which stood in

his name on the books of the bank, and for which he held the usual certificates. On that day one A. U. Thomas and the said Curtis borrowed from the Southern National Bank the sum of \$15,000, for which they gave their promissory note, payable four months after date. The note recited that the makers of the note had "deposited with said bank as collateral security for the payment of this or any other liability or liabilities of ours to said bank now due or to become due, or that may be hereafter contracted, the following property, viz.: 180 shares of the capital stock of the State National Bank of Vernon, as evidenced by certificate No. 97, 150 shares; certificate No. 98, 30 shares—the market value of which is now \$18,000."

The note contained the usual powers to sell, in case of default in payment, the securities at public or private sale, with the right on the part of the bank to become the purchaser thereof at such sale.

The note was not paid when due, and on August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on the 8th day of August, 1893. On \*August 7, 1893, it adver-[297] tised in the New York papers that the stock would be sold at noon of August 8, at the public exchange in New York. The sale took place at public auction, and the stock was struck off to the defendant for the sum of \$20, the defendant being the highest bidder. The defendant then paid the auctioneer the said sum of \$20, and afterwards received back from him that sum less his fees. That was the place where and the way in which sales of collateral to such notes were then made in New York.

The certificates of stock at that time remained in possession of the defendant bank, but the stock was not transferred to the defendant bank upon the books of the State National Bank, but continued to stand in the name of Curtis. The defendant bank never voted upon the stock, nor received any dividends thereon.

The State National Bank suspended payment on or before July 21, 1893, and was in possession of the United States bank examiner until September, 1893, when it resumed and continued business as usual, until August 18, 1894, when it finally closed, and the plaintiff Robinson was subsequently appointed receiver.

On August 10, 1893, the Southern National Bank of New York brought an action in the district court of Wilbarger county, Texas, against Curtis and Thomas, in which the complaint recited the fact of the sale of the collateral securities, and that the proceeds of the sale, to wit, \$20, had been applied as a credit on said note, and demanded judgment for the balance of the note remaining unpaid, with interest and costs.

Subsequently, Curtis and Thomas answered, and, among other things, claimed that the Southern National Bank had taken the stock that had been placed with it as collateral by purchasing the same at the sale, that the said stock was worth the sum

NOTE.—On the liability of a pledgee of stock as a shareholder—see *Andrews v. National Foundry & Pipe Works* (C. C. App. 7th C.) 36 L. R. A. 139, and note.



of \$18,000 at the date of said sale, and the same so taken at said sale was in full satisfaction for said note.

[298] They likewise filed a cross petition, in which they alleged that the sale by the Southern National Bank of the collateral stock was made improperly and in fraud of the defendants, and was a conversion of said stock to the use of said bank, which operated, not merely to discharge the said note, but to give the defendants Curtis and Thomas a right to be compensated to \*the extent of the difference between the amount due on the note and the amount of the value of the stock, which they averred to be \$18,000.

In an amended petition the Southern National Bank traversed the allegations of the cross petition, denied that they had, in effect or by operation of law, taken said collateral stock in full satisfaction of said note, and alleged that said stock had always been in its possession as collateral, that it had always been ready and willing, and was ready and willing, to return to said Curtis the said stock upon payment of said note, and thereupon tendered to said defendants the said stock upon payment of said note.

Subsequently, and while these proceedings were pending, the defendants Curtis and Thomas proposed to the Southern National Bank that if the bank would credit them with the value of the stock at the rate of 60 cents on the dollar they would confess judgment for the balance, some \$5,000. This offer was made on August 7, 1894, and on August 9, 1894, the Southern National Bank, by letter and telegram, stated that this proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed, and thereupon the Southern National Bank declined to stand by the proposal of the defendants to confess a judgment if credited with the stock at the rate of 60 cents on the dollar.

Whereupon the defendants Curtis and Thomas filed a further plea, or statement by way of cross petition, setting up said proposition and acceptance as an accord and satisfaction, and tendering judgment accordingly for amount sued for upon credit of \$10,800 being given them, and they prayed that said agreement should be carried out, and for general relief.

[299] The case then came on for trial, and was submitted, on all questions of law, as well as of fact, to the court without the intervention of a jury. The court found that the Southern National Bank was entitled to recover on said note the sum of \$16,200, principal and interest on the note sued on up to August 9, 1894, the time the agreement of compromise was entered into by and between the plaintiff and defendants; that under said agreement said defendants \*were entitled to a credit of \$10,800; and that the plaintiff was entitled to recover from the defendants the sum of \$5,751, with interest thereon from date, and decreed accordingly.

The plaintiff, the Southern National Bank, was thereupon allowed an appeal to the  
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court of civil appeals of the second supreme judicial district of Texas.

In that court the judgment of the trial court was reversed, and in the opinion the following statement was made:

"Did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief.

"August 7, 1894, one M. J. Tompkins wired appellant: 'Thomas says will confess judgment if you will allow 60 cents for stock;' to which appellant replied by letter and telegram on August 9, 1894, among other things requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement; and, through other counsel, employed about that time, sought to avoid it. When the agreement was made the court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial the court held appellant to the agreement, and, upon the offer of Curtis and Thomas to comply with its terms, rendered judgment accordingly, deducting \$10,800 from the sum due on the note, and giving judgment for the rest.

"It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We then have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it had been in any respect performed or acted on by the debtor. Upon the sole \*ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount of the debt is denied. We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such a case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and pre-existing status. . . . We therefore adopt the trial court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Cur-  
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tis for the full amount claimed, decreeing the bank stock to them as tendered."

In the case in the circuit court of the United States, the plaintiff, having offered in evidence the record of the case in the state courts, also offered in evidence a certificate from the clerk of the district court of Wilbarger county, Texas, in the following terms:

"I, W. B. Townsend, clerk of the district court of Wilbarger county, Texas, do hereby certify that, in the case of the Southern National Bank of New York against W. G. Curtis and W. U. Thomas, No. 688 on the docket of the said district court, the plaintiff, on the trial of said cause, tendered into court and to the said defendants the certificates of stock issued by the State National Bank of Vernon to W. G. Curtis, numbered 97 and 98 respectively, the first being for one hundred and fifty shares of the capital stock of said bank, and the other for thirty shares of the capital stock of said bank, which certificates of stock were filed by the clerk of said court on the 8th day of August, 1895, and have ever since remained on file in said cause in said court, and are on file at this time; that they have never been taken away by said Curtis and Thomas, or either of them, and that Curtis and Thomas, nor any one [301] acting for them or \*either of them, have not taken said stock away, . . . and that said stock now remains on file in said district court of Wilbarger county, Texas, as appears of record in said cause."

The plaintiff having rested, the defendant put in evidence a certified copy of the decree rendered by the court of civil appeals, containing, among other things, the following:

"It is the order of this court that the appellant, the Southern National Bank of New York, do have and recover of and from the appellees, W. G. Curtis and A. W. Thomas, the sum of \$15,000, with 6 per cent interest thereon from the 20th day of January, 1893, together with all their costs in this behalf expended. And it further appearing to this court that the said W. G. Curtis and A. W. Thomas delivered to the appellant the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the note sued hereon, it is further ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

The defendant bank further put in evidence two letters, dated respectively February 15 and September 27, 1894, written by the cashier of the Southern National Bank to A. W. Thomas and to R. P. Elliot, attorney for Curtis and Thomas, in the following terms:

Feb. 15th, 1894.

A. U. Thomas, Esq.,  
210½ Main Street, Houston, Texas.

Dear Sir:

I beg to acknowledge the receipt of your  
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letter of Feb. 8th, and to inform you that a copy of it will be forwarded to our counsel, Mr. H. C. Thompson, with the request that he will make known to us the proposition submitted to him by you. You can rest assured that when this is received it will have our closest attention.

We never had any disposition to oppress you. All that we wanted and now want is the money owed us by Mr Curtis and \*your- [302] self. When that is paid under the terms of your note the collaterals will be surrendered by us. We manifested in every proper way a disposition to help you, and it was only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at seventy-five or eighty cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our board to accept it. The litigation must necessarily be tedious, and loss must certainly come to both of us by reason of counsel fees, costs, etc.

I shall be glad to hear further from you.

Respectfully yours,

(Signed) J. D. Abrahams, Cashier.

New York, Sept. 27th, 1894.

R. P. Elliot, Esq.,

Attorney at Law, Vernon, Texas.

Dear Sir:

I have seen our counsel and shown him your letter of the 14th. He agrees that we ought to have a copy of the amended answer setting up an alleged compromise. As soon as that comes I will show it to him and get his opinion then.

At present I may say in reply to your question 'What do you want with the stock?' that we do not want the stock and never have wanted it. We attempted to sell the stock here after default of payment of the note, as the terms of the note permitted us to do, but we virtually bid in the stock ourselves and retained possession of it. We informed our former attorney at Vernon, and tried to impress it upon him, that we did not wish the stock and would give the debtors every benefit from it, notwithstanding the attempted sale. If we could have held the stock against the debtors we would not have done so, and we testified to that effect in the depositions now on file in your courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the courts. If the stock turned out to be worth anything we would get the benefit of it to the extent of our claim, and any balance would belong to the debtor.

\*The fact is, our counsel here thought the [303] attempted sale did not amount to a sale, for the reason that no officer of the bank was present with the auctioneer and that we simply hold the stock as collateral, as we did before the attempted sale. We were perfectly willing that the matter should so stand in the court at Vernon. Our attor-  
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ney there seemed desirous of having the stock sent on there to be foreclosed, notwithstanding the attempted sale here. We saw no use in that procedure, for if the sale here was not a sale we had full power, under the terms of the note, to make such a sale here as would be absolutely valid. We got our counsel here to prepare a brief on the subject, a copy of which was sent to our former attorney at Vernon. We have since sent a copy of it to you. You will see by the authorities there cited that we have ability to make a perfect sale of the property here without going to the expense of selling it under foreclosure proceedings in Texas. Moreover, our counsel advises us that he sees no use in making any sale of the stock at all. We are in just as good position in holding the stock as collateral as we would be by holding it by legal title. Upon reflection you will doubtless agree with us and our counsel here. We have not considered that we hold the stock under the alleged compromise, for no compromise was perfected.

We would like to have you tell us what you think of that defense when you send us the amended answer containing it. We will then get our counsel here to give us his opinion.

We knew nothing of the fact stated by you that Tompkins stood in with Thomas all the time. Do you think there was a conspiracy between Thomas and Tompkins to effect a compromise with us?

As to whether the stock will be assessed, will depend upon the action taken by the Comptroller of the Currency. If the bank resumes, perhaps he will permit it to do so by reduction of capital without assessment. Nobody can form any opinion as to the probability of an assessment until it is known what action the Comptroller will take, and whether the directors of the bank will be able to meet his terms.

Very truly yours,

(Signed) J. D. Abrahams, Cashier.

[304] \*The defendant bank then called as a witness Jesse D. Abrahams, who testified that he was cashier of the Southern National Bank of New York during the years 1893 and 1894; that he was familiar with the transactions connected with the loan to Curtis and Thomas upon the State National Bank of Vernon, Texas; that the stock was put up and sold at auction for the nominal sum of \$20, and bid in by the bank; that it was never transferred on the books of the State National Bank; and, under objection and exception by the plaintiff's counsel, the witness further testified that, at the time of the sale of the collateral security and its nominal purchase by the defendant bank, it was not the intention of the officers of the bank to take title adversely to the pledgeors, but that the purpose of the sale was to make it the introduction to the suit for the amount due on the note.

The plaintiff then asked the court to direct a verdict for the plaintiff, which the court refused to do, and plaintiff excepted. The plaintiff then asked to go to the jury  
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upon the issue as to whether the defendant was the real owner of the stock described in the complaint, which the court refused, and plaintiff excepted. The plaintiff then asked to go to the jury on the issues in the action, which the court refused, and plaintiff excepted.

In obedience to the direction of the court the jury then rendered a verdict for the defendant, and plaintiff excepted.

The case was then taken to the United States circuit court of appeals for the second circuit, and the judgment of the circuit court was affirmed. 36 C. C. A. 584, 94 Fed. Rep. 964. A writ of error by the direction of the Comptroller of the Currency was then allowed, and the case brought to this court.

Mr. Chase Mellen argued the cause and filed a brief for plaintiff in error:

The learned trial court erred in permitting defendant to produce testimony as to its intention in buying the stock at public auction thereof. The sale and bid were unconditional and absolute. The fact of the purchase spoke for itself.

*Dixon v. Yates*, 5 Barn. & Ad. 313; *McComb v. Wright*, 4 Johns. Ch. 659.

Persons by holding themselves out as stockholders may be deemed to encourage third persons to rely upon their reputation and ability, and thus to become creditors of the institution, and therefore they ought not to be permitted to escape responsibility.

*Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Bowden v. Johnson*, 107 U. S. 251, sub nom. *Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Pauly v. State Loan & T. Co.* 165 U. S. 619, 41 L. ed. 849, 17 Sup. Ct. Rep. 465; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739.

The real owner of the shares of the capital stock of a national banking association may in every case be treated as a shareholder within the meaning of § 5151.

*Pauly v. State Loan & T. Co.* 165 U. S. 619, 41 L. ed. 849, 17 Sup. Ct. Rep. 465.

When the auctioneer struck off the stock to defendant, and the latter paid the price bid and the auctioneer's fees, and received from him the certificates for the stock, it became the real owner thereof in the place of Curtis, who thereupon ceased to be the owner. The shareholder's liability under § 5151 instantly attached to defendant's ownership of the stock.

*Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 47; *Davis v. Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653; *Case v. Small*, 10 Fed. 722; *Snyder v. Foster*, 19 C. C. A. 406, 41 U. S. App. 95, 73 Fed. 136; *Young v. McKay*, 50 Fed. 394; *Houghton v. Hubbell*, 33 C. C. A. 574, 63 U. S. App. 31, 91 Fed. 453; *Earle v. Coyle*, 95 Fed. 99. See also notes to *Beal v. Essex Sav. Bank*, 15 C. C. A. 128; *Rickerson Rolling-Mill Co. v. Farrell Foundry & Mach. Co.* 23 C. C. A. 315, and *Scott v. Latimer*, 33 C. C. A. 23.

There is the further consideration that defendant in error might have been compelled in equity to transfer the stock on the books of the bank to its name, and to pay all calls on it after the transfer.

*Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384.

Mr. William B. Hornblower argued the cause and filed a brief for defendant in error:

The rule as to statutory liability has been strictly construed by this court as limited to stockholders of record.

*Richmond v. Irons*, 121 U. S. 58, 30 L. ed. 874, 7 Sup. Ct. Rep. 788; *Whitney v. Butler*, 118 U. S. 660, 30 L. ed. 268, 7 Sup. Ct. Rep. 47; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

A pledgee who has caused stock to be transferred to his name on the books of the corporation, appearing as absolute owner, is liable as a shareholder.

*Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

But a pledgee of stock is not chargeable as a shareholder where he is not registered as owner.

*Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *National Park Bank v. Harmon*, 25 C. C. A. 214, 51 U. S. App. 148, 79 Fed. 891; *Wilson v. Merchants' Loan & T. Co.* 39 C. C. A. 231, 98 Fed. 688.

It is only in clear cases that a pledgee on the ground of estoppel can be subjected to liability for an assessment on national bank stock.

*Frater v. Old Nat. Bank*, 42 C. C. A. 133, 101 Fed. 391.

The legal owner of stock remains liable so long as the stock stands in his name.

*Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Thomp. Corp.* §§ 3283, 3284; *Stuffebeam v. De Lashmutt*, 83 Fed. 449.

Even if one not a stockholder of record can be held liable as the real owner, the undisputed facts in this case show that the defendant in error was not in any proper sense the "real owner" of the stock, either in fact or in law.

*National Park Bank v. Harmon*, 25 C. C. A. 214, 51 U. S. App. 148, 79 Fed. 891.

Where a party is examined as to his conduct he may be asked as to his motive, his testimony as to such motive being based, not on inference, but on consciousness.

*Wharton*, Ev. §§ 482, 508; *Thurston v. Cornell*, 38 N. Y. 281; *Manufacturers' & T. Bank v. Koch*, 105 N. Y. 630, 12 N. E. 9.

[304] \*Mr. Justice Shiras delivered the opinion of the court:

By section 5139 of the Revised Statutes of the United States \*it is provided that the capital stock of banking associations shall be divided into shares of \$100 each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; that every person be-

coming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and that no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

By section 5151 it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and by section 5234 the Comptroller of the Currency is authorized to appoint a receiver of an insolvent national bank, who shall, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.

In the present case the State National Bank of Vernon, Texas, having become insolvent, Robinson, the plaintiff in error, was appointed receiver thereof on September 24, 1894; on February 1, 1895, the Comptroller made an assessment upon the capital stock and the owners of the same equal to the par value of the stock; and on October 26, 1898, the receiver brought an action in the circuit court of the United States for the southern district of New York against the Southern National Bank of New York as an alleged shareholder liable to pay its proportionate share of such assessment.

The reported decisions show that there are two classes of cases of this character—one, wherein the liability has been enforced against a party defendant in whose name the stock was registered on the books of the bank, regardless of the question whether he was, in point of fact, the owner of said stock; and the other, where the liability has been enforced against the real owner of the stock, although the stock stood registered on the books in the name of a third person.

\*In the former class, the liability is said to be created by the act of the party, in whose name the stock is registered, in holding himself out as a stockholder, and thus inviting others to deal with the bank and become creditors, relying on the reputation and financial strength of the nominal stockholders. [306]

Cases are also to be found in the books where transfers, made by shareholders in anticipation of a bank's insolvency, to irresponsible persons, have been held to be a fraud on the statute, and inefficacious to relieve the original holder from liability. *Bowden v. Johnson*, 107 U. S. 251, *sub nom.* *Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Pauly v. State Loan & T. Co.* 165 U. S. 619, 41 L. ed. 849, 17 Sup. Ct. Rep. 465; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419.

The conceded facts in the case are that the 180 shares of the stock embraced in the assessment were the property of W. G. Cur-



tis, in whose name they were registered on the books of the bank, and who held the certificates therefor; that the certificates were deposited with the defendant bank as collateral; but that the stock remained in the name of Curtis, and so continued to be at the time of the bringing of this suit. It therefore follows that the case is not one in which the defendant bank is estopped by having assumed an apparent ownership of the stock.

The important inquiry is whether, by the mere act of bidding in the stock at a nominal price, the Southern National Bank of New York must be regarded as having subjected itself to liability as the real owner thereof.

The facts to be considered in connection with this question are as follows:

On January 20, 1893, Curtis and Thomas borrowed from the Southern National Bank of New York the sum of \$15,000, giving therefor their joint note for that amount, payable four months after date, and as collateral security, two certificates for 180 shares of the capital stock of the State National Bank of Vernon, standing in the name of Curtis. The note was not paid at maturity. On July 21, 1893, the State National Bank suspended, and was in possession of the United States bank examiner from that date until September 14, 1893, when it reopened for business and continued to transact business as usual until August 18, 1894, when it finally suspended. The fact of such suspension and that the bank examiner was in charge was known to the Southern National Bank on July 26, 1893.

On August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on August 8, 1893, and it was so sold. On August 10, 1893, the Southern National Bank brought suit against Curtis and Thomas in the district court of Wilbarger county, Texas. Curtis and Thomas filed pleas, and also a cross petition, averring that the sale by defendant bank of the stock pledged was not made in pursuance of the powers granted in the written pledge, and was a fraud of the rights of the defendants; that by reason of said fraudulent sale the defendants had suffered damage to the amount of \$15,000, which they asked to be set off against the note sued on, and also that it should be adjudged that they had a right to recover the difference between the amount of the note and the value of the pledged stock, etc.

Subsequently Curtis and Thomas filed an additional plea or statement by way of cross petition, in which they allege that since the filing of their first cross petition the Southern National Bank had agreed to credit them with the amount of \$10,800 for the stock at the rate of 60 cents on the dollar, and that, in consideration thereof, they, Curtis and Thomas, had agreed to confess judgment for the balance due on the note, which they averred they were willing and ready to do.

In and by amended petitions the Southern National Bank claimed that the said bank stock had been, at all times since the execution and delivery of the note sued on, in the possession and under its control, and that it had always been ready and willing to return said bank stock upon payment of said note, and tendered in open court said bank stock upon payment of said note. At the trial in the district court of Wilbarger county that court held that the alleged agreement by the Southern National Bank to credit the defendants with the stock at the rate of 60 cents on the dollar was binding, and entered judgment accordingly in favor of the Southern National Bank in the sum of \$5,751. On appeal by the Southern National Bank to the court of civil appeals of Texas, the judgment of the district court was reversed, and judgment was entered in favor of the bank for the full amount claimed, and decreeing the bank stock to Curtis and Thomas as tendered. A portion of said decree was in the following terms:

"And it further appearing to the court that the said W. G. Curtis and A. W. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the notes sued hereon, it is therefore ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment, as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

It further appears that said certificates of stock remain on file in the said district court of Wilbarger county, not having been taken away by said Curtis and Thomas.

It has therefore been finally adjudicated between the Southern National Bank and Curtis and Thomas that there had been no conversion of the stock as alleged, and that, the Southern National Bank having waived its right as purchaser thereof, the stock has been decreed to be the property of Curtis and Thomas, subject to the payment by them of the judgment in favor of the bank. As between those parties, then, it cannot be pretended that the Southern Bank is under any legal or equitable obligation to Curtis and Thomas to assume or answer for the assessment made by the Comptroller on the stock. Having denied the validity of the auction sale, and forced an issue on that question, they cannot now, after a decision in their favor as respects the ownership of the stock, be heard to allege that the stock is really owned by the Southern National Bank, and that Curtis has been released from his liability as a shareholder.

If this be so, what foundation is there on which to base a recovery against the Southern National Bank in favor of the receiver of the State National Bank?

It is admitted that Curtis has always been and is liable as the registered owner of the stock; that, at no time, nor in any way, has the Southern National Bank held itself out to the State National Bank, or to its creditors, as a shareholder therein; and it is ad-

mitted that the Southern National Bank never received dividends and never voted on said stock.

It was held in *Pauly v. State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, that where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name on the books as pledgee, such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. When, therefore, it was decided, in the suit on the note, that the bank did not, by bidding in the stock at the auction sale for a nominal price, cease to be the pledgee, and that the stock remained the property of Curtis, how can it be said that the receiver, as respects that question, is in any better position? It may be said, indeed, that he was not a party to that suit, and is therefore not bound by the judgment; and it may be conceded that there might be cases where, by reason of fraud or collusion between the nominal shareholder and the real owner, the receiver would not be precluded, but might maintain his suit independently.

But, plainly, this is no such case. Indeed, the record of the Texas suit was put in evidence by the receiver, the plaintiff in error, and there is no effort to impeach the good faith of the bank in bringing that suit or in tendering the stock, nor can any objection be made to the soundness of the conclusions reached by the court of civil appeals.

This court has held in *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, and *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739, that it is not competent for national banking associations to invest any portion of their capital permanently in the stock of another corporation, and that they are not estopped from setting up such want of power against suits to enforce liability for assessments made by the Comptroller of the Currency. While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced \* (a proposition which we withhold from decision), we think there is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares. This was the view taken in the case of *Baker v. Old Nat. Bank*, 86 Fed. Rep. 1006, and *Frater v. Old Nat. Bank*, 42 C. C. A. 133, 101 Fed. Rep. 391, where it was held, after full consideration, that it is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests; and that where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified

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or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

Exception was taken in the circuit court to a question allowed to be put to the cashier of the defendant bank, whether at the time of the sale of the collateral security, and at the time of the nominal purchase for \$20, it was the intention of the officers of the bank to take title adversely to the pledgeors.

Whether it was competent to get at the intention of the bank officers in bidding in this stock at a nominal price, by examining one of such officers, might not be clear, if this were a contest between pledgeor and pledgee. But that question was, as between them, closed by the record in the Texas suit.

In the present case the question was an immaterial one, particularly as the case was not submitted to the jury, and as the other undisputed facts of the case showed that, as matter of law, the Southern National Bank was not, in any proper sense, the real owner of the stock. We agree with the courts below in thinking that the pledgee was at liberty to waive the nominal title thus acquired and to notify the pledgeors, as it did, that it still held the stock merely as collateral. We think that it is clear that the transaction, as it is admitted to have occurred, did not deceive or injure the insolvent bank or its creditors.

*The judgment of the Circuit Court of Appeals is affirmed.*

\*JOHN A. McDONALD, Plff. in Err., [311]  
v.

COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 311-313.)

*Habitual criminals—additional punishment on third conviction—constitutionality of statutes providing therefor.*

1. Imposing a heavier punishment upon a person convicted of a felony, as prescribed by

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

Constitutionality of statutes enhancing penalty for crimes when committed by habitual criminals or prior offenders.

The constitutional provision that "all penalties shall be proportioned to the nature of the offense" (III. Const. 1870, art. 2, § 11) is not violated by a statute imposing severer penalties upon one who is shown to have been previously convicted. *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644.

A law imposing additional punishment for a  
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Mass. Stat. 1887, chap. 435, § 1, if he has twice before been convicted of a crime for which he has been sentenced to imprisonment for not less than three years, does not impose any additional punishment for the former crimes, and is therefore not in violation of constitutional provisions against *ex post facto* laws or putting persons twice in jeopardy.

2. Constitutional provisions against cruel and unusual punishments are not violated by Mass. Stat. 1887, chap. 435, § 1, imposing a heavier penalty on a person convicted of felony if he has twice before been convicted of crimes for each of which he was sentenced to at least three years' imprisonment.
3. The equal protection of the laws is not denied by a statute imposing a heavier penalty upon a person convicted of a felony if he has twice before been sentenced for crime to three years' imprisonment or more.
4. A suggestion of misjoinder of counts in an

second or subsequent conviction of the same offense is not unconstitutional. *Hopkins v. Com.* 5 Met. 460.

"The validity of that statute has heretofore been sanctioned by this court, and it is now needless to discuss" it, says the court in *Combs v. Com.* 14 Ky. L. Rep. 245, 20 S. W. 268, in enforcing a statute providing for a life sentence of a person convicted a third time for a felony.

And the question of increased punishment for second and third convictions for the same offense was said in *White v. Com.* 20 Ky. L. Rep. 1942, 50 S. W. 678, to have been frequently considered by the Kentucky court of appeals, which has uniformly held that the legislature may increase the punishment in such cases, to prevent the repetition of the offense.

Such a statute is also said to be valid in *People v. Bosworth*, 64 Hun, 72, 19 N. Y. Supp. 114.

The particular grounds of the constitutional objections are not stated in these cases, but are doubtless the same as those mentioned in the divisions following.

The discrimination against prisoners serving a second or third sentence by denying them a good-time allowance has been made in several cases. *Atty. Gen.'s Opinion*, 3 Det. L. N. No. 34, Dec. 12, 1896, Appx.; *Re Canfield*, 98 Mich. 644, 57 N. W. 807. The constitutionality of a statutory provision requiring such a discrimination is assumed in these cases without question.

"The party charged with the commission of a second offense is supposed to have known all the penalties denounced against it. If, therefore, the punishment denounced against the first offense proves to be insufficient to restrain his vicious propensities, it is but just and right that an increased punishment should be inflicted for a second or third offense; and he has no reasonable cause of complaint that his former transgressions under the same law are brought up in judgment against him. No constitutional objection exists to such regulation of punishment." *Maguire v. State*, 47 Md. 485.

"One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew, or is presumed to have known, before the commission of the second offense all the penalties denounced against it; and if in some sense the additional punishment may be said to be a consequence of the first offense (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still, it is not a necessary consequence, but one which could only arise on the conviction for the second offense, and one therefore which, being fully apprised of in advance, the offender

indictment, and an objection that instructions on the charge of being an habitual criminal were first given after the jury had found the defendant guilty of the specific offenses charged, do not present any Federal question.

[No. 149.]

Submitted January 25, 1901. Decided February 25, 1901.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment of conviction of one who was sentenced as an habitual criminal. *Affirmed.*

See case in Massachusetts Supreme Judicial Court, 173 Mass. 322, 53 N. E. 874.

Mr. Francis P. Murphy submitted the cause for plaintiff in error:

Any statute allowing the government to

was left free to brave or avoid." *Rand v. Com.* 9 Gratt. 738.

There is nothing unconstitutional in the provisions of Mass. Stat. 1887, chap. 435, imposing a greater penalty in case of the conviction of a previous offender, and providing that the fact that he has offended before may be shown by convictions in that or another state, or both. *McDonald v. Com.* 173 Mass. 322, 53 N. E. 874.

A statute is no less a police regulation because it requires the court on conviction for a second offense to imprison the convict not less than a month nor more than a year, so that imprisonment is in a county jail or house of correction. *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089.

The fact that the provisions of the Ohio habitual criminal act of May 4, 1885, are made a supplement to the statute regulating the management of convicts in the penitentiary, rather than to that title of the Revised Statutes which relates to crimes and their punishment and to criminal procedure, is not sufficient to make the act invalid or ineffectual. It does not contemplate the creation of a new offense, but merely creates a class of convicts whose incorrigibility has been established by a series of convictions for felonies, and is therefore placed in its appropriate connection; but if it was not in the most appropriate connection it would be immaterial, if the legislative intent was apparent. *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18.

#### *Ex post facto laws.*

The constitutional provision against *ex post facto* laws is not violated by a statute providing for increased punishment for an offense because of a prior conviction of a like offense, even if the prior conviction was had before the statute was passed. *Rand v. Com.* 9 Gratt. 738; *Ex parte Gutierrez*, 45 Cal. 429; *Ross's Case*, 2 Pick. 165; *Riley's Case*, 2 Pick. 172; *People v. Raymond*, 96 N. Y. 38, *Affirming* 32 Hun, 123.

So, a statute designating one who is convicted of a felony after having been convicted of two others an habitual criminal, and subjecting him to long imprisonment as such, is not *ex post facto*, although by its terms it may be enforced against one whose former convictions occurred before its passage. *Com. v. Graves*, 155 Mass. 163, 16 L. R. A. 256, 29 N. E. 579; *Sturtevant v. Com.* 158 Mass. 598, 33 N. E. 648; *McDonald v. Com.* 173 Mass. 322, 53 N. E. 874; *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18.

A statute denying to convicts under sentence for a second offense the same reductions from their sentence for good behavior that are allowed to other convicts is not *ex post facto* as

make bad character a part of its original case is unconstitutional and void and oppressive because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, which guarantee a fair and impartial trial to persons charged with crimes.

In criminal proceedings the accused is permitted to offer evidence of good character.

*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *People v. Moett*, 23 Hun, 60; *Harrington v. State*, 19 Ohio St. 264; *Carter v. Com.* 2 Va. Cas. 169; *State v. Merrill*, 13 N. C. (2 Dev. L.) 269; *Armor v. State*, 63 Ala. 173; *People v. Fair*, 43 Cal. 137; *State v. Daley*, 53 Vt. 442.

The prosecution cannot, however, make bad character part of its original case; the initiative must be taken by the accused.

1 Wharton, Crim. Law, §§ 636-646; 3 Da-

vies' Abb. chap. 84, art. 1, § 5; *Olive v. State*, 11 Neb. 1; *State v. Crason*, 38 Mo. 372.

Where a person accused of a criminal offense introduces evidence tending to show that his general reputation is good, it is not competent for the government in reply to put in evidence of particular facts.

*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

A defendant can testify if he sees fit. If he does not choose to avail himself of that privilege, unfavorable inferences are not to be drawn to his prejudice from that circumstance.

*People v. Tyler*, 36 Cal. 522; *State v. Cameron*, 40 Vt. 555; *Carne v. Litchfield*, 2 Mich. 340.

This method of procedure destroys the presumption of innocence, which constitutional shield the law throws over every man, and prejudices his case in an unheard-of

applied to the punishment of an offense subsequently committed, although the offender had been convicted of his first offense before the passage of the act. *Re Miller*, 110 Mich. 676, 34 L. R. A. 398, 68 N. W. 990.

But a statute would be *ex post facto* if the later offense which is to be punished was committed before the statute was passed. *Ross's Case*, 2 Pick. 165; *Riley's Case*, 2 Pick. 172; *State v. Dale*, 110 Iowa, 215, 81 N. W. 453.

And a statute imposing an additional punishment for a second or third offense cannot operate on convictions previously had, to increase their effect as prior sentences, for the purpose of making a subsequent offense punishable by imprisonment for life in case the prisoner has been twice before convicted of offenses punishable by imprisonment at hard labor for a term of years. *Ex parte White*, 14 Pick. 90.

A change in the statute providing additional punishment because of prior offenses, which merely changes the tribunal which shall impose punishment, does not constitute an *ex post facto* law. *Com. v. Phillips*, 11 Pick. 28.

Thus, an information to impose additional punishment on a convict because of prior convictions may be authorized by the legislature to be prosecuted in a county different from that in which the convictions were had and in which the crimes were committed. *Com. v. Phillips*, 11 Pick. 28.

In answer to a contention that the penalty is made greater by an amending statute, inasmuch as it provides for doubling the penalty on a repetition of the offense, the court says, in *State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245: "This is a possible contingency, but not an incident of the sentence. The respondent may again violate the law, but this depends wholly upon his own will. It is not a right of which the sentence will deprive him, nor any result which the court can anticipate, or which it can take into consideration as a part of its sentence. It cannot consider the penalty by such possible contingency as increased. To do so would be to presume that the breach of law would be repeated, and to be solicitous, not for the preservation of the rights of the respondent, but to guarantee to him impunity in wrongdoing. This is not the proper business of the court."

#### *Cruel or unusual punishments.*

It is not cruel or unusual punishment to impose upon a convict a severer sentence for a second offense than for a first offense. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

and or subsequent offense than for a first offense. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179, Affirming *State v. Moore*, 121 Mo. 514, 26 S. W. 345; *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

Cruel and unusual punishment within the meaning of the Massachusetts Declaration of Rights, art. 26, is not imposed by the provision of Mass. Stat. 1887, chap. 435, that one who has been convicted in that state of a felony there committed since it went into effect, or who twice before in that state or another state, or both, has been sentenced and committed to prison for terms of not less than three years each, shall upon a subsequent conviction be punished by imprisonment in the state prison for twenty-five years,—especially as the statute provides for a conditional release for the residue of the term if it appear to the governor and council at any time that the convict has reformed. *McDonald v. Com.* 173 Mass. 322, 53 N. E. 874.

So, a statute regulating the sale of intoxicating liquors, which increases the punishment for second and third offenses, does not pass the arbitrary line fixed by the legislature between misdemeanors and felons, and is not unconstitutional by reason of the constitutional provisions relating to cruel and unusual punishments, such statutes being commonly and universally upheld. *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883.

#### *Equal protection of the laws.*

A person is not denied the equal protection of the laws by imposing upon him a severer punishment for a second offense than is imposed for the first offense. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

The equal protection of the laws guaranteed by U. S. Const. 14th Amend. is not denied by the provisions of Mass. Stat. 1887, chap. 435, imposing a heavier penalty upon conviction of a previous offender. *McDonald v. Com.* 173 Mass. 322, 53 N. E. 874.

#### *Due process of law.*

Due process of law is not denied by N. Y. Penal Code, § 688, providing for an increased penalty upon conviction of a person for a second offense, although such section be construed to permit proof of the prior conviction to be offered



manner, and really deprives him of every right which he ought to possess under the United States Constitution and Amendments and the Massachusetts Constitution and Bill of Rights

Cooley, Const. Lim. 387, 388.

By introducing records of prior convictions and commitments in the habitual-criminal count, a man is practically compelled to furnish evidence against himself, and thereby violate article 12, Bill of Rights, and U. S. Const. 5th Amend.

*Leonard v. Leonard*, 151 Mass. 151, 6 L. R. A. 632, 23 N. E. 732.

If a man's past record is considered and made a count of felony, it destroys the presumption of innocence, which constitutional shield the law gives the accused in all trials of felony.

Cooley, Const. Lim. 318-328; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

We claim that petitioner was put twice in jeopardy, contrary to the United States Constitution and Amendments.

Cooley, Const. Lim. 398-401.

One trial and verdict must, as a general

as part of the case against the defendant. *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288.

But a person committed to the New York city workhouse is denied due process of law by the provisions of §§ 708-711 of the city charter, making the term of imprisonment depend upon whether the superintendent of the workhouse and the commissioner of corrections shall decide that such person is identical with some former prisoner, and permitting this determination of fact to be made without requiring any notice of hearing to such person, or opportunity to be heard. *Re Kenny*, 23 Misc. 9, 49 N. Y. Supp. 1037.

#### *Second punishment or jeopardy for the same offense.*

The constitutional provision against putting a person twice in jeopardy for the same offense is not violated by imposing greater penalties upon persons convicted of a crime if they have been previously convicted. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179. *Affirming State v. Moore*, 121 Mo. 514, 26 S. W. 345; *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490.

So, the constitutional provision that no person shall be twice put in jeopardy for the same offense is not violated by the provision of N. Y. Laws 1886, chap. 21, for the discharge of convicts for good behavior before the expiration of the full term for which they are sentenced, upon condition that if such convict be convicted of a felony during the term of commutation he shall, in addition to the penalty for the felony so committed, be compelled to serve the remainder of the original term without commutation. *People ex rel. Willis v. Sage*, 11 App. Div. 4, 42 N. Y. Supp. 251.

The increased severity of punishment for a second or subsequent offense is not a punishment for the same offense a second time. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. McCarthy*, 45 How. Pr. 97; 180 U. S.

rule, protect him against any subsequent accusation of the same offense, whether the verdict be for or against him; and the verdict constitutes a bar to a new prosecution.

Cooley, Const. Lim. 398, 399.

*Mr. Hosea M. Knowlton* submitted the cause for defendant in error. *Mr. Arthur W. De Goosh* was with him on the brief:

There is nothing in the act itself, or in the title thereof, to suggest that it authorizes a trial for offenses committed beyond the jurisdiction of the state. It is simply an act in furtherance of a scheme for punishing old offenders, which has been in force in Massachusetts since 1804.

*Com. v. Richardson*, 175 Mass. 202, 55 N. E. 988.

Since, therefore, the indictment is in the form authorized by the statutes of Massachusetts, and does not violate any of the provisions of the 14th Amendment, the decision of the supreme judicial court of Massachusetts as to the sufficiency thereof is final. Merely technical objections to the form of an indictment do not raise any Federal question for the consideration of this court.

*Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Maguire v. State*, 47 Md. 485; *Ex parte White*, 14 Pick. 90; *Ross's Case*, 2 Pick. 165; *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18; *Chenoweth v. Com.* 11 Ky. L. Rep. 561, 12 S. W. 585; *Taylor v. Com.* 3 Ky. L. Rep. 783; *Boggs v. Com.* 9 Ky. L. Rep. 342, 5 S. W. 307.

"The increased punishment for a second or third conviction is simply the punishment for that offense, and the legislature may well increase the punishment in such cases, to prevent a repetition of offenses. This has been so often held that we do not regard it longer an open question." *Herndon v. Com.* 20 Ky. L. Rep. 1114, 48 S. W. 989.

The increased severity of the punishment for the second offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of the first crime. *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785.

It is said in *Ross's Case*, 2 Pick. 165, that the punishment for the last offense committed is rendered more severe in consequence of the situation into which the party has previously brought himself.

The prior conviction is regarded as giving a character of increased aggravation to the subsequent offense. *Ex parte White*, 14 Pick. 90.

The law which imposes the increased punishment is presumed to be known to all persons, and is intended to deter those so inclined from the further commission of crime. *State v. Moore*, 121 Mo. 514, 26 S. W. 345; *Rand v. Com.* 9 Gratt. 738; *Maguire v. State*, 47 Md. 485.

On the same ground that the prior offense is merely matter of aggravation, it is also held that an information is not objectionable as charging two offenses, merely because it alleges a prior conviction of a similar offense. *People v. Boyle*, 64 Cal. 153, 28 Pac. 232.

On the general question of increased punishment of crimes committed by habitual criminals or prior offenders, see note to *Re Miller* (Mich.) 34 L. R. A. 308.

*Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

The sentence was neither unusual nor cruel. The plaintiff in error might have been sentenced to imprisonment in the state prison for a term of forty years, under Pub. Stat. chap. 204, §§ 1, 2, if the charges as to the former convictions and imprisonment had been omitted from the indictment.

*Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

*Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80.

The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century, and make such changes as may be necessary.

*Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77. See also *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The state might have provided that a person should be liable to the same aggravated punishment as was imposed upon the plaintiff in error, upon a second conviction in Massachusetts, without regard to whether he had been convicted at all in some other state.

*Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

The 14th Amendment does not pretend to limit the states in their jurisdiction, so long as they classify criminality upon a reasonable theory, and do not deprive one offender of the same protection that other offenders of his class are entitled to receive.

*Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637.

A law is not *ex post facto* as to any particular offense, if enacted before the commission of that offense.

*Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

The statute is not *ex post facto*, although the two offenses which went to aggravate the punishment of the accused were committed before its enactment, the offense for which he was convicted having been committed afterwards.

*Sturtevant v. Com.* 158 Mass. 598, 33 N. E. 648.

That the plaintiff in error was not twice put in jeopardy for the same offense is con-

clusively settled by *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

\*Mr. Justice Gray delivered the opinion[311] of the court:

The plaintiff in error was indicted at August term, 1898, of the superior court in the county of Suffolk and state of Massachusetts, on the statute of Massachusetts of 1887, chap. 435, § 1, by which "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years: provided, however, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act."

\*Section 2 provides that when it appears[312] to the governor and council that the convict has reformed, they may release him conditionally from the rest of his sentence.

The indictment contained four counts, two charging the defendant with forging an order for money, and two with uttering as true a forged order for money; and further alleged that in April, 1890, he had been convicted in Massachusetts of perjury, and therefor sentenced and committed to the state prison for three years; and also in January, 1894, had been convicted in New Hampshire of obtaining property by false pretenses, and therefor sentenced and committed to the state prison for four years.

The defendant pleaded not guilty, and was tried by a jury, who returned a verdict that he was guilty of the whole indictment; and the court thereupon adjudged him to be an habitual criminal, and sentenced him to be punished by imprisonment in the state prison for the term of twenty-five years.

The defendant sued out a writ of error from the supreme judicial court of Massachusetts, which affirmed the judgment. 173 Mass. 322, 53 N. E. 874. He then sued out this writ of error from this court to the superior court, in which the record remains.

The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the



new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the statute of 1827, chap. 118, § 19, and by the Revised Statutes of [313] 1836, \*chap. 133, § 13. It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not *ex post facto*. It affects alike all persons similarly situated, and therefore does not deprive anyone of the equal protection of the laws. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Ross's Case*, 2 Pick. 165; *Com. v. Graves*, 155 Mass. 163, 16 L. R. A. 256, 29 N. E. 579; *Sturtevant v. Com.* 158 Mass. 598, 33 N. E. 648; *Com. v. Richardson*, 175 Mass. 202, 55 N. E. 988.

The statute does not impair the right of trial by jury, or put the accused twice in jeopardy for the same offense, or impose a cruel or unusual punishment. There is therefore no occasion to consider whether any of the provisions of the Constitution of the United States on these points can apply to the courts of the several states. *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

The suggestion of misjoinder of counts in the indictment, and the objection that instructions on the habitual criminal charge were first given by the court to the jury after they had said that the defendant was guilty of the specific offenses charged, present no Federal question.

*Judgment affirmed.*

[314]

\*D. MARX, *Appt.*,  
v.

WILLIAM M. EBNER *et al.*

(See S. C. Reporter's ed. 314-320.)

*Writs—service by publication—sufficiency of proof for.*

1. Sufficient proof to justify an order for service of summons by publication is made by evidence that the defendants did not reside in the jurisdiction, and that one of them, which

NOTE.—On *constructive service by publication*—see notes to *Cousins v. Alworth* (Minn.) 10 L. R. A. 504, and *Moyer v. Bucks* (Ind.) 16 L. R. A. 231.

On *presumption of performance of official duty*—see *Douglass v. Bishop* (Kan.) 10 L. R. A. 857, and note.

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was a corporation, had no managing agent therein, but that its president resided in another jurisdiction, while the proper officer has returned the summons with a statement that after due and diligent search he has been unable to find the defendants, or either of them, or their authorized agents, within the district.

2. The presumption that a public officer who has received process for service has done his duty and has made the reasonable and diligent search that is required, though not alone sufficient to justify an order for service by publication, may add some weight when there is other proof of the necessary facts.

[No. 126.]

*Argued January 22, 1901. Decided February 25, 1901.*

APPEAL from the District Court of the United States for the District of Alaska to review a decree dismissing a complaint in an action for mining land. *Affirmed.*

Statement by Mr. Justice Peckham:

The appellant has appealed from a judgment of the district court of the United States for the district of Alaska dismissing his complaint. Both parties claim the property in dispute from a common source of title, which is the Takou Mining & Milling Company. The property consists of mining land in the territory of Alaska, of which the defendants are in possession, and they claim title through a sale under a decree of foreclosure of a mortgage of the property by the Takou Company, which mortgage was executed at a time when the company was the owner of the property.

After the execution of the mortgage the company conveyed some, but not all, of the property covered by it to one Sylvester Farrell, subject to the mortgage, and after the foreclosure and sale under the mortgage Farrell and wife and the Takou Company sold and conveyed all of the property to the plaintiff, who claims to own the same subject to whatever may be \*due on the mortgage. He contends that the foreclosure proceedings under which the defendants claim title to the property were totally void, because the court in which they were conducted never obtained jurisdiction by valid service of process on the mortgagor company or upon Farrell. The facts upon which the allegation of a lack of jurisdiction was based are set out in full in the complaint, and the plaintiff asks that the defendants be decreed to be mortgagees in possession; that an accounting may be had to ascertain the exact amount due on the mortgage, which is alleged to be about \$1,000, and that the defendants vacate the property and surrender the possession thereof to the plaintiff, and that the pretended decree of foreclosure be annulled. [315]

The defendants demurred to the complaint, the court sustained it, and, upon the plaintiff refusing to amend, a decree was entered finally dismissing his complaint, and from that decree he has appealed to this court.

**Mr. W. Scott Beebe** argued the cause and filed a brief for appellant:

That the district court for Alaska is not a court of the United States is conclusively settled by the decisions of this court.

*McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *The Coquiltam v. United States*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117.

The jurisdiction of the district court for the district of Alaska is not invoked by an application addressed to the district court of the United States for the district of Alaska.

*Ward v. Stringham*, 1 Code Rep. 118; *Garretson v. Hays Bros.* 70 Iowa, 19, 29 N. W. 786; *Jordan v. Brown*, 71 Iowa, 421, 32 N. W. 450.

A pleading addressed to one court does not influence or start the machinery of any other court.

*Jordan v. Brown*, 71 Iowa, 421, 32 N. W. 450; *Dunlap v. Southerlin*, 63 Tex. 38; *Sheldon v. Newton*, 3 Ohio St. 499; *Edmiston v. Edmiston*, 2 Ohio, 252; *United States v. Arredondo*, 6 Pet. 709, 8 L. ed. 554; *Reynolds v. Stockton*, 140 U. S. 264, 35 L. ed. 467, 11 Sup. Ct. Rep. 773.

The record must stand as it is made and published, and inasmuch as it fails to show affirmatively a strict compliance with the requirements of the statute, it is void.

*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959.

Under statutes like this the courts hold, without any dissent, that an effort amounting to due diligence must be made to find the defendant, and that the facts constituting this due diligence must appear in the affidavit and affirmatively in the record.

*Ricketson v. Richardson*, 26 Cal. 153; *McCracken v. Flanagan*, 127 N. Y. 493, 28 N. E. 385; *Pike v. Kennedy*, 15 Or. 425, 15 Pac. 637; *McDonald v. Cooper*, 32 Fed. 748; *Palmer v. McMaster*, 13 Mont. 184, 33 Pac. 132; *Beach v. Beach*, 6 Dak. 371, 43 N. W. 702.

The search and return by the marshal do not establish the due diligence required by § 55 of the Oregon statute.

*Victor Mill & Min. Co. v. Esmeralda County Justice Ct.* 18 Nev. 21, 1 Pac. 833.

The publication of a summons requiring defendant to appear in a court that does not exist imposes no obligation to appear.

*Smith v. Ellendale Mill Co.* 4 Or. 70; *Trullinger v. Todd*, 5 Or. 39; *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110.

Failure to comply with the requirement of § 55 that the summons should state the date of the order of publication is fatal to the jurisdiction of the court.

*Odell v. Campbell*, 9 Or. 304.

The notice requiring defendants to appear on the first day of the next term of court, like the date of the order for publication, is by statute required to be stated in the summons, and, unless it is so stated, the summons is void.

*Ibid.*; *Choate v. Spencer*, 13 Mont. 127, 20 L. R. A. 424, 32 Pac. 651; *Ætna Ins. Co. v. Hallock*, 6 Wall. 556, sub nom. *Ætna Ins. Co. v. Doe ex dem. Hallock*, 18 L. ed. 948.

The probability that a summons sent to the president of a corporation would, if re-

ceived by him, be delivered to the corporation, lacks that certainty required in matters of this nature.

*Heatherly v. Hadley*, 4 Or. 18; *Cissell v. Pulaski County*, 3 McCrary, 446, 10 Fed. 893; *Galpin v. Page*, 18 Wall. 366, 21 L. ed. 962; *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 309; *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110.

The statutory provision that, when the jurisdictional facts "appear by affidavit to the satisfaction of the court or judge thereof," he may grant an order of publication, requires that he be legally satisfied, and the evidence upon which he acts must be competent and must appear affirmatively in the affidavit.

*Kümér v. St. Louis, Ft. S. & W. R. Co.* 37 Kan. 84, 14 Pac. 465; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *McDonald v. Cooper*, 32 Fed. 748.

**Mr. Henry E. Davis** argued the cause, and, with Messrs. William W. Dudley, L. T. Michener, and R. A. Friedrich, filed a brief for appellees:

Upon the statement in the attorney's affidavit that the Takou company is a foreign corporation organized and existing under the laws of the state of Oregon, and has no managing agent or representative within the district of Alaska, it is conclusively presumed that the corporation is a citizen of the state of Oregon, and incapable of citizenship or legal residence in the district of Alaska.

1 Foster, Fed. Pr. § 19.

In granting the order that the service be made by publication of summons, the court or judge acts judicially, and can know nothing about the facts upon which the order is granted except from the affidavit filed.

*Ricketson v. Richardson*, 26 Cal. 154.

Where the affidavit for service by publication follows the language of the statute, and the proceedings in other respects are regular, jurisdiction of the defendant is properly obtained.

*Storm v. Adams*, 56 Wis. 137, 14 N. W. 69.

This affidavit would have been sufficient had it been made upon information and belief.

*Steinle v. Bell*, 12 Abb. Pr. N. S. 171.

Proof of publication can be made only by a person holding the position of printer or foreman, or his principal clerk.

*Odell v. Campbell*, 9 Or. 298.

\***Mr. Justice Peckham**, after stating the foregoing facts, delivered the opinion of the court:

Counsel for the appellant admits that if the foreclosure proceedings operated to pass the title to the property mortgaged, this decree must be affirmed. He contends, however, that it appears on the face of the complaint that there was a want of jurisdiction in the court to render any judgment whatever in the foreclosure action, and that hence no title was conveyed to the defendants by virtue of the foreclosure decree and the sale thereunder. The record of the fore-



closure action is set out in the complaint, and the ground upon which the allegation of a lack of jurisdiction is founded is the alleged defective character of the proof of the service of process by publication.

Section 56 of the Code [Hill's Anno. Laws (Or.)] under which this service was made reads as follows:

[316] \* "When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or justice of the peace, in an action in a justice's court; and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, the court or judge thereof, or a justice of the peace in an action in a justice's court, shall grant an order that the service be made by publication of a summons in either of the following cases."

Here follows a list of the cases in which an order for publication may be made, and it is not disputed that the case of the foreclosure of a mortgage of land within the territory was one in which such publication could be ordered.

From the record in the foreclosure action it appears that process was issued to the marshal in Alaska on the 21st of December, 1893, and that it was returned by him to the clerk's office January 2, 1894, with the following indorsement by him:

"United States of America, } ss:  
District of Alaska, }

"I hereby certify that the within summons came into my hands for service on the 22d day of December, 1893, and that after due and diligent search neither of the within-named defendants nor their agents could be found within this district.

"Dated at Juneau, Alaska, this 2d day of January, 1894."

With such summons and the return made thereon by the marshal was an affidavit made by the attorney for the plaintiff, which, among other things, stated that the defendant, the Takou Mining & Milling Company, was a foreign corporation organized and existing under the laws of the state of Oregon, and that the defendant Farrell was not a resident of the district of Alaska, but resided in the city of Portland in the state of Oregon; that the defendant corporation was the mortgagor, and that Farrell purchased from the mortgagor some of the property subsequent to the execution of the mortgage.

[317] It also appeared from the affidavit that no officer of the defendant \*corporation resided within the district of Alaska, and that the corporation had no managing agent or representative within that district; that the postoffice address of its president was No. 246 Washington street, Portland, Oregon, and that Portland, Oregon, was also the postoffice address of the defendant Farrell; that the summons was duly issued out of the court to the United States marshal for the district of Alaska, with directions to the  
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marshal to serve the same upon the defendants; that personal service of the summons could not be made on the defendants, and the plaintiff therefore asked an order that the service of the same might be made by publication. Upon this proof an order was made by the judge of the court, which, after reciting that it satisfactorily appeared to him that the defendants resided out of the district and could not, after due diligence, be found therein, directed the publication of the summons in a newspaper published at Juneau, Alaska, at least once a week for eight weeks. The order was dated January —, 1894, and signed by the judge. The summons was thereafter published as required by the order and a copy of the complaint was sent by mail to each of the defendants at their postoffice address, as directed, and as the defendants did not appear, judgment of foreclosure and sale was given, and under the decree the premises were sold and the defendants have the title which passed by the sale. The objection is made by the appellant that there was no sufficient proof that the defendants, after due diligence, could not be found, and therefore the court ordering the publication had no jurisdiction to make the order; that the simple statement of the marshal that defendants could not be found after due and diligent search was no proof that any such search had been made, and that it was necessary to show what had been done in the way of searching for defendants, so that the court could itself judge whether due diligence had been exercised. Taking the return of the officer, with the other facts proved, we think this contention not well founded.

As to the case of the corporation, it appeared that it was a foreign corporation organized under the laws of Oregon, that none of its officers resided within the district of Alaska, and that it had no managing agent or representative therein, and \*that its presi- [318] dent resided in Portland, Oregon. There is also a distinct allegation in the affidavit of the attorney for the plaintiff, used to procure the order for publication, that the defendant Farrell was not a resident of the district of Alaska at the time of the making of the affidavit, and that he resided in the city of Portland, in the state of Oregon, and that personal service of the summons could not be made on him, and then there is the return of the marshal stating that the summons came into his hands on December 22, 1893, and that after due and diligent search neither of the defendants nor their agents could be found within the district, and that certificate was dated January 2, 1894.

We think on these facts there was sufficient proof to give the judge jurisdiction to determine the question before him, and consequently his order for publication was valid. The order was not alone based on the statement that the defendants could not after due and diligent search be found, but there were the other facts showing the non-residence of both parties; that there was no managing agent or representative of the cor-

poration defendant within the district; and that neither could be personally served with process therein.

The cases referred to by the appellant are not opposed to these views. There is nothing to the contrary in *McCraeken v. Flanagan*, 127 N. Y. 493, 28 N. E. 385, cited by the appellant. At the time of that decision, § 135 of the Code of Procedure of that state provided that where the person on whom the service of summons is to be made cannot after due diligence be found within the state, and that fact appears to the satisfaction of the court or a judge thereof, etc., an order for publication may be made in the cases mentioned. The affidavit which in the above case was held insufficient stated "that defendant is a nonresident of this state nor can be found therein," leaving out the statutory words "after due diligence;" and for want of these words, or of language substantially like them, the affidavit was held fatally defective, no proof of any effort to serve being given.

[319] The case of *Kennedy v. New York Life Ins. & T. Co.* 101 N. Y. 487, 5 N. E. 774, was cited in the opinion, and the affidavit\* in that case stated that the defendants "cannot after due diligence be found within this state," and that they were residents of other states named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such nonresidence." This affidavit was held to be sufficient, and the court said: "The statement as to due diligence is not absolutely an allegation of a conclusion of law or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used."

In *McDonald v. Cooper*, 32 Fed. Rep. 745, the circuit court of the district of Oregon held that the affidavit to obtain the order for publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the state after due diligence, and the mere assertion of the fact was insufficient, but it was also held that a statement of the facts as to the residence and actual abode of the defendant, which shows beyond a peradventure that a search for him within the state would be unavailing, is sufficient. "Beyond a peradventure" is stronger language than is necessary. It is seldom that such certainty of proof is possible.

We think where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due dili-

gence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is, too, some presumption that the public officer who has received "the process for service" has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty.

Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question.

We have not overlooked the other objections made by the appellant relating to the invalidity of the decree, but we do not regard it necessary to notice them further than to say that we think they are not well founded.

The judgment of the court below is therefore affirmed.

NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA, Limited, et al., Plffs. in Err.,  
v.

STATE OF LOUISIANA, Dft. in Err.

(See S. C. Reporter's ed. 320-332.)

*De facto corporation—suit to annul charter—right of members to be parties—questions of local law.*

1. A *de facto* corporation may be treated as such by the state and brought into court as the party defendant, without making its members parties, for the purpose of obtaining a decree against it to annul its charter on the ground that the incorporation was illegal because made for an illegal purpose.
2. Members of a *de facto* corporation, who appear in court and contest the right to maintain a suit against the corporation as such for the annulment of its charter, and who appeal from a decision against it, thereby waive any objection to the failure to make them parties to the proceeding.
3. The decision by a state court that the purpose for which a corporation is formed is not lawful, or that the good faith of its members is immaterial on the question of such legality, is a matter of local law, and is not

NOTE.—On the effect of decisions of state courts in Federal courts—see notes to United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490, and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Ke Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gloman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.



reviewable by the Supreme Court of the United States on writ of error.

A decree adjudging the charter of an alleged corporation to be null and void, and enjoining the officers and stockholders from acting as a corporation, on the ground that the purpose for which it was formed is illegal, does not take away the property of the individual corporators without due process of law, or deny to them the equal protection of the laws.

[No. 129.]

*Argued December 13, 14, 1900. Decided February 25, 1901.*

**IN ERROR** to the Supreme Court of the State of Louisiana to review a decision affirming a judgment annulling the charter of a corporation. *Affirmed.*

See same case below, 51 La. Ann. 1827, 26 So. 586.

**Statement by Mr. Justice Peckham:**

This is a writ of error to the supreme court of the state of Louisiana, brought for the purpose of reviewing a judgment of that court affirming a judgment of the civil district court for the parish of Orleans decreeing the charter of the corporation plaintiff in error, under color of which it claimed [321] corporate \*existence, to be null, void, and of no effect. The suit was in the nature of a quo warranto. The attorney general of Louisiana, pursuant to statute, filed a petition in the trial court against the New Orleans Debenture Redemption Company of Louisiana, Limited, as sole defendant, and in that petition alleged that the defendant was not organized for any purpose for which the law authorized the formation of corporations in the state of Louisiana; that it was a debenture company formed for the sole purpose of selling or borrowing money upon its own obligations or debentures, to be paid for in monthly instalments, the company binding itself to pay the holders of debentures a profit of 50 per cent upon the amount invested. A description of the manner in which the business was to be conducted was given in the petition, and it was alleged that the whole system amounted to a mere gambling venture, demoralizing as such, and was unlawful. It is also alleged that the company in its modes of organization had not complied with the requirements prescribed for corporations of any of the classes authorized by law, and that the act (No. 36 of the Laws of 1888) under which it claimed to have incorporated did not authorize the business which the company was doing. It was also alleged that the company and its officers, agents, managers, directors, and stockholders were unlawfully exercising a corporate franchise, and were acting as a corporation in the state without having been legally incorporated, and in violation of law, and that the public interest and common justice required that the company be enjoined from declaring forfeited or lapsed the rights of any debenture holder who did not continue paying his monthly instalments 180 U. S.

during the pendency of the suit, and the prayer was that the affairs of the company be liquidated according to law under the direction of the court for the common benefit of all creditors and other persons interested according to their respective rights. The attorney general further prayed that if it should be held that the organization of the company was authorized by law, that then the charter be forfeited on account of the subsequent violation of law by the company in not insisting upon cash in payment for its shares or stock. A preliminary injunction was asked and granted, enjoining the \*defendant from forfeiting or declaring [322] lapsed the rights of any debenture holder during the pendency of the suit. This preliminary injunction was, upon an order to show cause, subsequently dissolved.

Process was served upon the president of the company in accordance with its charter. The defendant appeared and filed "peremptory exceptions to the petition, founded on law," which were overruled by the court. The defendant thereupon answered denying the material allegations in the complaint, and alleging that it was a duly and legally constituted private corporation, organized in conformity with the laws of the state, and expressly authorized by act No. 36 of the Laws of the year 1888, for the pursuit of the private enterprise and purposes set forth in its charter, and that stock had been issued to the extent of \$50,000 and paid for to it, and that in doing business it had made many legal contracts which were outstanding, and that its debenture holders wished the company to keep on doing business, and it denied any gambling or wagering feature in connection with its contracts.

By supplemental answer it alleged that the purpose of the suit was to deprive the defendant, a duly and legally organized corporation under the laws of the state, of the legal right to engage in or pursue its business in any manner, and that the suit as instituted and prosecuted had for its object one which was in violation of the Constitution of the state of Louisiana and of the Constitution and laws of the United States, in that it deprived the defendant of its property without due process of law, and denied to it the equal protection of the laws of the state of Louisiana and of the United States, and that it violated the laws of the United States in that the purpose of the suit was to deprive the defendant of its lawful right to pursue a lawful business, and was an unlawful discrimination against the defendant and a denial to it of the equal protection of the laws in the pursuit of its business.

The parties went to trial and evidence was given in support of the petition as to the character of the business, and also that the stock which had been issued by the defendant to shareholders had not in fact been paid for in cash as required by the statute. \*The [323] charter was put in evidence, from which, together with testimony taken in the case, it appeared that in all probability the company would be unable to perform its contracts with those who remain debenture holders 551

until the maturity of their debentures, without the benefit which the company was to receive from lapses and forfeitures on the part of other debenture holders, resulting in a forfeiture to the company of all prior payments made by such holders. Ability to pay was even then claimed to be a matter of great doubt. It was stated by the trial court that with fair management and in the five years of its existence the company had more liabilities than assets. Much evidence was given on the trial of the case for the purpose of showing the general character of the business transacted by the company, and that it was, as alleged in the petition, of a gambling nature, and hence against the public policy of the state, and illegal.

There was no contradictory evidence on the trial regarding the facts as to the manner and plan of conducting the business of the defendant. Whether that business as thus conducted by it as a corporation and under its charter was or was not illegal, became a simple question of law. The trial judge held in favor of the state, deciding that the business done by the defendant was an unlawful business, not permitted to be pursued by any corporation, and that defendant was illegally doing business as a corporation, and decreed that the pretended charter under color of which the defendant claimed corporate existence was null and of no effect. A decree was thereupon entered adjudging that the president, secretary, and general manager, as also the agents, directors, stockholders, and members of the so-called corporation, were and had ever been without legal authority to act in a corporate capacity in the name of the defendant or under color of its pretended charter. It was also decreed that the injunction theretofore issued prohibiting and restraining the company, its officers, directors, agents, and representatives, from removing the assets and funds of the company from the state or beyond the jurisdiction of the court, and from receiving any money or instalments from its debenture holders, and from paying out any money on surrenders or withdrawals, [324] or in redemption \*of debentures, and from making loans on and from forfeiting any of said debentures, or the rights of any of the holders thereof, should be and was thereby confirmed and made absolute, and the company and its officers, representatives, and members were perpetually enjoined and restrained from acting in a corporate capacity.

A motion for a new trial was made and the constitutional objections again advanced, but the motion was denied.

After the entry of the final decree and the denial of the motion for a new trial, one August M. Benedict, a resident of the parish of Orleans, presented his petition to the trial court, in which he alleged that he had been appointed by the governor of the state the liquidator of the defendant, after the governor had been officially informed of the judgment rendered by the court, and he asked to be recognized as such liquidator. The trial court upon the presentation of the petition, with the annexed commission of the

governor, made an order recognizing Benedict as liquidator upon his taking oath and furnishing bond in the sum of \$10,000; the court further ordered that the officers of the defendant transfer and turn over to the liquidator all the assets, books and other property of whatever nature or kind belonging to the defendant corporation. The liquidator duly filed his bond, which was approved, and letters were granted him by the judge of the trial court. Thereupon the defendant corporation prayed for a suspensive and devolutive appeal to the supreme court, which was granted. Upon the same day a petition under the Louisiana practice was duly presented by the individual stockholders and the board of directors of the company to the court for leave to intervene in the suit, and in the petition they alleged the giving of judgment in the case against the company, which was the sole defendant therein, and that none of the individual incorporators or other persons interested were ever in any manner made parties to the suit, and that the sole issue in the suit was in regard to the legality of the business done by the company and the legality and validity of the charter adopted and executed by the corporators, and they represented that the right to be a corporation or the right to legal existence as such was not a franchise of the corporation \*itself, but belonged to the cor- [325] porators solely and exclusively. The petitioners further represented that they and each of them felt aggrieved by the judgment and by the injunction which had been issued and by the order for the appointment of a liquidator, and the order for the transfer of the property to his possession, all of which they alleged had been highly prejudicial to their legal rights, and they therefore asked to intervene in the cause for the purpose of taking and prosecuting an appeal, devolutive and suspensive, from the final judgment, and from all orders, decrees, or proceedings had in the cause, including the order and proceedings under the writ of injunction therein ordered or issued, and including all orders, decrees, and proceedings made or had therein for the appointment of a receiver or liquidator for said company, to the end that on said appeal they might be enabled to be heard and to obtain a reversal of all such proceedings.

Service of the petition was made on the attorney general, who accepted the same, waived citation, and acquiesced in the order granting the petitioners leave as asked for. Thereupon the directors and stockholders duly appealed to the supreme court from the final judgment and also from the various orders in regard to the liquidator. All of these appeals were heard in the supreme court and the decree of the court below was affirmed, but the separate appeal taken by the shareholders from the order recognizing Benedict as liquidator under the governor's appointment was sustained, reserving to the state of Louisiana and all other parties in interest the question whether the appointment of a liquidator lies with the governor, or of a receiver with the court, or with the



parties in interest; such question to be thereafter determined by the court below as an open question. The company and the stockholders sued out writs of error to bring up the final decree of the state court for review.

**Mr. J. F. Pierson** argued the cause and filed a brief for plaintiffs in error:

A reference to the statutes of the state shows that the state can be represented before courts in civil cases by her attorney general alone, and even then in proper cases only.

*State ex rel. Hart v. Burke*, 33 La. Ann. 510.

The exercise by a state of the right to control the private business affairs of persons engaged in private pursuits is inconsistent with the civil liberties of the citizens and the rights guaranteed under the 14th Amendment to the Federal Constitution.

*Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

The question whether the relator is or is not a duly authorized and organized corporation involves only the liability, whether limited or not, of those engaged in the business in the associated name. Such liability concerns only those who hold obligations and liabilities against the association, and they have an adequate remedy, at their own suit, in their own names, to enforce their own legal rights.

*African M. E. Church v. New Orleans*, 15 La. Ann. 441; *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369; *Workingmen's Bank v. Converse*, 33 La. Ann. 963; *Hincks v. Converse*, 37 La. Ann. 485; *Mount Carmel Church Congregation v. Farrelly*, 34 La. Ann. 534; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496.

The sovereign state, organized for public governmental purposes only, is without any real or actual interest in the pursuit of such private business enterprises between citizens.

*People v. Lowe*, 117 N. Y. 175, 20 N. E. 1016; *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 650, 24 Pac. 121.

In an action to declare the nonexistence of a corporation and the nullity of its charter, the nonexisting corporate body is not a competent defendant to the action. No such association can appear in court as a corporation. It can only sue or be sued in the name of all the members composing it.

*Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369; *Hincks v. Converse*, 37 La. Ann. 484; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496.

This action is against the association in its corporate name and capacity only. It is not against the individuals by name who compose it, and the exception that it cannot be sued in that form is undoubtedly good.

*Mount Carmel Church Congregation v. Farrelly*, 34 La. Ann. 533; *African M. E. Church v. New Orleans*, 15 La. Ann. 441.

In a suit by the state alleging the nullity of the corporate charter, the nonexistence of

the corporate body, and praying for judgment to that effect, the alleged nonexistent corporate body is not a competent defendant against which judgment can be rendered or enforced.

*Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496.

The rights to pursue any livelihood or avocation, and to make contracts in such pursuits, are ingredients of the liberty of the citizen, protected by the 14th Amendment of the Constitution of the United States.

*Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

A preliminary injunction issued *ex parte* at the institution of the suit, and subsequently dissolved and set aside *in limine litis* by interlocutory judgment of the court, cannot, in the same suit, be subsequently applied for *ex parte* by the same plaintiff, or granted by the court.

*State ex rel. Logan v. New Orleans Dist. Judge*, 19 La. Ann. 6; *State ex rel. Schoenhause v. King*, 47 La. Ann. 700, 17 So. 254.

After all incidental questions are decided, the evidence of both parties adduced, and the argument commenced, no witness can be heard or proof introduced except by consent of parties. It is then out of order to raise preliminary questions of injunction, after defendant is cut off from making pleas and proof to dissolve it.

*Burbank v. Harris*, 32 La. Ann. 396; *Hart v. Bowie*, 34 La. Ann. 325.

The nullity or forfeiture of the corporate charter does not involve the forfeiture of the property used, or the contract rights made in the name of the company, or their administration by those in interest.

*African M. E. Church v. New Orleans*, 15 La. Ann. 441; *Hincks v. Converse*, 37 La. Ann. 489; *Fleitas v. New Orleans*, 51 La. Ann. 1, 24 So. 623; *People v. Lowe*, 117 N. Y. 175, 20 N. E. 1016; *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 650, 24 Pac. 121.

The corporators are not bound by the citation issued and served in this case. No citation has been issued to or served upon them, either to appear individually or through an agent. The defendants could not be proceeded upon by a citation not addressed to them.

*Belard v. Gebelin*, 47 La. Ann. 166, 16 So. 739.

A court can presume nothing with respect to a party being cited; nothing will cure defect of citation or want of service, except appearing and answering to the merits.

*Harris v. Alexander*, 1 Rob. (La.) 30; *Rooks v. Williams*, 13 La. Ann. 374.

It is well settled by the amplest authority that a judgment rendered against a party who has not been cited and who has not appeared is an absolute nullity, which can be invoked, not only by the party, but also by anyone interested.

*Bledsoe v. Erwin*, 33 La. Ann. 618.

A judgment rendered against a person without citing him in the ordinary manner, without his appearing, or anything deemed equivalent to citation or appearance, is ut-

terly void, and imports such absolute nullity that anyone interested may have it pronounced.

*Walworth v. Stevenson*, 24 La. Ann. 253; *Thomas v. Breedlove*, 6 La. 577; *Compton v. Airial*, 9 La. Ann. 496; *Fletcher v. Henley*, 13 La. Ann. 150.

Due process of law means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.

*Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

It means the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.

*Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 481, 23 L. ed. 479.

It must be according to the modes of proceeding applicable to the case in hand.

*Davidson v. New Orleans*, 96 U. S. 105, 24 L. ed. 620; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

Due process requires the forms of law appropriate to the case and just to the parties to be affected to be followed, and the ordinary mode prescribed by law and adapted to the end to be attained to be pursued, and an opportunity to be heard upon the justice of the judgment sought to be given to parties to be affected. It implies more than the mere issuance of process, and includes the right of being heard in the defense of the action brought.

*Marchant v. Pennsylvania R. Co.* 153 U. S. 387, 38 L. ed. 755, 14 Sup. Ct. Rep. 894.

Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations.

*Hovey v. Elliott*, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80.

Conceding the nonexistence of the corporate capacity, the corporators are entitled to their rights of property in what may have been acquired in the corporate name.

*African M. E. Church v. New Orleans*, 15 La. Ann. 441; *Hincks v. Converse*, 37 La. Ann. 489.

The expiration of the charter does not carry with it the destruction of the ownership of the property which the corporation held during its existence.

*Fleitas v. New Orleans*, 51 La. Ann. 1, 24 So. 623; *Stark v. Burke*, 5 La. Ann. 741.

The privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, embraces the right to make all proper contracts in relation thereto.

*Allgeyer v. Louisiana*, 165 U. S. 590, 41 L. ed. 836, 17 Sup. Ct. Rep. 427, and authorities cited.

Mr. Frank E. Rainold argued the cause, and, with Messrs. Walter Guion and Milton

*J. Cunningham*, filed a brief for defendant in error:

A franchise is a special privilege conferred by the government on individuals, and does not belong to the citizens of a country generally of common right.

*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

If a franchise is a privileged immunity of a public nature which cannot be legally exercised without legislative grant, to be a corporation is a franchise, etc.

*People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 387, 8 Am. Dec. 243.

No one can take advantage of a breach of the conditions on which a corporation was created, for the purpose of depriving it of its franchise, except the sovereignty by which it was created.

*Elliott, Priv. Corp.* 236.

Had it been sued as a corporation in its corporate name, under citation similar to the one issued in this case, served in the manner in which the citation herein has been served, it would have been estopped from denying its corporate existence, if the plaintiff in suit had treated with it as a corporation.

*Jones v. Mount Zion Congregation*, 30 La. Ann. 711.

Alternative pleas are permitted and sanctioned by the jurisprudence of Louisiana, because they avoid a multiplicity of suits.

*Johnson v. Mayer*, 30 La. Ann. 1203; *Chaffe v. Scheen*, 34 La. Ann. 687; *Smith v. Donnelly*, 27 La. Ann. 98; *Webre v. Gaillard*, 16 La. Ann. 189.

The voluntary appearance of a defendant in court for any other purpose than to object to the want of citation has been held, under the law of Louisiana, to waive its necessity.

Code Pr. art. 206; *Byland Heirs*, 38 La. Ann. 757.

This court has upheld the validity of a statute of Texas which provides that the appearance of a defendant for any purpose whatsoever dispenses with the necessity of citation.

*Kauffman v. Wootters*, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298; *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9.

Where the forfeiture of a franchise held by virtue of a valid incorporation is sought, the information must be against the corporation, and not against its officers or members.

*State ex rel. Atty. Gen. v. Taylor*, 25 Ohio St. 279. See also *People v. Bank of Hudson*, 6 Cow. 218; *People ex rel. Marshall v. Ravenswood, H. C. & W. Turnp. & Bridge Co.* 20 Barb. 521.

A decree which remands a case to the lower court for further proceedings is not final for the purpose of a writ of error.

*Union Mut. L. Ins. Co. v. Kirehoff*, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318; *Rice v. Sanger*, 144 U. S. 197, 36 L. ed. 403, 12 Sup. Ct. Rep. 664; *Lodge v. Twell*, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; *Dainese v. Kendall*, 119 U. S. 53, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; *Bostwick v.*



*Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Grant v. Phoenix Mut. L. Ins. Co.* 106 U. S. 431, 27 L. ed. 238, 1 Sup. Ct. Rep. 414; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 108 U. S. 28, 27 L. ed. 639, 2 Sup. Ct. Rep. 6; *Ex parte Norton*, 108 U. S. 242, 27 L. ed. 711, 2 Sup. Ct. Rep. 490; *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170.

Even where the statutes are silent upon this question, the courts would have the power to pass upon the legality of any business which its promoters might attempt to pursue under the color of a corporate franchise.

7 Am. & Eng. Enc. Law, p. 648; *Re Mutual Aid Asso.* 15 Phila. 626; *Re Helping-Hand Marriage Asso.* 15 Phila. 644.

The business of defendant companies is deceptive and fraudulent.

*McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908; *Re National Indemnity & E. Co.* 142 Pa. 450, 21 Atl. 879; *United States v. McDonald*, 59 Fed. 563.

[326] \*Mr. Justice Peckham, after stating the foregoing facts, delivered the opinion of the court:

This suit was brought against the defendant corporation alone, to obtain, among other things, a decree enjoining the company and its officers from acting as a corporation on the ground that its alleged charter was a nullity. It was also brought to forfeit the charter in case it should be held that it had been legally organized, and such forfeiture was prayed on the ground that the company had violated the law by not receiving cash on payment of its shares.

It is now claimed that the company defendant could not properly have been made a sole defendant in an action to declare null its charter to be a corporation, and that therefore a decree in such suit declaring the company not to be a corporation (while making no decree upon the question of a violation of the charter by not taking payment for its stock in cash) condemns the corporations and takes away their property without a hearing from them and is not due process of law, they claiming that the franchise to be a corporation was their property exclusively, and did not belong to the corporation as such.

It is also asserted that the state was not rightfully or properly a plaintiff in the suit, and that the institution of the suit in the name of the state was without authority of law and was therefore null and void, and did not constitute due process of law. What is meant by this latter claim is stated by the plaintiff in error as follows:

"We do not wish to be understood as dissenting from the doctrine of the plenary power of the state over the subject-matter of creating or authorizing such corporations, and we concede that her power to grant or withhold charters, as well as to grant or withhold authority to others, to constitute such corporations, is unlimited. What we

here insist is, that where the state has acted through her legislature and authorized the organization of the corporation, and such corporation has been constituted under her authority, that, in common with other persons, it cannot, after its creation, be denied the common right to pursue any lawful business or enterprise not inconsistent \*with[327] the objects and purposes of its creation; and that is precisely what the state is attempting by this suit to do in relation to the company, plaintiff in error, in this cause."

The first inquiry which presents itself is as to whether it was proper and legal to make the company alone a defendant, and as to the sufficiency of the means by which it was brought into court in an action where the relief sought was to declare the pretended charter of the company a nullity from the beginning, and where an injunction was sought to prevent the further action of the defendant corporation.

The company claimed as a fact to be organized under the act No. 36 of the Laws of Louisiana of 1888. The 1st and 3d sections of the act read as follows:

"Sec. 1. That it shall be lawful for any number of persons, not less than three, upon complying with the provisions of the laws of this state governing corporations in general, to form themselves into and constitute a corporation for the purpose of carrying on any lawful business or enterprise, not otherwise specially provided for, and not inconsistent with the Constitution and laws of this state, . . . provided, no such corporation shall engage in stock-jobbing business of any kind."

"Sec. 3. That no stockholder of such corporation shall ever be held liable or responsible for the contracts or defaults of such corporations in any further sum than the unpaid balance due to the company on the shares owned by him."

In the answer of the company it is alleged that it was organized by the authority of this statute and that it duly filed its articles of association, stating therein at large the character of its business. It was provided in that charter that all legal process should be served upon the president of the company. The evidence showed that the company in fact did business under its charter and amendments for several years as a corporation, and claimed to be legally organized as such. It also appeared from the evidence that its stock was subscribed for by various individuals, and was issued to such subscribers or their assigns. It also issued its debentures and did business in accordance with the charter, and, as claimed, under and by the authority of the act of the legislature above mentioned. It made contracts and \*it[328] elected officers who thereafter acted as such and assumed to represent the company as a corporation doing business under the laws of the state. It was thus a *de facto* corporation, and those who contracted with it as such could not set up as a defense, when sued by it upon those contracts, that it was not a corporation or that its organization was a nullity. None but the state could call its existence in question. *Chubb v. Upton*,



95 U. S. 665, 24 L. ed. 523; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 34 L. ed. 784, 786, 11 Sup. Ct. Rep. 185. The supreme court of Louisiana, in this case, holds that by the laws of that state the defendant as a *de facto* corporation was properly brought into court by the service of process on its acting president. The state can therefore treat this *de facto* corporation as such, for the purpose of calling it into court and asking for a decree enjoining it from acting as a corporation, on the ground of the nullity of the organization; in other words, on the ground that it has no right to be a corporation, and that it is not a corporation *de jure*. For that purpose it is not necessary that the individuals who were incorporators or officers of the company be made defendants and service of process be made upon them. The company itself may be brought into court by service upon its officer appointed pursuant to the charter under which it assumed to act, and in which it is provided that the president shall be served with process against the corporation.

Section 2593, Revised Statutes of Louisiana, provides:

"An action by petition may be brought before the proper district court or parish court by the district attorney, or district attorney *pro tempore*, and for the parish of Orleans by the attorney general, or any other person interested, in the name of the state upon his own information, or upon the information of any private party, against the party or parties offending, in the following cases:

"First, when any person shall usurp, intrude into, or unlawfully hold or exercise any public office or franchise within this state; or . . . Third, when any association or number of persons shall act within this state as a corporation without being duly incorporated.

[329] \*Sec. 2595. Service shall be made in such cases . . . the same as in other civil suits. . . .

"Sec. 2602. When defendant, whether a person or corporation against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant and such damages as are proved to have been sustained."

The state court has held that under these provisions, in such a case as this, the service of process upon the defendant company is sufficient to bring that company into court as a *de facto* corporation, even though not legally organized. If the company actually appear pursuant to such service, it surely must be enough so far as the corporation is concerned.

Pursuant to the service of process upon its president the company appeared in court, put in pleadings, set up as a defense that it was a legal and valid corporation under the act already cited, and claimed judgment in

its favor. All this gave jurisdiction to the court to proceed with the case and try the issues, whether the defendant were or were not a valid corporation. But it is said that in such suit even that question cannot be decided, and that the presence of the individual corporators is indispensable because, as is stated, the franchise, to be a corporation, belongs to them, and not to the corporation itself, and the case of *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, 619, *sub nom. Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299, is cited as authority for the purpose of showing that such franchise cannot be taken away without making the corporators parties.

In a certain sense the franchise to be a corporation does belong to the corporators in so far as that it does not pass by a mortgage by the company of its charter and franchises, and a sale under the foreclosure of the mortgage does not confer on the purchaser the right to be a corporation. This was held in above case. The right to be a corporation was conferred upon certain individuals, and the court held could not by the language used pass to purchasers on a foreclosure, the franchise not in \*fact having [330] been mortgaged, and the law not providing for such a mortgage. But a proceeding by the state against a *de facto* corporation to forbid its acting any longer as such on the ground that no legal right exists for it to be a corporation, we have no doubt is well brought against the company alone, treating it as such *de facto* corporation, and serving process upon its officers in accordance with the charter or law under which it assumes to be acting as such corporation. And as we remark, in another connection below, the shareholders or corporators by their action in making themselves parties to the suit, appealing from the decree and arguing their objections before the supreme court, have cured any possible defect which might otherwise have existed, founded upon an alleged defect of parties.

The injunction which was issued as part of the judgment was simply a means of carrying out what the court decreed, and whether an injunction prior thereto and preliminary in its nature had been granted *ex parte* or not was immaterial. The final injunction was part of the relief sought by the action, and when the court decided such action in favor of the plaintiff the injunction was to follow as matter of course. We are of opinion that for the purpose of obtaining a decree declaring the charter void and restraining the officers from acting as a corporation, the state through its attorney general was a proper party to bring the action, and for the reasons stated it was well brought against the corporation alone and the final injunction was properly issued.

Nor do the facts in this case furnish any foundation for the claim on the part of the plaintiffs in error that the state after having granted the right to be a corporation could not, after the corporation was created, deny to it the common right to pursue any lawful business or enterprise not inconsistent



[331] ent with the object and purposes of its creation. The claim rests upon the proposition that the state cannot deny to the company the common right to pursue any lawful business or enterprise. If the business or enterprise be not lawful, the whole argument fails. If not created for a lawful purpose the company was not created at all. It is not a question of the right to do certain business after it was authorized by the state to organize as such \*corporation. Its legal creation depended upon the lawful character of the work it was organized to do. Whether the business be lawful is, in a case like this, a question of local law, and a decision by the state court upon that question is not reviewable here. The right to be a corporation was given by the state upon the terms that the business transacted should be lawful, and it certainly must rest with the state to determine whether the business thus transacted by a corporation is or is not lawful. Whether such business could be done by individuals without the intervention of a corporation is not to the point. The state having the right to say upon what terms and upon what conditions it will grant the right of incorporation, it must have the right to determine through its courts whether those conditions have been complied with. It granted the right by the act of 1888 to transact any lawful business, as a corporation, upon filing articles, etc. It rests with its own courts to say whether the business transacted by such assumed corporation, by virtue of that act, is or is not lawful. Having decided that it was unlawful, the court had the right, under the state law, to declare the charter null.

Then as to the rights of the individual corporators. Has their property been in any way taken without due process of law by this decree? Clearly it has not. Nor have they been denied the equal protection of the laws. As already stated, the decree adjudges the charter, under color of which the defendant company claimed corporate existence, to be null and void, and it enjoins the officers and stockholders from acting as a corporation, in the terms already set forth. This simply holds the property until it can be properly disposed of according to law.

[332] The original decree was entered after a trial upon the merits, and the record shows that the officers and many of the stockholders were present at the trial, and were witnesses and examined by the counsel for the company, and that in truth they made the whole defense. There was no dispute in regard to the facts, and the whole question was resolved into one of law, whether the business which was confessedly conducted by the corporation was or was not a lawful one under the laws of \*Louisiana. The court refused to hear evidence that the defendant's officers acted in good faith, believing they were acting lawfully. That also was a question of local law, whether such facts constituted any defense, and the decision of the court on that subject is not reviewable here. As a result of all the evidence, the trial court held the business transacted by the

company was unlawful for a corporation under the laws of Louisiana, and decreed accordingly. The shareholders then, pursuant to the law of Louisiana, petitioned the court to permit them to intervene in the case and to appeal from the decree because they were interested therein; and leave being given, they appealed to and were heard in the supreme court, and that court, while affirming the final decree, at the same time reversed the order appointing a liquidator, and left the whole question open in regard to such appointment. The corporators have not in any manner been impeded or embarrassed in the presentation of their defense by not being formal parties to the record at the trial in the court of first instance. Many were present, as a matter of fact, and the defense which they interpose is one of law upon undisputed facts. There has been no taking of any property belonging to shareholders, and whatever may be done hereafter, whether by liquidator or receiver, can only be done upon notice to them, as parties to the action and after full hearing of their claims.

It is certain, therefore, that their rights have not been improperly interfered with or their property taken under or pursuant to the decree of the trial court. We are of opinion that *the judgment of the Supreme Court of Louisiana must be affirmed.*

\*BOSWELL M. BLYTHE, *Plff. in Err.*, [333]

v.

FLORENCE HINCKLEY.

(See S. C. Reporter's ed. 333-342.)

*Courts—jurisdiction to decide Federal question—state law giving alien right to hold property.*

1. A writ of error to a state court from the Supreme Court of the United States will not be dismissed for want of jurisdiction, where a Federal question is clearly raised, merely because the claim by which it is presented is not well founded.
2. A motion to affirm a judgment on writ of error to a state court should be granted by the Supreme Court of the United States, where the assignments of error are frivolous and the court is convinced that the writ was taken only for delay.
3. State courts have concurrent jurisdiction with Federal courts to determine the constitutionality of a state statute which is attacked as in violation of the Federal Constitution.
4. The right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders, as is declared by Cal. Civ.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the concurrent jurisdiction of Federal and state courts—see *Copp v. Louisville & N. R. Co.* (La.) 12 L. R. A. 725, and note.

Code, § 671, is not precluded by U. S. Const. art. 1, § 10, declaring that "no state shall enter into any treaty, alliance, or confederation."

[No. 347.]

*Submitted January 14, 1901. Decided February 25, 1901.*

**I**N ERROR to the Supreme Court of the State of California to review a decision affirming a judgment sustaining a state statute giving aliens the right to hold property. *Affirmed.*

See same case below, 127 Cal. 431, 59 Pac. 787.

Statement by Mr. Justice **Peckham**:

This case comes here on writ of error to the supreme court of California to review the judgment of that court affirming a judgment of the superior court of California for the county of San Francisco sustaining a demurrer to the complaint. The case involves a large amount of real property belonging in his lifetime to one Thomas H. Blythe, who was a naturalized citizen of the United States, and died intestate on the 4th of April, 1883, a resident of the city and county of San Francisco. Questions relating to the title to this property have been in litigation for over fifteen years, and various suits have been instituted in the state and Federal courts in California during that time, all of which have resulted favorably to the interests of the defendant in error herein, who claims to be the owner of the property. Three suits have been before this court upon a writ of error or by appeals brought by some of the parties interested, and have been dismissed for want of jurisdiction. *Blythe v. Hinckley*, 167 U. S. 746, 42 L. ed. 1210, 17 Sup. Ct. Rep. 991; *Blythe Co. v. Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

[334] The sole question which plaintiff in error herein seeks to have decided is whether the defendant in error was capable of taking the property of the intestate under the laws of California, the plaintiff in error claiming as one of the next of kin and heirs at law of the intestate, and objecting that the defendant in error could not take the property because she was an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland at the time of the death of the intestate, "and that in the absence of a treaty between the United States and Great Britain, permitting and providing for such taking on the part of an alien, there was no power in the state of California to legislate upon the subject, and the statute of that state assuming to permit such alien to take was a violation of that part of § 10 of article 1 of the Constitution of the United States, which provides that "no state shall enter into any treaty, alliance, or confederation; . . ." and the attempt of the state of California to legislate upon this subject was therefore an invasion of and an encroachment upon, the treaty-making power of the United States.

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The facts upon which the question arises are set forth in the complaint, which stated in substance that the defendant in error was an alien and illegitimate daughter of an unmarried woman, and that prior to the death of the intestate neither the defendant nor her mother had ever been outside of Great Britain, and that she was incapable by the common law of England and of California and by the Constitution of the United States, § 10, article 1, and by § 1978 of the Revised Statutes, of inheriting the real property described in the complaint; that there was at the time of the death of the intestate no treaty between the United States and Great Britain which provided for the inheritance of aliens in the United States. After the death of the intestate the defendant in error came to the United States and claimed (falsely as alleged) that she had been adopted by the intestate as his daughter in his lifetime under the provisions of § 230, Civil Code of California; also that he had adopted her as his heir under the provisions of § 1387 of that Code. Some time in 1885 she therefore instituted by her guardian, under § 1664 of the same Code, a proceeding for the purpose of establishing her claim as such adopted daughter or as such heir to succeed to the estate left by the intestate. Upon the trial it was made to appear that the defendant in error was an illegitimate child and an alien, and the complaint herein then alleges that it was the duty of the court before which the trial was going on to dismiss the proceeding for want of jurisdiction to decree that defendant in error was an heir to the real estate or capable of \*taking[335] by descent. The court, however, as the complaint alleged, decided otherwise, and upon the evidence determined and adjudged that the defendant was the natural heir of the intestate and that in his lifetime he had adopted her as his daughter under § 230 of the California Civil Code, or had instituted her as his heir under § 1387 of that Code.

It was further alleged that the 17th section of article 1 of the new Constitution of California, permitting aliens to acquire, possess, enjoy, transmit, and inherit property the same as native-born citizens, was void as an attempt by the people of the state of California to encroach upon the treaty-making power of the United States, and was in violation of § 10 of article 1 of the Federal Constitution. It was then alleged that the court in the proceeding mentioned did not in legal effect determine the question of heirship, title, or interest in the real estate for want of jurisdiction, and that the legislature of the state had no power or authority to enact any law which gave to the defendant in error the right to inherit the real estate of the intestate.

The complaint further stated that an appeal was taken to the supreme court of the state, and that all of the above matters were made to appear to that court, which nevertheless affirmed the judgment. The same averments of the lack of jurisdiction to make such decree were made with regard to the supreme court as were set forth regard-

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ing the lower court, and the plaintiff in error alleged that the judgment of the supreme court was void for lack of jurisdiction. It was also alleged that after this affirmation of the decree of the lower court, by which the rights of the defendant in error to take the property were formally determined, she instituted a proceeding pursuant to the provisions of the California Code, in the superior court in San Francisco, where the administration of the estate of the intestate was pending, to have distributed the estate of the intestate in accordance with the judgments of the superior and the supreme courts in the proceeding already mentioned. This was opposed by the parties interested adversely to the defendant in error upon the same grounds which had been set up as a defense in the former suit. Upon the trial of [336] the latter proceeding the \*record in the former suit was offered in evidence and objected to as void for want of jurisdiction, but it was received by the court and held by it to be conclusive evidence of the rights of the parties, and the court then made a decree of distribution in favor of the defendant in error. An appeal was taken to the supreme court where the judgment was affirmed, although, as alleged, the court was without jurisdiction. Pursuant to that decree the defendant in error obtained possession of the real property in December, 1895.

It was further alleged that all the claims of the defendant in error to inherit or to hold the real property were groundless and unfounded in fact or in law, and judgment was asked declaring the claims of the defendant to any of the property to be illegal and unfounded, and that plaintiff, as against her, was the lawful owner in fee of the real property mentioned, and was entitled to the income and profits thereof, and decreeing that his title thereto and estate therein should be quieted and the defendant perpetually enjoined from setting up any claim whatever to the property, and that the possession and accumulated rents of the property in the hands of the receiver be delivered to the plaintiff.

The portions of the Federal and state Constitutions and the various statutes referred to in the complaint are set forth in the margin.†

[337] \*The defendant demurred to this complaint on the grounds, among others (1) that the complaint stated no cause of action; (2) that the judgment of distribution set forth in the complaint was a conclusive bar and estoppel against the plaintiff and prevented him from maintaining the action. The demurrer was sustained and judgment entered

in favor of the defendant on the merits, and upon appeal it was affirmed by the supreme court of California. A writ of error has been allowed by the Chief Justice of the supreme court of that state. A motion is now made to dismiss the writ of error for lack of jurisdiction or to affirm the judgment.

**Messrs. S. W. Holladay, E. Burke Holladay, Jefferson Chandler, and L. D. McKisick** submitted the cause for plaintiff in error:

The question of the right of aliens to inherit land is a fit subject for treaty regulation.

*Geofroy v. Riggs*, 133 U. S. 266, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Head Money Cases*, 112 U. S. 598, *sub nom. Edye v. Robertson*, 28 L. ed. 803, 5 Sup. Ct. Rep. 247; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; *People ex rel. Atty. Gen. v. Gerke*, 5 Cal. 382.

Even an act of Congress could not extend rights of inheritance to nonresident aliens, as such act, to be valid, would need to have an extra-territorial effect, and reach into the heart of a foreign country, and there give heritable blood to the alien.

*Re Ross*, 140 U. S. 453, *sub nom. Ross v. McIntyre*, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

Any subject which pertains to the foreign relations branch of our government is by that clause of the Constitution excluded from the action of the states.

*Holmes v. Jennison*, 14 Pet. 569, 10 L. ed. 593; *People ex rel. Barlow v. Curtis*, 50 N. Y. 326, 10 Am. Rep. 483.

A decree of a state court on or in execution of a statute that is void is itself void.

*Ex parte Siebold*, 100 U. S. 376, 25 L. ed. 719; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Reddy v. Tinkum*, 60 Cal. 459.

**Messrs. William H. H. Hart, Robert Y. Hayne, and Frederic D. McKenney** submitted the cause for defendant in error:

The sections of the California Code permitting aliens to inherit, and providing for the institution of heirship, do not constitute a treaty, and are not, in any view, an invasion of the treaty-making power. If this be so, the claim that the constitutional provision referred to is involved is merely frivolous and fictitious.

*Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; *New Orleans v. New Orleans Waterworks*, 142 U. S. 87, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; *Hamblin v. Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353.

†Section 10, article 1, of the Federal Constitution:

"No state shall enter into any treaty, alliance, or confederation; . . . ."

Section 10, article 2:

"No state shall, without the consent of the Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

Section 17 of article 1 of the Constitution of California:

"Foreigners of the white race or of African 180 U. S.

descent eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens."

Civil Code of California:

"Sec. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and

It is well settled that a constitutional question must be a real and substantial one.

*New Orleans v. Benjamin*, 153 U. S. 424, 38 L. ed. 769, 14 Sup. Ct. Rep. 905.

Even if the Code provisions referred to were in violation of a treaty, that would not involve a constitutional question, for, as already shown, a treaty stands on the same footing as an act of Congress.

*Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Chinese Exclusion Case*, 130 U. S. 600, 32 L. ed. 1073, 9 Sup. Ct. Rep. 623.

The constitutional question must not be remotely or collaterally involved. It must be controlling.

*Carey v. Houston & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63.

The ruling of a state court that a state law does not violate the state Constitution is conclusive upon the Supreme Court of the United States.

*Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *McCutchen v. Marshall*, 8 Pet. 240, 8 L. ed. 931; *Bank of Hamilton v. Dudley*, 2 Pet. 499, 7 L. ed. 498; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Elmwood Twp. v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Chambers County v. Clews*, 21 Wall. 317, 22 L. ed. 517; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Medberry v. Ohio*, 24 How. 413, 16 L. ed. 739; *Salomons v. Graham*, 15 Wall. 208, 21 L. ed. 37.

Alleged errors of the state courts, which involve questions either of act or of state, and not Federal law, are not reviewable in the United States Supreme Court on writ of error.

*Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

A question of state law alone does not present a Federal question, so as to give the Supreme Court of the United States jurisdiction over a state judgment. The judgment of the state court is final.

*Nouconnah Turnpk. Co. v. Tennessee ex rel. Talley*, 24 L. ed. 368; *Palmer v. Marston*, 14 Wall. 10, *sub nom.* *Worthy v. Marston*, 20 L. ed. 826; *Sevier v. Haskell*, 14 Wall. 12, 20 L. ed. 827.

A controversy where no right is claimed under the Constitution or laws of the United States, but which depends on state laws and proceedings, is exclusively within the jurisdiction of the state court.

*Congdon & T. Min. Co. v. Goodman*, 2 Black, 574, 17 L. ed. 257.

The position that the provisions permit-

ting aliens to inherit were beyond the power of the state to enact is destitute of every semblance of merit.

*Chirac v. Chirac*, 2 Wheat. 259, 4 L. ed. 234; *Spratt v. Spratt*, 1 Pet. 343, 7 L. ed. 171, 4 Pet. 393, 7 L. ed. 897; *Levy v. M'Cartee*, 6 Pet. 102, 8 L. ed. 334; *Beard v. Roan*, 9 Pet. 317, 9 L. ed. 141; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *Prevost v. Grenaux*, 19 How. 7, 15 L. ed. 574; *Frederickson v. Louisiana*, 23 How. 447, 16 L. ed. 578; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Griffith v. Godey*, 113 U. S. 96, 23 L. ed. 937, 5 Sup. Ct. Rep. 383; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213.

To the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances.

*De Vaughn v. Hutchinson*, 165 U. S. 570, 41 L. ed. 829, 17 Sup. Ct. Rep. 461; *United States v. Crosby*, 7 Cranch, 115, 3 L. ed. 287; *Clark v. Graham*, 6 Wheat. 577, 5 L. ed. 334; *Kerr v. Moon*, 9 Wheat. 570, 6 L. ed. 163; *M'Cormick v. Sullivant*, 10 Wheat. 202, 6 L. ed. 303; *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *United States v. Fox*, 94 U. S. 320, 24 L. ed. 192; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Robertson v. Pickrell*, 109 U. S. 610, 27 L. ed. 1050, 3 Sup. Ct. Rep. 407; *Ridings v. Johnson*, 128 U. S. 224, 32 L. ed. 405, 9 Sup. Ct. Rep. 72; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; *Budzisz v. Illinois Steel Co.* 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 289, 42 L. ed. 1041, 18 Sup. Ct. Rep. 594.

In a subsequent suit in a state court to quiet title to the property, the probate decrees were conclusive of everything which might have been litigated.

*Cromwell v. Sac County*, 94 U. S. 352, 24 L. ed. 197; *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *New York L. Ins. Co. v. Bangs*, 103 U. S. 782, 26 L. ed. 609; *Dimock v. Revere Copper Co.* 117 U. S. 565, 29 L. ed. 996, 6 Sup. Ct. Rep. 855; *Wilson v. Deen*, 121 U. S. 532, *sub nom.* *Milne v. Deen*, 30 L. ed. 981, 7 Sup. Ct. Rep. 1004; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 464, 14 Sup. Ct. Rep. 611; *Morenhout v. Higuera*, 32 Cal. 296; *Sul-*

otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

"Sec. 671. Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.

"Sec. 672. If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case

is disposed of as provided in Title VIII., Part III., Code of Civil Procedure."

"Sec. 1387. Every illegitimate child is an heir of any person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child."

Revised Statutes of the United States:

"Sec. 1978. All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."



*Ivan v. Triunfo Gold & S. Min. Co.* 39 Cal. 459; *Byers v. Neal*, 43 Cal. 216; *Brummagim v. Ambrose*, 48 Cal. 368; *Parnell v. Hahn*, 61 Cal. 131.

[337] \*Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The motion to dismiss the writ of error in this case, for lack of jurisdiction, must be denied.

The objections raised by the complaint to the validity of the judgments mentioned therein were that they were void for want of jurisdiction in the courts which rendered them over the questions decided, because of the provisions of the Federal Constitution above recited. Although the claim may not be well founded, the question, nevertheless, was duly raised, and its Federal character cannot be disputed. This necessitates the denial of the motion to dismiss.

[338] But the motion to affirm should be granted because the assignments of error are frivolous and we are convinced the writ was taken only for delay. This is the ground for the decisions in *Chanute v. Trader*, 132 U. S. 210, 214, 33 L. ed. 345; 346, 10 Sup. Ct. Rep. 67, and *Richardson v. Louisville & N. R. Co.* 169 U. S. 128, 132, 42 L. ed. 687, 688, 18 Sup. Ct. Rep. 268.

The original judgment in the superior court of California, which was affirmed by the supreme court of that state, determined the rights of the defendant in error, and conclusively adjudged her to be the owner of the property in question, unless the judgment were reversed upon appeal. The state courts had jurisdiction over the whole question, including the defense founded upon the Federal Constitution, and if that objection had been properly raised and appeared in the record, an appeal to this court from the supreme court of California could have been taken, if the defense had been overruled. The allegation of the plaintiff in error that the state courts had no jurisdiction to determine the question because of the facts set forth by him in the complaint herein is therefore not well founded, and being a mere conclusion of law is not admitted by the demurrer.

This court has already decided the question of jurisdiction of the state courts in *Blythe v. Hinckley*, 173 U. S. 501, 508, 43 L. ed. 783, 786, 19 Sup. Ct. Rep. 497, 499, where it was said by Chief Justice Fuller, speaking for the court, that—

“The state courts had concurrent jurisdiction with the circuit courts of the United States to pass on the Federal questions thus intimated, for the Constitution, laws, and treaties of the United States are as much a part of the laws of every state as its own local laws and Constitution, and if the state courts erred in judgment it was mere error, and not to be corrected through the medium of bills such as those under consideration.”

If the Federal question which plaintiff in error claimed existed in the suits in the state court were not plainly enough present—

ed \*by him to those tribunals so as to permit [339] of their review by this court, that is no answer to the proposition that those judgments are conclusive of the matters therein decided, unless reviewed by this court and reversed in a proper proceeding in error to the state court.

Litigation in regard to the merits of the claim of the defendant in error to this property has been continued by her opponents since the judgments of the state courts, just as if the whole merits of the case had not been decided by the state courts in her favor several times. This court has been asked to review a judgment dismissing the complaint filed in a separate action, brought in the Federal circuit court to set aside the state judgments, and this we refused to do on the grounds stated in the report. *Blythe v. Hinckley*, 173 U. S. 507, 43 L. ed. 786, 19 Sup. Ct. Rep. 499. It was said in that case:

“The superior court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction ‘of all matters of probate,’ and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco, and left an estate therein; and that court repeatedly decreed that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the supreme court of the state. So far as the construction of the state statutes and state Constitution in this behalf by the state courts was concerned, it was not the province of the circuit court to re-examine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees, that Florence did inherit, and that judgment covered the various objections in respect of § 1978 of the Revised Statutes, and the 10th section of article 1 of the Constitution of the United States, and any treaty relating to the subject.

In the same case it was said: “We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power or were in conflict with the Constitution or laws of the United States, or any treaty with the United States.” This decision conclusively determined that the superior court of California and the supreme court of that state, upon appeal therefrom, \*had full jurisdiction to [340] determine the whole case and give the judgments that they have given. Notwithstanding which it is now again argued that those judgments were void for want of jurisdiction.

There must be an end to these claims at some time, and we think that this is a proper occasion to terminate them.

The sole question now remaining before us arises as to the claim made by plaintiff in error under the Constitution of the United States, already referred to, and although it was not in terms decided in the above case, we now say that the provision of the Federal Constitution had no bearing in this case, and that the question is, in our opinion, entirely free from doubt.

Plaintiff urges that never before has the question been directly passed upon by this court. If he means that it has never heretofore been asserted that, in the absence of any treaty whatever upon the subject, the state had no right to pass a law in regard to the inheritance of property within its borders by an alien, counsel may be correct. The absence of such a claim is not so extraordinary as is the claim itself.

Questions have arisen as to the rights of aliens to hold property in a state under treaties between this government and foreign nations which distinctly provide for that right, and it has been said that in such case the right of aliens was governed by the treaty, and if that were in opposition to the law of the particular state where the property was situated, in such case the state law was suspended during the treaty or the term provided for therein. Counsel cite *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295, a case arising, and affecting lands, in the District of Columbia, in regard to which Congress has exclusive jurisdiction, and in that case Mr. Justice Field, in delivering the opinion of the court, said at page 266, L. ed. p. 644, Sup. Ct. Rep. p. 296:

"This article, by its terms, suspended, during the existence of the treaty, the provisions of the common law of Maryland and of the statutes of that state of 1780 and 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein."

But there is no hint in that case that in [341] the absence of any \*treaty the state itself could not legislate upon the subject and permit aliens to hold property, real and personal, within its borders, according to its own laws. This court has held from the earliest times, in cases where there was no treaty, that the laws of the state where the real property was situated governed the title and were conclusive in regard thereto.

The latest exposition of the rule is found in the case of *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873. *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461, is another illustration of the same rule. The right of the state to make this determination by her own laws, in the absence of a treaty to the contrary, is distinctly recognized in *Chirac v. Chirac*, 2 Wheat. 259, 272, 4 L. ed. 234, 237, where the court said:

"John Baptiste Chirac having died seised in fee of the land in controversy; his heirs at law being subjects of France; and there being, at that time, no treaty in existence between the two nations; did this land pass to these heirs, or did it become escheatable? This question depends upon the law of Maryland."

In *Levy v. M'Cartee*, 6 Pet. 102, 8 L. ed. 334, the question was in regard to the law of New York, and the right of an individual to inherit through an alien title to real es-

tate in that state. Mr. Justice Story delivered the opinion of the court, in which he stated that the question resolved itself into "whether one citizen can inherit in the collateral line to another, when he must make his pedigree or title through a deceased alien ancestor. The question is one of purely local law, and, as such, must be decided by this court."

It was not claimed that the state of New York had no power to permit an inheritance through an alien or an inheritance by an alien himself of land situated in that state in the absence of a treaty upon the subject.

There has not been cited a single case where any doubt has been thrown upon the right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders. The treaties have always been for the purpose of enabling an alien to take even though the particular state may not have expressly permitted it. But no case has arisen where it was asserted or \*claimed that a state in the absence of a [342] treaty might not itself permit an alien to take property within its limits.

Again, in *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628, where the question depended upon a consideration of the treaty between the United States and the Swiss Confederation of November 25, 1850, it was said by Mr. Justice Swayne, in delivering the opinion of the court, that "the law of nations recognizes the liberty of every government to give to foreigners only such rights touching immovable property within its territory as it may see fit to concede. Vattel, book 2, chap. 8, § 114. In our country, this authority is primarily in the states where the property is situated." And it is also said in that case, if a law of a state is contrary to a treaty, the treaty is superior under the Federal Constitution, but there is no intimation that when there is no treaty the right of the state does not exist in full force. The treaty, it will be observed, in cases where by the laws of the state the alien could not hold real property, permitted him to sell it and export the proceeds without difficulty, while by the state statute he was permitted to take and hold by being in the state, and making under oath and having recorded within five years a declaration that he intended to reside in the state. See also *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147. The question of the extent of the power of the United States to provide by treaty for the inheriting, by aliens, of real estate, in spite of the statutes of the state in which the land may be, does not arise in this case, and we express no opinion thereon.

The claim which the plaintiff in error founds upon the section of the Federal Constitution is too plainly without foundation to require further argument. The right of the defendant in error to this property has been in litigation for more than fifteen years, and many years after courts of competent



jurisdiction have decided all the questions in her favor, and we think this writ of error, judging by the character of the question sought to be raised under it, has been taken for delay only. *The judgment must be affirmed.*

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\*UNITED STATES, *Appt.*,

v.

EUGENE BEEBE, William A. Henshaw, et al.

(See S. C. Reporter's ed. 343-355.)

*Judgments—bill to set aside—fraud in obtaining—power of district attorney to accept compromise—multifariousness in bill.*

1. A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property and that nothing could be realized by execution against them, when no representations are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency.
2. A district attorney has no authority to accept a compromise judgment in favor of the United States merely because of representations by the defendants that they have no property and that an execution against them would avail nothing, while they agree that, if the compromise judgment shall be entered, it shall be paid.
3. There was no ratification of an unauthorized judgment of compromise entered in favor of the United States, nor any laches in attacking it, where there was a delay of a little more than five years after the judgment was entered before steps were taken to set it aside, but this was due to the fact that no one having authority to act had any knowledge of the facts until that time.
4. An offer to repay the money received in payment of a compromise judgment in favor of the United States is not necessary in a bill by the United States to set aside the judgment on the ground that a larger sum was due, since, if that is found to be the case, a credit of the payment can be made, and, if nothing is found due, judgment can be entered against the United States for the amount of such payment.
5. An amendment to a bill by the United States against a surety on an official bond, setting up an additional claim against him on another bond, does not make the bill multifarious.

[No. 71.]

*Argued November 6, 7, 1900. Decided February 25, 1901.*

**A** PPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment dismissing a bill by the United States against sureties on a bond. *Reversed.*

See same case below, 34 C. C. A. 321, 92 Fed. Rep. 244.

**NOTE.**—On the conclusiveness of a compromise judgment—see note to *Morrill v. Morrill* (Or.) 11 L. R. A. 155.  
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Statement by Mr. Justice Peckham:

On the 10th day of March, 1890, the United States brought suit in the circuit court of the United States for the middle district of Alabama, against Eugene Beebe and the heirs at law of one Ferris Henshaw, deceased, praying that two separate judgments in favor of the United States (one against Beebe and the other against the administrator of Henshaw) should be set aside and vacated; for the removal of the administration of the estate of Henshaw into that court; for an accounting by Beebe and the other defendants by reason of the liability of Beebe and Henshaw on the bond of Francis Widmer, late collector of internal revenue in the second district of Alabama, and that the amount found due on the accounting should be made a prior lien on the land described in the bill, and for other relief.

The defendants demurred to the bill and the court sustained the same, after which the bill was amended and again demurred to. \*The defendant Beebe died August 24, 1894, and the complainant revived the suit against his heirs at law, and subsequently the court sustained the demurrers to the amended bill, and the judgment dismissing the bill was upon appeal affirmed by the circuit court of appeals for the fifth circuit, and from that judgment of affirmance the United States has appealed to this court.

The following facts were set forth in the bill: Some time in 1873 one Francis Widmer was appointed collector of internal revenue for the second district of Alabama, and Eugene Beebe and Ferris Henshaw became sureties on his bond in the sum of \$50,000. Widmer defaulted and failed to account for and pay over to the government the sum of \$28,158.56 public moneys that had come into his hands as collector, which sum was due the United States, with interest thereon from January 1, 1874. Beebe and Henshaw had for many years been partners in business, and were joint owners in fee of certain real estate described in the bill and situated in the county of Montgomery and state of Alabama. Henshaw died there, intestate, April 19, 1879, leaving certain of the defendants named in the suit as his heirs at law. The administrator of the estate of Henshaw reported to the court that his estate was insolvent, and in accordance with that report the estate was on July 2, 1880, declared to be insolvent, and no settlement of the estate has since been had. Beebe before and since July 2, 1880, was and has been insolvent, without sufficient property to pay his debts. Ferris Henshaw was also insolvent at the time of his death. By reason of the insolvency of Eugene Beebe and Ferris Henshaw and the insolvency of the latter's estate the United States became and was entitled to priority of payment over any and all other creditors of Beebe and Henshaw out of their property and estate, of the full amount collected, withheld, and appropriated by Widmer, the collector, and due to the United States. It is averred that the land above described is liable for such debt, and also

that the complainant has a prior lien upon it therefor.

[345] On June 3, 1880, separate actions in the circuit court of the United States for the middle district of Alabama were commenced, one against Beebe and the other against the administrator \*of the estate of Henshaw, for the recovery of the sums for which Widmer, collector, was in default, and amounting, as stated, to over \$28,000, with interest, and those suits were continued from time to time, at the request of the defendants, until February 6, 1885, when judgments were severally entered in that court against Beebe, and also against Hatchett, as administrator of Henshaw, for \$100 and costs, and Beebe on July 1, 1886, paid into the Treasury of the United States the sum of \$109.85 as the amount of the judgment and costs rendered against him, but the judgment against Hatchett, as administrator, remained unsatisfied to the date of the filing of the bill in this suit.

The bill then proceeds as follows:

"That said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferris Henshaw were poor men, and that said Beebe and the estate of said Ferris Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates, by execution, but that if the court would allow a jury and verdict to be entered against them for \$100 they, and each of them, would pay said judgments and costs; that no evidence or proof was or had been introduced in said causes, or either of them; the indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents (\$28,158.56), and interest, or other large sum; and the statements and representations aforesaid only were before the said circuit court at the time of the entry of said judgments; and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid. Said district attorney did not object, and said judgments for \$100 and costs were entered in each of said

[346] causes. . . . [And orator \*avers and charges] that said statements and representations made as aforesaid by and on behalf of, and for, said Beebe and said Ferris Henshaw, and the estate of said Ferris Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States. [Orator further avers and charges] that said court and United States attorney had no authority in law to accept said statements and represen-

tations, which were not made under oath nor in the course of any judicial proceeding, and were not supported nor verified by evidence or proofs; and that said acts of said court and United States attorney amounted in law and in fact to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferris Henshaw, and the estate of said Ferris Henshaw, which said court and the United States attorney had no authority, but were inhibited by law, to make, entertain, and consummate. That said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for \$100 and costs are null and void *ab initio*, and of no effect, and should be vacated and held for naught in this court of equity."

The bill then asks for the appointment of an administrator *ad litem* of the Henshaw estate to represent it in the proceeding. It alleges that several of the defendants, naming them, assert some claim against the property described in the bill, which claims are alleged to be subordinate to the rights of the United States to condemn and subject the land already mentioned to the satisfaction of the indebtedness of Beebe and Henshaw as sureties on the bond of Widmer, as collector, by reason of the default of the latter; and it is alleged that if any conveyance of the land has been made by Beebe or Henshaw, or the heirs of the latter, that such conveyances were void and ought to be vacated and set aside. It is further stated that the facts and circumstances set out in the bill as the basis of the relief asked for only recently came to the knowledge of the complainant, to wit, on or about March 5, 1890. The bill also set forth that on March 22, 1877, Beebe conveyed by deed to Ferris \*Hen-[347] shaw, then his partner in business, all his interest and estate in the property described in the bill for certain purposes therein set forth, and this deed complainant alleges was without consideration and fraudulently made to hinder, delay, and defraud the existing creditors of Beebe, and was void, and all the property described in the bill was bound even in the hands of the heirs at law of Henshaw for the payment of the debts due the United States from Beebe. The complainant prayed that the judgments might be set aside and vacated, and the property sold and the proceeds thereof applied to the payment of the debts above mentioned.

The defendants severally demurred to the bill on various grounds, (1) for want of equity; (2) that the bill showed that the matters complained of against Beebe and Henshaw, by reason of their being sureties for Widmer, the collector, had been adjudicated in the circuit court of the United States for the middle district of Alabama, in a suit commenced by the complainant against them, and that no sufficient ground was shown for vacating and setting aside the judgments therein rendered; (3) that it appeared from the allegations in the bill



that the judgment against Beebe had been paid by him, and had been received and accepted by the complainant, the United States, and the bill contained no offer to refund the money, and it does not show that the same had ever been tendered to Beebe. Other grounds were stated in the demurrers.

Upon the hearing the court sustained the demurrers and granted leave to amend the bill. On January 5, 1891, the complainant amended its bill, the amendment alleging that Beebe had executed another official bond as surety for one Dustan, deputy postmaster at Demopolis, Alabama; that a default had occurred and judgment been recovered against Beebe for \$579.45 in 1878, and the judgment was still due and unpaid, and execution thereon having been issued was duly returned "no property."

The amended bill also contains an averment that there was in fact no jury drawn in the cases in which the two judgments were obtained and no verdicts rendered therein, although the records of these judgments show a jury trial and a verdict in each case.

[348] \*To this bill as amended the defendants demurred, setting up the same grounds of demurrer as to the original bill, and also the additional grounds, (1) that the bill made a new case; (2) that the matters stated in the amendment were not germane to the purposes and object of the original bill, and stated new matter; (3) that the bill as amended was multifarious.

The demurrers to the amended bill were sustained, and the bill was finally dismissed.

Mr. Robert A. Howard argued the cause, and, with Mr. W. S. Reese, Jr., and Solicitor General Richards, filed a brief for appellant:

A judgment or decree obtained otherwise than through the legal modes of procedure is void, even though it be one which the court could make. If these rules are violated in arriving at the determination, it can be collaterally assailed. It is a mere arbitrary edict.

*Munday v. Vail*, 34 N. J. L. 418; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

The district attorney exceeded his authority in consenting to a compromise of the suit.

*Swinfen v. Chelmsford*, 2 L. T. N. S. 406; *Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396.

The want of authority of an attorney to consent to a compromise judgment can be shown in a collateral attack, and the judgment thus obtained set aside.

*Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Robinson v. Murphy*, 69 Ala. 543; *Derwort v. Loomer*, 21 Conn. 245; *Davidson v. Rozier*, 23 Mo. 387; *Marbourg v. Smith*, 11 Kan. 562; *Swinfen v. Swinfen*, 24 Beav. 549.

The government is not bound by the unauthorized acts of its agents.

*Hunter v. United States*, 5 Pet. 173, 8 L. ed. 86; *Gibbons v. United States*, 8 Wall. 180 U. S. U. S., Book 45.

269, 19 L. ed. 453; *Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 882; *Hart v. United States*, 95 U. S. 316, 24 L. ed. 479; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

No careless or intentional wrongful act of one of the government's agents could affect its rights.

*Ryan v. United States*, 19 Wall. 514, 22 L. ed. 172; *Osborne v. United States*, 19 Wall. 577, 22 L. ed. 208; *Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 882.

The judgments sought to be set aside were obtained by fraud and inposition upon the court and district attorney.

*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

The bill as amended is not multifarious in that it makes a new case.

*Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858; *Hunter v. United States*, 5 Pet. 173, 8 L. ed. 86; *Walden v. Bodley*, 14 Pet. 156, 10 L. ed. 398.

Mr. W. S. Reese also argued the cause, and, with Mr. Warren S. Reese, Jr., filed a brief, for appellant:

An attorney may enter into no bargains or contracts in reference to his client's rights, as contradistinguished from mere agreements as to the conduct of the suit, which will bind the client, unless he has been specially authorized or his acts have been ratified by his employer.

*Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396; *Robinson v. Murphy*, 69 Ala. 543; *Hall Safe & Lock Co. v. Harwell*, 88 Ala. 441, 6 So. 750; *Derwort v. Loomer*, 21 Conn. 245; *Vail v. Conant*, 15 Vt. 314; *Doub v. Barnes*, 1 Md. Ch. 127; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Marbourg v. Smith*, 11 Kan. 562.

Laches are not imputable to the government.

*United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Dox v. Postmaster General*, 1 Pet. 318, 7 L. ed. 160; *Gausson v. United States*, 97 U. S. 584, 24 L. ed. 1009.

Even where the creditor gives a receipt in full upon payment of a portion of an undisputed account, he is not concluded thereby from recovering the balance, although the receipt is given with knowledge and there is no error or fraud.

*Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Harrinan v. Harriman*, 12 Gray, 341; *Miller v. Coates*, 66 N. Y. 609; *Evans v. Powis*, 1 Exch. 601; *Cooper v. Parker*, 14 C. B. 118; *Warren v. Skinner*, 20 Conn. 559.

It was not necessary to offer to credit the money collected under the Beebe judgment on the original debt. This was done by operation of law, and the government has a right to receive a partial payment on the debt of a defaulting officer, and not be thereby estopped from proceeding, in a proper manner, to collect the balance of the debt.

*Fire Ins. Asso. v. Wickham*, 141 U. S. 504, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

This bill is not subject to the objection of misjoinder. Henshaw and his heirs held the property for the purposes named, and held it in trust for Beebe and his creditors, of which the complainant is one. In cases of this kind it makes no difference how many grantees there may be of the fraudulent debtor, nor how disconnected their titles. All may be joined by the defrauded creditor in one bill; and so in all similar cases.

*Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Hinds v. Hinds*, 80 Ala. 225; *Russell v. Garrett*, 75 Ala. 350; *Halstead v. Shepard*, 23 Ala. 558; *Handley v. Heflin*, 84 Ala. 600, 4 So. 725; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412.

**Messrs. Henry S. Cattell and Alexander Troy** argued the cause and filed a brief for appellees except the Henshaw heirs:

The United States is not entitled to any other or greater measure of relief than would be accorded to an individual suitor under like circumstances.

*Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283; *The Siren*, 7 Wall. 159, sub nom. *The Siren v. United States*, 19 L. ed. 132; *Chicago & N. W. R. Co. v. United States*, 104 U. S. 685, 26 L. ed. 892; *United States v. Beebe*, 17 Fed. 36; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 540, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308.

Payment and satisfaction of the judgment against Beebe was in law payment and satisfaction of the judgment against the administrator of Henshaw.

2 Freeman, Judgm. § 467; *Cox v. Smith*, 10 Or. 418; *Bank of South Carolina v. Iler*, 44 N. C. (3 Dev. L.) 380, 24 Am. Dec. Mosely, 1 Strobb. L. 414; *Sherwood v. Col-264*; *Mathews v. Lawrence*, 1 Denio, 212, 43 Am. Dec. 665.

The judgments rendered are conclusive that the amount recovered, and no more, was due, until they are set aside by some proper proceeding.

1 Freeman, Judgm. § 249; *Fendall v. United States*, 14 Ct. Cl. 247.

Evidence *aliunde* cannot be introduced to contradict the recital that there was a jury and verdict for the amount named, unless there is an averment of facts showing such a fraud in the procurement of said judgments as would authorize a court of equity to set them aside.

*Beverly v. Stephens*, 17 Ala. 701; *Deslonde v. Darrington*, 29 Ala. 92; *Duchess of Kingston's Case*, 2 Smith Lead. Cas. \*\*437, 438, note.

The recitals of the record of a judgment import absolute verity until the facts are averred which show that the judgment was procured by fraud; that is, that there was a fraud perpetrated by the party against whom complaint is made, which would authorize a court of equity to vacate and annul the judgment.

*Thompson v. Maxwell*, 95 U. S. 391, 24 L. ed. 481; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534.

The frauds for which courts of equity will

intervene to set aside and stay the enforcement of a judgment of a court having jurisdiction of the subject-matter and the parties must consist of extrinsic, collateral acts not involved in the consideration of the merits.

*Hilton v. Guyott*, 42 Fed. 252; *Kimberly v. Arms*, 40 Fed. 558; *United States v. Flint*, 4 Sawy. 42; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Marquez v. Frisbie*, 101 U. S. 479, 25 L. ed. 802; *Vance v. Burbank*, 101 U. S. 520, 25 L. ed. 931; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 454, 27 L. ed. 229, 1 Sup. Ct. Rep. 389; *Western P. R. Co. v. United States*, 108 U. S. 513, 27 L. ed. 806, 2 Sup. Ct. Rep. 802; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 520, 28 L. ed. 503, 4 Sup. Ct. Rep. 583; *Mahn v. Harwood*, 112 U. S. 365, 28 L. ed. 669, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; *Moffat v. United States*, 112 U. S. 32, 28 L. ed. 625, 5 Sup. Ct. Rep. 10; *United States v. Minor*, 114 U. S. 241, 29 L. ed. 113, 5 Sup. Ct. Rep. 836; *Maxwell Land-Grant Case*, 121 U. S. 379, sub nom. *United States v. Maxwell Land Grant Co.* 30 L. ed. 958, 7 Sup. Ct. Rep. 1015; *United States v. San Jacinto Tin Co.* 125 U. S. 281, 31 L. ed. 750, 8 Sup. Ct. Rep. 850; *Crugin v. Powell*, 128 U. S. 699, 32 L. ed. 568, 9 Sup. Ct. Rep. 203; *Marshall v. Holmes*, 141 U. S. 596, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 540, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308.

It is not shown that there was any fraud in obtaining the judgment, or any fraud by which the court was imposed upon or misled into a false judgment.

*Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; 2 Freeman, Judgm. § 489; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534.

The fraud of Beebe and Henshaw must have been such as to prevent the United States from successfully prosecuting its claim in the original suit in which the judgment was obtained; and this must have been without any fault on the part of the United States or its representatives.

*Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62.

A court of equity will not lend its aid to set aside a judgment unless the party claiming its assistance can impeach the judgment by facts or grounds of which he could not have availed himself at law, or of which he was prevented from availing himself by fraud, accident, or act of the opposite party unmixd with negligence or fault on his part.

*Watts v. Gayle*, 20 Ala. 817; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; 2 Freeman, Judgm. § 486; *Kinney v. Ogden*, 3 N. J. Eq. 168; *Hair v. Lowe*, 19 Ala. 224; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Smith v. Worthington*, 4 C. C. A. 130, 10 U. S. App. 616, 53 Fed. 981.

Courts of equity will not grant relief on the ground that an attorney, through design, or ignorance, mismanaged the case, or that, the client being absent, the attorney, through a misapprehension of the facts, consented to a judgment.



2 Freeman, Judgm. § 508; *Burton v. Wilcy*, 26 Vt. 430; *White v. Bank of United States*, 6 Ohio, 528; *Jamison v. May*, 13 Ark. 600; *Burton v. Hynson*, 14 Ark. 32; *Broda v. Greenwald*, 66 Ala. 538; *Ezzell v. Watson*, 83 Ala. 123, 3 So. 309.

The rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable whether the neglect is that of himself or that of his attorney employed in the management of his case.

2 Freeman, Judgm. § 500; *Vaughan v. Hewitt*, 17 S. C. 442; *Bradish v. Gee*, 1 Amb. 229; *Jones v. Williamson*, 5 Coldw. 371.

Within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, the attorney may have large discretionary powers given to him, that he may perfect and promote the rights and interests of the clients.

*Robinson v. Murphy*, 69 Ala. 547.

The authority of an attorney to compromise pending litigation is fully recognized in the English courts, upon the theory that he is, as to the matters involved in the litigation, the general agent of his client. Many American courts coincide with the English rule.

Prof. Green's note to Story, Agency, 8th ed. § 24; Wharton, Agency, §§ 587-592.

An agreement made by an attorney that certain property might be sold and the proceeds paid into the court to await the result of an appeal was binding on the client.

*Halliday v. Stuart*, 151 U. S. 237, 38 L. ed. 144, 14 Sup. Ct. Rep. 302.

A party to a proceeding in court, and represented by an attorney, has no right to make agreements affecting the conduct of the case.

*Bonnifield v. Thorp*, 71 Fed. 924.

Courts are reluctant to set aside a compromise, and in such cases very slight evidence of acquiescence on the part of the client will be deemed a ratification of the attorney's act in making the compromise.

3 Am. & Eng. Enc. Law, 2d ed. p. 360.

The amendment did not cure the defects of the original bill, but did add a new cause of action, and made the bill multifarious.

Story, Eq. Pl. § 271; *Kimberly v. Arms*, 40 Fed. 548.

The appellant has no right to prosecute in the same bill two separate and distinct claims, as to one of which some of the parties defendant have no interest, and as to which said parties can under no circumstances be made liable.

*Hardin v. Swoope*, 47 Ala. 273; *Kinsey v. Howard*, 47 Ala. 236; *Johnson v. Parkinson*, 62 Ala. 456; *Adams v. Jones*, 68 Ala. 117.

Every attorney by virtue of his office and his relation to his client has inherent power to accept judgment or confess judgment in a pending litigated case, and by so doing to bind his client.

Wharton, Agency, 8th ed. § 585; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237; *Talbot v. McGee*, 4 T. B. Mon. 377.

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*Mr. W. A. Gunter* filed a brief for appellees, the Henshaw heirs:

When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.

*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Smoot's Case*, 15 Wall. 36, sub nom. *United States v. Smoot*, 21 L. ed. 107; *Chicago & N. W. R. Co. v. United States*, 104 U. S. 685, 26 L. ed. 892; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 233; *The Siren*, 7 Wall. 159, sub nom. *The Siren v. United States*, 19 L. ed. 132; *United States v. Beebe*, 17 Fed. 36.

While it is true that the United States is not bound by the statute of limitations, as an individual would be, still, when a bill is brought after a considerable lapse of time and after the death of all the parties concerned, seeking to annul judgments surrounded by every presumption which should give them support, it should present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest.

*United States v. Throckmorton*, 98 U. S. 64, 25 L. ed. 94; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 540, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308; *United States v. Beebe*, 17 Fed. 36.

The particulars of fraud must be alleged; it will not be presumed from loose untraversable allegations of fraud in general.

*Marquez v. Frisbie*, 101 U. S. 478, 25 L. ed. 802; *United States v. Atherton*, 102 U. S. 372, 26 L. ed. 213.

A bill which seeks to enforce against different defendants demands which are distinct is multifarious.

*Gaines v. Chev*, 2 How. 619, 11 L. ed. 402.

The judgment record imports absolute verity, and is only to be assailed by direct and precise allegations of fraud. It admits of no contradiction.

1 Freeman, Judgm. §§ 76-125; 1 Black, Judgm. § 273, pp. 233, 234; *Jeter v. Hewitt*, 22 How. 352, 16 L. ed. 345.

The record is conclusively presumed to speak the truth, and can be tried only by inspection.

1 Black, Judgm. § 273; *Wilcher v. Robertson*, 78 Va. 602; *Mobley v. Nave*, 67 Mo. 549.

The satisfaction of one judgment of two or more for the same debt is a satisfaction of the entire claim.

2 Freeman, Judgm. § 467.

\*Mr. Justice **Peckham**, after making the [348] above statement of facts, delivered the opinion of the court:

The principal claim against the defendants is based upon the manner in which the two separate judgments were obtained against the defendant Beebe, and the administrator of Henshaw, in the circuit court of Alabama on February 6, 1885. The amount due on one of those judgments (that against Beebe) was paid into the United States Treasury on July 1, 1886, and this suit was commenced in March, 1890.

The grounds upon which the court is asked to set aside the judgments so entered are (1) fraud in procuring them, and (2) the absence of power on the part of the district attorney to make the compromise, and the consequent invalidity of the judgments entered thereon.

[349] The only ground upon which the allegation of fraud in relation to the judgments is based consists in the averment in the bill that the defendants came into court and represented that they were poor men; that Beebe and the estate of Henshaw were without property out of which any judgment could be collected or paid; that no part of any judgment could be collected by due process of law; that nothing could be made out of them or \*either of them or their estates by execution, but that if the court would allow a jury and a verdict to be entered against them for \$100 they and each of them would pay said judgments and costs. Accordingly judgments were so taken without any evidence given or hearing had upon the merits of the claim.

It is manifest that these allegations would furnish no defense to the cause of action on the part of the United States against the defendants as sureties on the bond of Widmer. The statements had no tendency to prevent full preparation for trial on the part of complainant, nor did they tend in any way to obstruct the full presentation of the cause of action against the defendants on the trial. It is plain, therefore, that the representations, assuming them to have been false, could not constitute such a fraud as upon well-settled principles a court of equity will relieve against by setting aside a judgment in a case where such representations were made. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Ward v. Southfield*, 102 N. Y. 287, 292, 6 N. E. 660. The first case has also been cited with approval in *Moffat v. United States*, 112 U. S. 24, 32, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10, although a distinction is therein made taking it out from the rule recognized in *Throckmorton's Case*.

But in fact there was no deception in the case. The bill itself avers that the estate of Henshaw had been declared insolvent upon a report of the administrator in 1880, and there is no allegation that the estate was not insolvent at that time. There is, on the contrary, a distinct allegation that the defendant Beebe, at, before and since July 2, 1880, had been insolvent and without sufficient property to pay his debts, including his indebtedness to the United States, and also that Ferris Henshaw at the time of his death was insolvent and without sufficient property to pay his debts, and that by reason of the insolvency of Beebe and Henshaw and the estate of Henshaw the government was entitled to priority of payment. Section 3466, Revised Statutes of the United States.

The insolvency of Beebe and the estate of Henshaw was thus made a material averment of the bill in order to base the demand upon the part of the United States for prior-

ity of payment of its debt of more than \$28,000, which would exist, as \* was alleged, upon the setting aside of these judgments. It is obviously impossible to found an allegation of fraud upon a representation made by and for the defendants in open court, which simply states as a fact that which the bill of the complainant itself distinctly avers was a fact. It is true the defendants, as the bill alleges, based their application for reduced judgments upon this fact of insolvency, but whether the application were or were not meritorious is quite immaterial upon the issue of fraud, so long as the statements upon which it was made were neither fraudulent nor even false.

It is entirely plain there was no fraud in the case, and therefore this ground for complainant's relief cannot be sustained.

But a very different question arises from the alleged absence of power on the part of the district attorney to make the compromise and the consequent invalidity of the judgment entered thereon.

By demurring to the amended bill it is admitted that in former suits commenced by complainant against the defendants Beebe and the administrator of the estate of Henshaw, upon a claim to recover some \$28,000 with interest for a number of years, based upon the liability of the defendants upon a bond to the United States executed by them as sureties, two separate judgments were entered in favor of the United States at a term of the United States circuit court for the middle district of Alabama, each judgment being for the sum of only \$100 and costs, and that although the judgment records showed a regular trial before a jury and a verdict in each case, yet in truth there had been no jury, no witnesses, no evidence, and no verdict, and that the judgments were simply the result of a compromise of the claim in each of the two suits as agreed upon by the district attorney on the one side and the defendants upon the other. Upon these facts the appellant claims that the judgments were wholly void for want of jurisdiction in the court to authorize them.

The appellants also claim that if not void, the judgments were at least irregular, and upon the facts averred in the bill ought to be set aside.

We do not think that they were void as if rendered by a \*court having no jurisdiction[351] of the person or of the subject-matter, as confessedly the court had jurisdiction over both; but the facts just stated and which are admitted by the demurrers are enough in our opinion to call for the setting aside of those judgments. It is enough, without alleging fraud in their entry, that they simply carry out and represent a compromise made by the district attorney which he had no power to enter into, and which rendered the judgments so far unauthorized as to permit a suit to set them aside.

We think there can be no serious question that a district attorney of the United States has no power to agree upon a compromise of a claim in suit except under circumstances



not present in this case. There is no statute of the United States, and no regulation has been called to our attention, giving a district attorney any such power, but, on the contrary, it is provided in paragraph 7 of the regulations established by the Solicitor of the Treasury, and approved by the Attorney General, pursuant to § 377 of the Revised Statutes of the United States, that no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States, without express instructions from the Solicitor of the Treasury, unless circumstances exist which do not obtain in this case. The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party, and that such an attorney has no power to compromise a claim in suit has been frequently decided. *Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396. In that case it was remarked by Marshall, Chief Justice, that—

“Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized \*and being therefore in itself void, ought not to bind the injured party.”

The same has been held in Massachusetts in *Lewis v. Gamage*, 1 Pick. 347; and in New York in *Barrett v. Third Avenue R. Co.* 45 N. Y. 628, 635, and *Mandeville v. Reynolds*, 68 N. Y. 528, 540. And see *Kilmer v. Galaher*, supreme court of Iowa, December 22, 1900, 52 Cent. L. J. 150, and note, 84 N. W. 697; *Bigler v. Toy*, 68 Iowa, 688, 28 N. W. 17. Indeed, the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed.

A judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. Prima facie, the act of the attorney in making such compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with special authority, but when it is proved he had none, the judgment will be vacated on that ground. Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted.

In *Robb v. Vos*, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4, it was held that although

the judgment was on its face valid and regular, yet, inasmuch as the attorney who appeared on behalf of one of the defendants did so without the consent of his principal, the remedy of the principal, when the facts came to his knowledge, was in equity, where the judgment might be set aside as to him. So, if the judgment be in fact entered upon a compromise made by the attorney who had no authority to make it, the judgment may be attacked and set aside in an equitable action upon proof of the necessary facts. Although the judgment is not void for want of jurisdiction in the court, it will yet be set aside upon affirmative proof that the attorney had no right to consent to its entry.

It is said that the judgment being valid on its face evidence to contradict its recitals is not admissible unless in case of such a fraud as will be relieved against in a court of equity. Fraud under certain circumstances is a ground upon which a judgment may and will be set aside; but in addition to such ground, \*where, as in this case, the judgment is entered upon a compromise made by an attorney, entirely unauthorized, and without any trial, we have no doubt that such fact may be proved in order to lay the foundation for an application to a court of equity to set the judgment aside, although the proof contradicts the record of the judgment itself, and shows that in fact there was no jury, no trial, and no verdict.

It is, however, urged that the government has lost its right to assail these judgments because of the lapse of time and because one of the judgments was paid before the commencement of this suit. The bill shows that they were entered on February 6, 1885, and that on July 1, 1886, Beebe paid the amount of the judgment against him into the Treasury of the United States. The bill was not filed until March 10, 1890, and it is therefore said that the government has ratified the action of the district attorney by a failure to proceed to set the judgments aside at an earlier date than it did.

It is not averred in the bill to whom Beebe paid the amount of the judgment, but there is simply a statement that it was paid into the Treasury of the United States. We must probably assume from such averment that the payment was made to an officer who had the right to receive the money, but it is not charged that such officer received it with knowledge of the facts preceding the entry of the judgment and by virtue of which such judgment was entered. There would be nothing in the record of the judgment itself which would show anything other than a regular trial of the case and a verdict of a jury upon which the judgment was entered; consequently there would be nothing in the record which would charge the officer with knowledge that the judgment was only the result of and represented a compromise made by the district attorney, which he had no power to make.

In addition to this want of notice there is an averment in the bill that the facts

and circumstances set out therein as the basis of the relief asked for by the bill had only come to the knowledge of the complainant on or about March 5, 1890. From 1885, when the judgments were entered, no one having authority to act in the premises for the government had any knowledge of these facts until March, 1890, and this the demurrers \*admit. Generally speaking, the laches of officers of the government cannot be set up as a defense to a claim made by the government. *United States v. Kirkpatrick*, 9 Wheat. 720, 735, 6 L. ed. 199, 203; *United States v. Vanzandt*, 11 Wheat. 184, 6 L. ed. 448; *Dox v. Postmaster-General*, 1 Pet. 318, 325, 7 L. ed. 160, 163; *Hart v. United States*, 95 U. S. 316, 24 L. ed. 479; *Gausson v. United States*, 97 U. S. 584, 24 L. ed. 1009.

But we fail to see wherein the officers of the government have been guilty of laches. There has been no ratification of any unauthorized act of the district attorney by reason of any delay on the part of the government after knowledge of the facts, and without that knowledge there can be no ratification, and in this case no laches.

Where an agent has acted without authority, and it is claimed that the principal was thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. *Story, Agency*, 9th ed. § 239, notes 1, 2. If there be want of it, though such want arises from the neglect of the principal, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them. Here, it is denied by an express averment in the bill to that effect, and must be taken as a fact. There being no knowledge of the facts on the part of the government until March, 1890, we think there were no laches on its part which would bar the maintenance of this suit. We think it cannot be said that a failure to earlier obtain knowledge was evidence of neglect upon the part of the officers of the government, even though neglect would affect the government in its right to maintain this suit.

Nor do we think the omission to make in the bill an offer to repay the \$100 and costs paid into the Treasury of the United States constituted a fatal defect in the pleading. It was a payment of money only, and the amount might be properly credited to the representatives of Beebe upon the trial of the action, and constitute by that amount a reduction of the claim of the government; or if, upon the trial, the compromise being

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the judgment against Henshaw's estate, and the payment made by Beebe did not operate as a payment of the judgment against that estate, because by the terms of the agreement as set forth in the bill the compromise consisted in a promise to pay by each the amount of each judgment of \$100 and costs. The amended bill is not therefore defective so as to be demurrable as not containing facts sufficient to constitute a cause of action. And we do not think it is multifarious. The amendment but added another claim to those already made which were averred to be prior liens upon the lands in the hands of the Henshaw heirs at law. If the lands described in the bill, or any portion of them, have been conveyed to bona fide grantees for value, nothing in this opinion can be taken as in any way passing upon the question of their right to insist that they took the lands free and clear of any lien in favor of the government, other than the \$100 judgments.

To conclude, we are of opinion that the district attorney had no authority to compromise the claim of the government by consenting to the entry of the judgments in question, and, as that unauthorized act on his part has never been ratified by the government, with knowledge of the facts, and no laches are in reality attributable in this case to the government, which proceeded at the earliest moment after the discovery of the facts to file this bill, we are of opinion that a cause of action was set forth in the amended bill, and that the demurrers to such amended bill should be overruled.

The judgments of the United States Circuit Court of Appeals for the Fifth Circuit and of the Circuit Court of the United States for the Middle District of Alabama are therefore reversed, and the case remitted to the latter court with directions to overrule the demurrers, with leave to the defendants to answer, and for such further proceedings as are consistent with this opinion.

So ordered.

\*HOMER BIRD, *Plff. in Err.*,  
v.

UNITED STATES.

(See S. C. Reporter's ed. 356-362.)

[356]

*Homicide—evidence of threats—prior and subsequent conduct—error in instructions.*

1. Testimony against the accused on a trial for murder, that more than a month before the homicide he threatened violence to another member of the same party, and that he

NOTE.—*Evidence in a criminal case of threats by accused against third persons.*

Generally, threats made by the defendant to kill some person other than the deceased are not admissible. *Carr v. State*, 23 Neb. 749, 37 N. W. 630.

A disconnected threat to stab a third person was said in *State v. Smith*, 125 Mo. 2, 28 S. W. 181, to be immaterial and irrelevant on the trial of an assault with intent to kill.

Evidence that defendant, charged with as-

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was very disagreeable and abusive and vulgar in his language toward the others; and testimony that he tried to pick a fight with another about six months after the homicide,—is inadmissible because the time is too remote, and because the facts do not show enmity toward the person whom he killed.

2. Instructions which leave the jury to pass upon the vital question of the guilt of a person charged with homicide without reference to his evidence are erroneous when he himself has testified to his own belief that his life was in danger, and to the facts that led him so to believe.

[No. 278.]

*Argued January 21, 1901. Decided February 25, 1901.*

**I**N ERROR to the District Court of the United States for the District of Alaska to review a judgment of conviction for murder. *Reversed.*

sault, had, at different times extending over a period of several years, made threats against others than the prosecuting witness, is inadmissible in evidence where none of such threats were in any manner connected with the crime charged. *People v. Drake*, 65 Hun, 331, 20 N. Y. Supp. 228.

And the reception of such evidence cannot be justified upon the assumption that it tends to impeach the character or standing of the defendant as a witness. *Ibid.*

But evidence of a threat by defendant, charged with assault with intent to kill, to stab a third person, is admissible when it constitutes a part of an admission by the defendant of the crime with which he is charged, although it tends to prove another distinct offense. *State v. Smith*, 125 Mo. 2, 28 S. W. 181.

A threat of defendant to "get even" with a person whom he supposed to be the author of a libelous article, but whom he afterwards found out was not, cannot be proved against him on a trial for killing another person, his ill feeling towards whom grew out of the same publication. *People v. Powell*, 87 Cal. 358, 11 L. R. A. 75, 25 Pac. 481.

Threats against a particular person with whom the prisoner had had a quarrel are not admissible to show malice or intention to kill another person with whom at the time he had no quarrel, but whom, in a scuffle, he afterwards killed. *Abernethy v. Com.* 101 Pa. 328.

But on a trial for the murder of an inoffensive spectator of a saloon row precipitated by the defendant's unprovoked assault on the bartender, evidence that, on leaving the saloon from one half to two hours before, the defendant had threatened "to fix" the bartender that night, is admissible both to show malice and premeditation and an unlawful purpose in returning to the saloon, and as a part of the *res gestæ*. *State v. Crawford*, 115 Mo. 620, 22 S. W. 371.

So, in *Palmer v. People*, 138 Ill. 356, 28 N. E. 130, it was held that evidence that one accused of murder in killing an officer who was attempting to arrest him had previously stated that he expected arrest by another officer, and that he exhibited a deadly weapon and indicated that he intended to use it in case such officer attempted to arrest him, is admissible to show his animus and a premeditated design to make resistance to the expected arrest.

Evidence of previous threats made by defendant against a railroad company is admissible on a trial for an assault upon one of its employees, upon the question of the motive and 180 U. S.

Statement by Mr. Justice Shiras:

\*At a term of the United States district court in and for the district of Alaska, Homer Bird, the plaintiff in error, was tried on a charge of having murdered one J. H. Hurlin on the 27th day of September, A. D. 1898. On December 6, 1899, the jury found the defendant guilty as charged in the indictment, and on December 13, 1899, a motion for a new trial having been overruled, a sentence of death by hanging on February 9, A. D. 1900, was pronounced. A bill of exceptions was settled and signed by the trial judge on February 8, 1900, and a writ of error from the Supreme Court of the United States was allowed. The evidence contained in the bill of exceptions shows that a party of five persons, composed of Homer Bird, J. H. Hurlin, Robert L. Patterson, Charles Scheffler, and Naomi Strong, sailed up the Yukon river, in the latter part of July, 1898,

intent of the assailant. *Newton v. State*, 92 Ala. 33, 9 So. 404.

And evidence of declarations on the part of defendant, charged with a homicide, which showed a hostile and deadly animus against deceased's son, and a purpose to go to the house where deceased and his son resided and "clean them up," is admissible as disclosing motive for the offense charged. *Bonner v. State*, 107 Ala. 97, 18 So. 226.

Threats of an accused to kill several persons, including deceased, are not inadmissible in evidence as being threats to kill others than deceased, where the theory of the state is that defendant and others had conspired together to kill all of those persons. *Slade v. State*, 29 Tex. App. 381, 16 S. W. 253.

Evidence of threats by defendant to kill an entire family is admissible on his trial for aggravated assault on a member of that family. *Sebastian v. State* (Tex. Crim. App.) 53 S. W. 875.

Evidence of threats by a husband against his wife's family was admitted in *People v. Craig*, 111 Cal. 460, 44 Pac. 186, on his trial for her murder, over an objection that it was incompetent to prove ill will or malice on his part against any other person, as tending to show his intent and that he acted with malice in killing her, such threats being broad enough to include his wife with the other members of her family, and it being for the jury to determine whether she was in fact one of the persons intended by him.

Evidence of threats made by defendant a few days before the homicide, to shoot both the deceased and a third person, are admissible where they form a part of one and the same conversation or statement made by the defendant. *State v. Wong Gee*, 35 Or. 276, 57 Pac. 914.

On a trial for murder alleged to have been the result of conspiracy, evidence of a threat made by the mob immediately after the homicide, to kill another, and of their endeavors to execute such threat, was admissible as tending to show the desperate character of the conspiracy, and that murder was a part of its programme. *State v. McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599.

Proof of a threat by defendant, charged with homicide, to kill a companion who protested against his proposition to kill a physician who was going to the relief of his victim, is admissible as evidencing malice against the deceased, or indifference to his fate. *Perry v. State*, 110 Ga. 234, 36 S. E. 781.



on an adventure in search of gold. They traveled on a small steam launch, towing a scow laden with an outfit of clothes and provisions sufficient to last them about two years. In the latter part of September, 1898, they reached a point on the river about 600 miles from St. Michaels, at the mouth of the Yukon, when they determined to go into winter quarters, and there began the construction of a cabin on the banks of the stream. On September 27, 1898, in a quarrel that had arisen about a partition of the supplies, Hurlin was shot and killed by Bird. At the trial in December, 1899, there were three witnesses who had been present at the time of the homicide, Scheffler, Strong and Bird, the accused. As the fact of the killing of Hurlin by Bird was not denied, the trial turned on the question whether the killing was malicious and wilful or was in self-defense.

**Mr. L. T. Michener** argued the cause, and, with **Mr. W. W. Dudley** and **Messrs. Malony & Cobb**, filed a brief for plaintiff in error.

**Assistant Attorney General Beck** argued the cause and filed a brief for defendant in error.

[357] \***Mr. Justice Shiras** delivered the opinion of the court:

The assignments of error are twenty-five in number, but of these we think it sufficient to consider only the tenth, the fourteenth, and twenty-third.

[358] \*The homicide, as alleged in the indictment, occurred on September 27, 1898, at a point on the Yukon river about 85 miles above Anvik, and about 2 miles below a coal mine known as Fort Dewey.

At the trial the government called as a witness for the prosecution one Charles Scheffler, who testified, among other things—

"That in the month of August, when the defendant, in company with the deceased, Hurlin, R. J. Patterson, Naomi Strong, and witness, were going up the Yukon river in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar, he would curse them; he would say 'The Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river, and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson a 'son of a bitch,' and told him he would 'hammer the devil out of him,' and witness and the others would not let them fight. And if anything would go wrong he, defendant, would not curse in front of witness and the others' faces, but defendant would be disagreeable all the way along, and would make things very disagreeable."

To this testimony the defendant, by his counsel, objected "as immaterial and irrelevant, and too remote from the time the offense is charged to have been committed;"

but this objection was by the court overruled, and said testimony permitted to go to the jury; to which ruling of the court he then and there excepted. This testimony, the objection, and the ruling are set forth in the bill of exceptions, and form the subject of the tenth assignment of error.

As it was not denied that Hurlin died immediately from a wound intentionally inflicted by the accused, the issue to be determined by the jury was whether the accused was actuated by a malicious motive or acted in self-defense.

As the testimony in this issue was conflicting, or, rather, the defendant's evidence not yet having been given, as it might well have been anticipated that the testimony would be conflicting, it seems to have been the theory of the prosecution \*that the evi- [359] dence in question in the tenth assignment tended to show such a state of enmity on the part of the accused towards the deceased as to warrant the jury in finding that the act of the accused in shooting the deceased was the result of a pre-existing unfriendly feeling.

The general rule on the subject of permitting testimony to be given of matters not alleged is that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. And it was said by Mr. Best in the 92d section of "Principles of Evidence," that whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty.

In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged; for the unlawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time. Thus, upon the trial of a person for maliciously shooting another, the question being whether it was done by accident or design, evidence was admitted to prove that the prisoner intentionally shot at the prosecutor at another time, about a quarter of an hour distant from the shooting charged in the indictment.

So, also, in cases of homicide, evidence of former hostility and menaces on the part of the prisoner against the deceased is admissible in proof of malice. 3 Greenl. Redfield's ed. § 15.

But in the case of *Farrer v. State*, 2 Ohio St. 54, it was held, upon full consideration, that on an indictment charging the prisoner with poisoning A, in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of August previous.

So, in *Com. v. Horton*, 2 Gray, 354, it was held by the supreme judicial court of Massachusetts that, under an indictment charging one act of adultery at a particular time and place, evidence of other acts of a similar



character at other times and places is inadmissible, the court saying:

[360] "It is a universal rule, in the trial of criminal cases, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. The prosecuting officer is not, therefore, allowed to give evidence of facts tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged."

But even if it be conceded that prior conduct of the accused may be put in evidence in order to show that he had feelings of enmity towards the deceased, we are clear that the testimony was wrongfully admitted in the present case, because the time of the incident testified to, more than a month before the homicide, was too remote, and because the incident itself did not tend to prove any feeling of enmity on the part of Bird to the deceased, such as to warrant the jury in inferring that the subsequent homicide was malicious and premeditated. The particular violence threatened was not against the deceased, but against another member of the party; and the vulgar language attributed to the accused was of a character not unusual among coarse men engaged in such an adventure.

The only doubt we feel is whether the evidence, though improperly admitted, was of sufficient importance to call for a reversal of the judgment. However, we cannot say that the testimony did not suffice to turn the scale against the prisoner. And we are the more inclined to sustain this exception because the error was immediately followed by another and similar one, appearing in the fourteenth assignment of error.

The bill of exceptions discloses that, over objection, Scheffler was permitted to testify as follows:

"That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man named Smith; that Smith left, and the next day after that Bird was very disagreeable and tried to pick a fight with the woman Naomi Strong; he acted very funny. You had to watch him and be careful. He got awful good after that, and everything was just so. It was Charles this and Naomi that."

[361] The matters so testified to took place six months after the alleged murder, and would seem to have no bearing, direct or remote, upon the guilt of the accused, but still may have tended to persuade the jury that Bird was a dangerous man and likely to kill any one who excited his anger.

We think there was substantial error in the first paragraph of the instructions given the jury by the court at the request of the government, and which was as follows:

"The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant Homer Bird, on the 180 U. S.

27th day of September, 1898, at a point on the Yukon river, about 2 miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the district of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated, and wilful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

The bill of exceptions shows that to "this instruction the defendant then and there excepted for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty."

It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 3, § 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

It has sometimes been said that if the judge omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain. But such a principle cannot \*apply to the present [362] case, because the judge's attention was directly called by the government's request to the question of self-defense, and because the defect in that request was then and there pointed out by the defendant's counsel in their exception. The question involved in that instruction was a fundamental one in the case; indeed, it may be said that the defendant's sole defense rested upon it. The defendant, as shown in the bill of exceptions, had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant's evidence. *Beard v. United States*, 158 U. S. 554-559, 39 L. ed. 1088, 1090, 15 Sup. Ct. Rep. 962.

As the trial judge allowed and signed a bill of exceptions to his instruction in this behalf, it cannot be fairly presumed that the error was healed by any modification or correction made in some other and undisclosed part of his charge.

The judgment of the District Court of the United States for the District of Alaska is reversed, and the cause is remanded to that court with directions to set aside the verdict and award a new trial.

JACOB GARDNER and Peter Gardner,  
Plffs. in Err.,  
v.

L. H. BONESTELL, Executor of the Estate  
of Ebenezer Wormouth, Deceased, Dft. in  
Err.

(See S. C. Reporter's ed. 362-370.)

*Determinations of Land Department — con-  
clusiveness in private action.*

Determinations of the Land Department against the claim that certain land is included within a Mexican grant which has been surveyed and patented to the claimant, and also that he is not a bona fide purchaser from the original grantee, are conclusive against him in a subsequent private action against him to recover the land by one who has entered the tract as public land and received a patent therefor.

[No. 143.]

*Argued January 17, 18, 1901. Decided Feb-  
ruary 25, 1901.*

ON WRIT OF ERROR to the Supreme Court of the State of California to review a decision affirming a decree in a suit to try title to land. *Affirmed.*

See same case below, 125 Cal. 316, 58 Pac. 20.

**Statement by Mr. Justice Brewer:**

[363] In 1834 Juan Reed applied to and received from the Mexican \*governor of California a grant of a tract of land. In 1854 his heirs petitioned the commission created by the United States for a confirmation of that grant. It was confirmed, the order therefor being in these words:

"In this case on hearing the proofs and allegations, it is adjudged by the commission that the said claim of the petitioners is valid, and is therefore hereby decreed that the same be confirmed.

"The land of which confirmation is hereby made is the same on which said Juan Reed resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in Marin county and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presidio, and running from thence in a northwardly direction 4,500 varas to an arroyo called Holon where is another forest of redwoods called Corte de Madera de San Pablo; thence by the waters of said arroyo and the bay of San Francisco 10,000 varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, 4,700 varas to

the north of the canada and the point of the 'sausal' which is near the Estero lying east of the house on said premises which was occupied by said Juan Reed in November, 1835; and thence continuing the measurement from east to west along the last line 800 varas to the place of beginning; containing 1 square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Reed under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the expediente, a traced copy of which is filed in the case, reference is to be had."

An appeal was taken therefrom to the district court of the United States, and the following order of confirmation was made on January 14, 1856:

\*"This cause came on to be heard at a [364] stated term of the court on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the state of California under the act of Congress approved on the 3d of March, A. D. 1851, upon the transcript of the proceedings and decision of the board of commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the court that the said transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby, in all things, affirmed, and it is likewise further ordered, adjudged, and decreed that the claim of the appellees is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent and quantity of 1 square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided, that the said quantity of 1 square league now confirmed to the claimants be contained within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity."

No appeal was taken from this order of confirmation, and it therefore became final. In 1858, a survey was ordered by the Land Department, and was made by a surveyor, named Mathewson, who surveyed 1 square league as being the full amount of the tract confirmed to the petitioners. The petitioners claimed that their grant was of a tract described by metes and bounds, and not of a given quantity within exterior boundaries, and after some controversy between them and the Land Department the latter recognized their claim, set aside the Mathewson survey, and ordered a new survey. This was made in 1871. It was confirmed by the Land Department, and has never been questioned therein. Thereupon a patent was issued to the petitioners, conveying the tract by metes and bounds as described in the or-

NOTE—On conclusiveness and effect of decisions of the Land Department—see notes to Hartman v. Warren, 22 C. C. A. 38, and Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344.



der of the commission and shown by the last survey.

[365] The tract in controversy is outside the limits of both surveys. Prior to the last survey Ebenezer Wormouth, the testator of defendant in error, settled upon the tract in controversy, and thereafter made application to enter the tract as public land of the United States. A contest was had between such testator and one Samuel R. Throckmorton, claiming title from the heirs of Reed, the original grantee, first in the local land office, thence carried by appeal to the General Land Office, and thereafter to the Secretary of the Interior. The right to enter was sustained and a patent issued. Thereafter this action against the plaintiffs in error holding under Throckmorton was instituted in the superior court of the county of Marin, California, which, at first a mere action in ejectment, became by the pleadings subsequently filed a suit in equity to try title. The decree in the trial court was in favor of Wormouth, which was affirmed by the supreme court of the state (125 Cal. 316, 58 Pac. 20), and thereafter this writ of error was sued out.

In the trial court the question of title was submitted to the court and findings of fact made. Among them were the following:

"2d. That one of the questions decided by the United States register and receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of *Throckmorton v. Wormouth*, mentioned in the 20th paragraph of said cross complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

"3d. That the officers of the United States Land Department, to wit, the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said register and receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican government to Juan Reed."

[366] "6th. That the officers of the United States Land Department, to wit, the United States register and receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of *Throckmorton v. Wormouth*, \*in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

"7th. This court further finds as follows: That the rancho granted by the governor of California, under the government of Mexico, to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach *et al.* to Julius C. McCeney of February 14, 1871, or any part

thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed *et al.* That the grant mentioned in the first paragraph of said cross complaint did not include any part of the land in controversy in this action. That no grant ever made by the Mexican government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22d paragraph of said cross complaint.

"8th. That the land described in said deed of T. B. Deffebach *et al.* to Julius C. McCeney, or any part thereof, except as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant."

"12th. That none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and right of the plaintiff, as alleged in his complaint in this action.

"That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

"13th. That the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross complaint did not show without conflict, or show \*at all, that all of the facts set forth in the preceding paragraphs of said cross complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross complaint was not true.

"That the register and receiver of the land office at San Francisco did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their, or his, decision upon the evidence as the same is alleged in said cross complaint, or upon evidence without conflict; that the said register and receiver did not, nor did either of them, rest their, or his, decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law or under the law entitled to purchase the said land.

"That the Commissioner of the General

Land Office, on appeal from the decision of the register and receiver, did not base his decision upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

"That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

"That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton v. Wormouth*, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross complaint.

"14. That the said Throckmorton did, claiming to be a bona fide purchaser from Mexican grantees, make said application (to purchase) to the register and receiver of the United States land office at San Francisco, under § 7 of the act of Congress entitled, 'An Act to Quiet Land Titles in California.'

[368] "That the said Throckmorton was not a bona fide purchaser \*from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said act of Congress."

The opinion of the supreme court rested upon the single proposition that the land department had jurisdiction of the controversy, and that its judgment was founded upon disputed questions of fact, and, therefore, was not subject to review in the courts.

Mr. George W. Monteith argued the cause and filed a brief for plaintiffs in error.

Mr. C. K. Bonestell argued the cause and filed a brief for defendant in error:

The question involved in this action is one of boundary alone, and this court has no jurisdiction.

*Almonester v. Kenton*, 9 How. 1, 13 L. ed. 21; *Lanfear v. Hunley*, 4 Wall. 204, 18 L. ed. 325; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

All the questions involved in the contest before the Land Department were disputed questions of fact, and their determination by the Land Department was conclusive.

*Moreland v. Page*, 20 How. 522, 15 L. ed. 1009; *Aurora Hill Consol. Min. Co. v. 85 Min. Co.* 34 Fed. 515; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Craig v. Leitensdorfer*, 123 U. S. 189, *sub nom. Downs v. Hubbard*, 31 L. ed. 114, 8 Sup. Ct. Rep. 85.

A court of equity can interfere only when it is clear that the officers of the Land Department have by a mistake of law given to one man the land which on undisputed facts belongs to another. And where there is a question of fact, or a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake is, the decision of the tribunal to which the law has confided the matter is conclusive.

*Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929.

Where a survey conforms to the decree confirming the grant, as nearly as practicable, the survey will not be disturbed even on direct attack.

*Dehon v. Bernal*, 3 Wall. 774, 18 L. ed. 146; *United States v. Armijo*, 5 Wall. 444, 18 L. ed. 492.

The subject of surveys of confirmed land claims is under the control of the Land Department, and its action is not subject to supervision of the court, however erroneous.

*United States v. Flint*, 4 Sawy. 42, Fed. Cas. No. 15,121.

Messrs. C. K. Bonestell and Alfred L. Black also filed a brief for defendant in error.

\*Mr. Justice Brewer delivered the opinion-[368] of the court:

The plaintiffs in error base their right to the land in controversy upon this provision of the act of July 23, 1866 (14 Stat. at L. 218, 220, chap. 219, § 7):

"That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant; and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same."

Every branch of the Land Department, from the register and receiver of the local land office up to the Secretary of the Interior, decided against the contention of Throckmorton (under whom the plaintiffs in error claim), holding that the land was not within the exterior boundaries of the grant, and that Throckmorton was not a purchaser in good faith from the grantee or his assigns. The trial court, referring to the decision of the Land Department, found that it was not based upon any matter of law, but upon questions of fact in respect to which there was \*conflicting testimony. [369] Further, that court upon the testimony adduced before it found in accord with the conclusions of the Land Department, and the supreme court of the state has sustained such finding.

Certain propositions may be stated which compel an affirmance of the judgment of the supreme court of the state. And first, "it is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding." *Knight v. United Land Asso.* 142 U. S. 161, 176, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258, 262.

The grant was one not of quantity, but by metes and bounds, and the final survey, ap-  
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proved by the Land Department, determined conclusively the exterior boundaries of that grant. The land in controversy was not within those boundaries. Counsel for plaintiff in error assumes that the correctness of this survey may be litigated in an action between private parties. He insists that the last survey, which he says was a mere compilation, and not an actual resurvey, included a large body of lands on the one side which were not, in fact, within the boundaries of the tract of which juridical possession had been given, and excluded on the other side a large body which were within such boundaries and which included the lands in controversy. If his contentions were sustained to the full extent the result would be to enlarge the boundaries of the grant on the one side without reducing them on the other, and so increase the area of the grant several hundred acres above its admittedly true size. In other words, the United States, which obtained by the treaty of cession full title to all lands not subject to private grant, would be deprived of these extra acres, undoubtedly their property. He has mistaken his remedy. It was by application to the Land Department to correct the survey, and, failing to secure correction there, a direct proceeding in the courts in which the Reed heirs should have been parties, and in which they could have been heard to defend the survey and patent.

[370] Again, the determination of the Land Department in a case within its jurisdiction of questions of fact depending upon conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in the courts. *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018, and cases cited in the opinion; *Johnson v. Drew*, 171 U. S. 93-99, 43 L. ed. 88-91, 18 Sup. Ct. Rep. 800.

The Land Department found and adjudged, not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton was not a purchaser in good faith. Both of these findings were matters of fact and based upon the testimony. No proposition of law controlled such findings, and no error of law is apparent. Both questions of fact were determined by the Land Department adversely to the plaintiffs in error, and that determination concludes the courts. Counsel insists that there was no conflicting testimony. He ignores the survey which is in itself evidence, and that of a most persuasive kind. There are many things which a surveyor sees and finds in making a survey which are not and cannot be reproduced on paper, and which yet guide him, and wisely guide him, in the lines he runs. So that, even in a case in which a survey is a proper subject of attack, it can be overthrown only upon satisfactory evidence of mistake. It cannot be ignored, and the only matter considered be the tendency and significance of the oral testimony of witnesses as to lines, metes, and bounds.

The trial court, in addition to its findings  
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in reference to the proceedings in the Land Department, found, as independent matters of fact, that the land in controversy was outside the exterior boundaries of the grant, and that Throckmorton was not a bona fide purchaser. The supreme court of the state sustained those findings. Now, in proceedings in this court to review the action of state courts we do not enter into a consideration of questions of fact. We accept the department, found, as independent matters as conclusive, and inquire simply whether there have been errors of law. *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 322, 17 Sup. Ct. Rep. 922.

For these reasons the judgment of the Supreme Court of California is affirmed.

\*FRED LEE RICE *et al.*, Appts.,  
v.

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JOHN C. AMES.

(See S. C. Reporter's ed. 371-379.)

*Habeas corpus—appeal in case of—complaint—part of the counts defective—extradition commissioners—limit of time for continuing case—inapplicability of state statutes—power of Congress to invest courts with appointment of commissioners.*

1. An appeal, and not a writ of error, from a decision of a district court denying an application for a discharge upon a writ of habeas corpus, where the construction of an extradition treaty is involved, is authorized by the court of appeals act March, 1891, § 5, providing for appeals direct from the district court to the Supreme Court in any case in which the validity or construction of a treaty is drawn in question.
2. The invalidity of one count in a complaint in extradition proceedings because the charges are made solely upon information and belief, without setting forth the sources of information or the grounds of belief, will not invalidate other counts in which the natural intendment is that the affiant swore to facts within his personal knowledge.
3. The continuation of proceedings before an extradition commissioner for a longer period than an examining magistrate is authorized to continue a case under the state laws does not invalidate proceedings for extradition under the treaty with Great Britain, which provides that the extradition shall be carried out "in conformity with the laws regulating extradition for the time being in force in the surrendering states," as the laws contem-

NOTE.—On the sufficiency of the information or complaint in extradition proceedings—see note to *Ex parte Hart* (C. C. App. 4th C.) 28 L. R. A. 801.

As to habeas corpus in extradition proceedings—see note to *Re Huse*, 25 C. C. A. 4.

On extradition of persons accused of crime on demand of foreign governments—see note to *Kentucky v. Dennison*, 16 L. ed. U. S. 717.

plated therein are those of the United States, and not the laws of the particular state within which the proceedings are taken.

4. The power to appoint extradition commissioners is conferred upon the courts by Congress, in U. S. Rev. Stat. § 5270, under the authority of the Constitution, art. 2, § 2, ¶ 2, since such commissioners are not judges in the constitutional sense.

[No. 420.]

*Submitted December 17, 1900. Decided February 25, 1901.*

**A** PPEAL from the District Court of the United States for the Northern District of Illinois to review a decision denying an application for a discharge upon a writ of habeas corpus. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was an appeal by Fred Lee Rice, Frank Rutledge, and Thomas Jones from an order of the district court for the northern district of Illinois, denying their application for a discharge upon a writ of habeas corpus, the object of which writ was to test the validity of certain proceedings against the appellants, taken before a commissioner for that district, 'specially authorized to take jurisdiction of proceedings for the extradition of persons charged with crimes, under treaties with foreign governments.

The proceedings before the commissioner are set forth in a bill of exceptions signed by the district judge.

[372] \*The first warrant for the arrest of the appellants was issued June 2, 1900, upon complaint made upon information and belief, by "a police officer of the city of Chicago," and an affidavit of a police detective of the city of Toronto, Canada, also upon information and belief, charging defendants with sundry crimes committed both at Aurora and at Toronto, in the province of Ontario. Pursuant to this warrant appellants were taken by the respondent, Ames, as United States marshal, out of the custody of the city police, by whom they had been arrested the day before, and brought before the commissioner. Proceedings were adjourned until June 4, when the case was dismissed, and a new warrant issued upon the complaint of Albert Cuddy, police detective of the city of Toronto, also upon information and belief. Defendants moved to quash this complaint and warrant by reason of the fact that the complaint was made upon information and belief, which was denied, and the proceedings adjourned until June 14. Defendants were committed for further hearing. Upon that day, it appearing that the proceedings had been taken only for the purpose of provisional apprehension and detention, the case was dismissed, and a new and final complaint made by William Greer, a government detective for the province of Ontario, duly authorized by the Attorney General of the province to act as the agent of the government in the prosecution of extradition proceedings.

This complaint contained four counts, the

first of which charged the defendants, upon information and belief, with stealing from the postoffice building in the town of Aurora, a quantity of Canadian postage stamps, \$55 in money, and certain certificates in mining stock. The other three counts, in which the charge was made absolutely, and not upon information and belief, charged the defendants, first, with stealing a horse, cart, and harness; second, with breaking and entering a private bank in the town of Aurora with intent to steal, and also with the larceny of certain money in the bank; and, third with breaking into a shop on Queen street, in the city of Toronto. A new warrant was issued upon this complaint, and the examination adjourned until June 25, at which time defendants were brought before the commissioner, and motion made for their discharge \*for want of [373] jurisdiction and for insufficiency of the complaint. This motion being denied, the case went to a hearing upon certain documents certified by the American consul, and a large number of depositions of witnesses which were not sent up with the record. The examination was continued for several days, and finally upon July 10 the commissioner found there was probable cause to believe the defendants guilty, and ordered them to stand committed to await the action of the proper authorities.

Whereupon, and upon the same day, petitioners sued out this writ of habeas corpus from the district court; and from the order of that court denying their discharge, they took an appeal directly to this court.

Mr. **Samuel H. Trude** submitted the cause for appellants:

The judiciary act of March 3, 1891, did not cut off the right to appeal which then existed, or change the form of reviewing the cause by a higher court from appeal to writ of error.

*Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182; *Shute v. Keyser*, 149 U. S. 651, 37 L. ed. 885, 13 Sup. Ct. Rep. 960; *Gonzales v. Cunningham*, 164 U. S. 619, 41 L. ed. 574, 17 Sup. Ct. Rep. 182; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

The act of 1891 simply changed the right of the relator or respondent in habeas corpus cases, if the facts came within any of the provisions enumerated in § 5, to appeal direct to this court, instead of the circuit court, as was done in *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 619, 44 L. ed. 912, 20 Sup. Ct. Rep. 822; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Bryant v. United States*, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744.

Independent of statutory provisions, a decision in a habeas corpus case is not of that



final and conclusive character necessary to support a review by writ of error.

9 Enc. Pl. & Pr. p. 1072.

And if appellants in this case had sued out a writ of error, a motion could have been made to dismiss it for that reason.

*Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

The averments in the complaint relating to shop-breaking on May 22, 1900, are the only ones by which any endeavor was made to show that the acts complained of were crimes and punishable by the laws in force in the Dominion of Canada, and these averments are mere conclusions of the rankest form, without the averment of any facts whatever, and are therefore wholly fatal to confer jurisdiction.

*State v. Swope*, 72 Mo. 399; *Bundy v. Hart*, 46 Mo. 460, 2 Am. Rep. 525; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Re Heyward*, 1 Sandf. 701; *Re Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382.

The usual and customary words, such as "felonious," "burglarious and felonious intent," are omitted, and "did commit an indictable offense," without naming what offense was committed therein, and then concluding, "contrary to statute," etc., are wholly defective.

Wharton, Pl. & Pr. § 265; *State v. Swope*, 72 Mo. 401.

The first charge on information and belief, in the complaint of Wm. Greer, and also the second and third charges, are wholly insufficient to charge a common-law larceny, because no value is averred. The words "sum of money," and figures \$55, \$200, do not show that it was current or lawful money of the United States, or what kind of money of what country is meant. This is fatal.

*Brown v. People*, 173 Ill. 34, 50 N. E. 106; Wharton, Pl. & Pr. §§ 213-218; *Reside v. State*, 10 Tex. App. 675; *Bork v. People*, 16 Hun, 476; *People v. Donald*, 48 Mich. 492, 12 N. W. 669; *State v. Denton*, 74 Md. 517, 22 Atl. 305; *Rea v. Furneaux*, Russ. & R. C. C. 334; *King v. Flower*, 5 Barn. & C. 736; *Stewart v. Com.* 4 Serg. & R. 194; *People v. Williams*, 35 Cal. 671; *State v. Hoke*, 84 Ind. 137; *State v. Hinckley*, 4 Minn. 345, Gil. 261; *State v. Oakley*, 51 Ark. 112, 10 S. W. 17; *Rhodus v. Com.* 2 Duv. 159; *Kearney v. State*, 48 Md. 16; *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631; *State v. Thompson*, 42 Ark. 517.

This complaint of Wm. Greer does not charge that anything was feloniously done. This is also fatal.

*Scudder v. State*, 62 Ind. 13; *Ridgeway v. State*, 41 Tex. 231; *Barker v. Com.* 2 Va. Cas. 122; *Sovine v. State*, 85 Ind. 576; *Gregg v. State*, 64 Ind. 223.

A complaint charging the larceny of coin must allege that it is current money of the United States or of some other country.

*People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631; *State v. Parker*, 1 Houst. Crim. Rep. (Del.) 9; *Lord v. State*, 20 N. H. 404, 51 Am. Dec. 231; *Leftwich v. Com.* 20 Gratt. 716.

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It must also allege the value of the coin.

*Boyle v. State*, 37 Tex. 359; *Beery v. United States*, 2 Colo. 186.

The complaint does not charge a larceny at common law, because it does not aver a taking and carrying away.

*Gregg v. State*, 64 Ind. 223; 1 Hale P. C. 504, 508; 2 Hale P. C. 184; *Spittorff v. State*, 108 Ind. 171, 8 N. E. 911.

A complaint under oath, as provided by the treaty, is wholly insufficient to confer jurisdiction unless all the essential elements and facts necessary to constitute the particular crime charged are set forth in the complaint.

*Re Farez*, 7 Blatchf. 35, Fed. Cas. No. 4,644; *Ex parte Hart*, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 259; *Ex parte Morgan*, 20 Fed. 299; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *State ex rel. Stundahl v. Richardson*, 34 Minn. 115, 24 N. W. 354; *People ex rel. Lawrence v. Brady*, 56 N. Y. 183; *Smith v. State*, 21 Neb. 556, 32 N. W. 594; *United States v. Tureaud*, 20 Fed. 623; *Lippman v. People*, 175 Ill. 113, 51 N. E. 872; *Housh v. People*, 75 Ill. 487.

Where an essential element necessary to charge an offense has been omitted in the complaint it is a matter of substance. No jurisdiction is conferred upon the magistrate, and such fatal defects can be availed of at any stage of this proceeding, even in this court, if raised for the first time on appeal.

*Donaldson v. Hazen*, Hempst. 423, Fed. Cas. No. 3,984; *Eilenberger v. Nelson*, 64 Ill. App. 277; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021; 1 Chitty, Pl. 7th Am. ed. 722, 723; *Dillard v. St. Louis, K. C. & N. R. Co.* 58 Mo. 69; *Mathie v. McIntosh*, 40 Wis. 120; *Riley v. Lovell*, 117 Mass. 76; *Stearly's Appeal*, 3 Grant Cas. 270; *Doctor v. Hartman*, 74 Ind. 211.

The complaints being void, the magistrate had no jurisdiction. Where the magistrate loses jurisdiction, his judgment is void, and habeas corpus is the proper remedy to relieve from imprisonment thereunder.

*Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

The complaints before the commissioner were insufficient complaints under oath, in that they were on information and belief, and therefore void, and gave the commissioner no jurisdiction.

*Ex parte Lane*, 6 Fed. 34; *Johnston v. United States*, 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 189; *Ex parte McCabe*, 46 Fed. 363; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872; *State v. Swope*, 72 Mo. 399; *Re Heilbonn*, 1 Park. Crim. Rep. 436; *Re Kelley*, 25 Fed. 268.

When it is not clear what portion of a complaint is on information and belief, and what, if any, is positively sworn to, all is on information and belief.

*Siegmund v. Ascher*, 37 Ill. App. 122; *Stirlen v. Neustadt*, 50 Ill. App. 378; *Brabrook Tailoring Co. v. Belding Bros. & Co.* 40 Ill. App. 328; *Commerce Vault v. Hurd*, 73 Ill. App. 107; *Chicago Ex-*

*hibition Co. v. Illinois State Bd. of Agri.* 77 Ill. App. 350.

The commissioner lost all possible jurisdiction in the extradition proceeding by continuing the cause from June 14, 1900, to June 25, 1900, the same being a period of more than ten days; and every order entered in said proceeding thereafter was absolutely null and void and of no effect.

*United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393; *Mahr v. Young*, 13 Wis. 635; *Gamage v. Law*, 2 Johns. 192; *Crichton v. Beebe*, 7 Ill. App. 272; *People v. Jarrett*, 7 Ill. App. 566; *State v. Swope*, 72 Mo. 399; *Re Kaine*, 10 N. Y. Legal Obs. 259, 14 How. 103, 14 L. ed. 345; *Re Macdonnell*, 11 Blatchf. 79, Fed. Cas. No. 8,771.

Discretion must be governed by rule, not by humor; it must not be arbitrary, vague, or fanciful, but legal and regular.

*Rex v. Wilkes*, 4 Burr. 2539; *Tripp v. Cook*, 26 Wend. 152.

The case at bar is essentially different in many respects from any case yet decided. No case is found that holds that a magistrate can take a case under advisement after the evidence is all in. The authorities are against it.

*Re Calder*, 2 Edm. Sel. Cas. 380.

The appointment of the commissioner to act in extradition matters by the district judge did not make him a district court, or confer upon him the powers of a district judge, or powers to proceed as a district judge might have proceeded, or to continue a cause for more than ten days, as a district judge might have done.

*Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

Under the proviso in article 10 of the treaty of 1842, that delivery "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, will justify his apprehension and detention for trial," it is held that the extradition commissioner should proceed according to the laws of the states.

*Re Farex*, 7 Blatchf. 360, Fed. Cas. No. 4,645; *Re Kelley*, 25 Fed. 268; *Re Ezeta*, 62 Fed. 972; *Benson v. McMahon*, 127 U. S. 463, 32 L. ed. 236, 8 Sup. Ct. Rep. 1240.

If neither Congress nor the treaty has provided for the procedure as to continuances by extradition commissioners, the laws of Illinois which are not in conflict with the treaty or acts of Congress, but auxiliary thereto, and which provide a mode of procedure as to continuances, must govern the extradition commissioner; and such laws are constitutional.

*Ex parte Rosenblat*, 51 Cal. 287; *Ex parte Cubreth*, 49 Cal. 436; *Kurtz v. State*, 22 Fla. 36; *Com. v. Tracy*, 5 Met. 536; *Ex parte Romanes*, 1 Utah, 23; *Hurd, Habeas Corpus*, p. 636; *Moore v. Illinois*, 14 How. 13, 14, 14 L. ed. 306.

The commissioner did not proceed in accordance with the laws of Illinois, or any other law. His orders entered after June 14, 1900, were void under the decisions of this and other states as heretofore cited, and

it does not matter which side asked for the continuance.

*United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393; *State v. Swope*, 72 Mo. 399.

Congress can establish an inferior tribunal, but it does not invest such inferior tribunal with judicial power.

*Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

U. S. Rev. Stat. § 5270, is unconstitutional in attempting to invest a person with powers to hear and determine the rights of the parties under the treaty, and pass upon the sufficiency of the evidence, and construe treaties and laws.

6 Am. & Eng. Enc. Law, pp. 1048, 1053-1055; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L. R. A. 105, 46 N. E. 454; *United States v. Rider*, 50 Fed. 406; *Campbell v. Mississippi Union Bank* 6 How. (Miss.) 659; *Election Supervisors Case*, 114 Mass. 247, 19 Am. Rep. 341.

If Mark A. Foote, as United States commissioner, was a magistrate without such special appointment, then he should have continued the case according to state statutes on continuances.

*Re Kaine*, 14 How. 103, 14 L. ed. 345.

*Mr. Lynden Evans* submitted the cause for appellee:

Since March 3, 1803, no appeals have been entertained in this court in cases at law, appeals being allowable only in chancery and admiralty. These remedies can never, in the Federal court, be used interchangeably.

*The San Pedro*, 2 Wheat. 132, 4 L. ed. 202; *Brooks v. Norris*, 11 How. 204, 13 L. ed. 665; *Sarchet v. United States*, 12 Pet. 143, 9 L. ed. 1033; *Ballance v. Forsyth*, 21 How. 389, 16 L. ed. 143; *Walker v. Dreville*, 12 Wall. 440, 20 L. ed. 429; *Bondurant v. Watson*, 103 U. S. 278, 26 L. ed. 447; *Ex parte Ralston*, 119 U. S. 613, 30 L. ed. 506, 7 Sup. Ct. Rep. 317.

U. S. Rev. Stat. §§ 763, 764, allowing an appeal in habeas corpus proceedings, together with the amendment thereto of March 3, 1885, which was a substitution for the original § 764, were repealed by the act of March 3, 1891, establishing circuit courts of appeals, inasmuch as the entire appellate jurisdiction is by that act divided between this court and the circuit courts of appeal.

*McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

It is apparent that the circuit court of appeals act is the only act under which a review of a judgment of any district court could be had in this court. Before that act no case could come here directly from a district court.

*National Exchange Bank v. Peters*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 159 U. S. 698, 40 L. ed. 311, 16 Sup. Ct. Rep. 189; *Webster v. Daly*, 163 U. S. 155, 41 L. ed. 111, 16 Sup. Ct. Rep. 961.

The provision of the act of March 3, 1891, should be construed with reference to the



hitherto existing law and practice in cases of review where like words have been used.

*Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182.

Errors in pleading and practice in a habeas corpus proceeding are not assignable here.

*Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

Furthermore an application on information and belief is proper.

*Ex parte Lane*, 6 Fed. 34; Moore, Extradition, § 285.

The rule seems to be settled that the length of adjournment is within the discretion of the magistrate.

*Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369; *Re Farez*, 7 Blatchf. 35, Fed. Cas. No. 4,644.

An examining magistrate, such as a commissioner, is not a court in the real sense of that word. The commissioner who hears applications for extradition is in no sense trying the prisoners.

*Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42.

In *Re Kaine*, 14 How. 103, 14 L. ed. 345, the power of such commissioners was considered. In that case the commissioner acted under the same statute now called in question, and his action was sustained by the majority of the court, and the question of the power of the commissioner to act was upheld by the dissenting members of the court, but they held that the foreign minister must first make a demand for a warrant.

The power to pass this act grows out of and exists under the treaty clause of the Constitution.

*Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *United States v. Rauscher*, 119 U. S. 412, 30 L. ed. 426, 7 Sup. Ct. Rep. 234; *Re De Giacomo*, 12 Blatchf. 391, Fed. Cas. No. 3,747.

[373] \*Mr. Justice Brown delivered the opinion of the court:

1. Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the court of appeals act of 1891, provision was made for an appeal to the circuit court in habeas corpus cases "from the final decision of any court, justice, or judge inferior to the circuit court" (Rev. Stat. § 763); and from the final decision of such circuit court an appeal might be taken to this court. Rev. Stat. § 764, as amended March 3, 1885 (23 Stat. at L. 437, chap. 353).

The law remained in this condition until the court of appeals act of March, 1891 [26 Stat. at L. 828, chap. 517], was passed, the 5th section of which permits an appeal directly from the district court to this court "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." In this connection the appellee insists that an appeal will not lie, but that a writ of error

is the proper remedy. In support of this we are cited to the case of *Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182, in which \*the appellant was [374] convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an appeal was allowed in habeas corpus cases. The observation made in the *Bucklin Case*, that "there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error," may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued.

*Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Elciu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Gonzales v. Cunningham*, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182. As a construction of the extradition treaty with Great Britain is involved, the appeal was properly taken to this court.

2. The first assignment of error is to the effect that the commissioners issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by § 5270 of the Revised Statutes. The first two complaints, which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. Nor is it saved by the fact that Greer described himself as government detective for the province of Ontario and duly authorized by the Attorney General to act as the agent of the government to prosecute extradition proceedings. *Ex parte Smith*, 3 McLean, 121, 135, Fed. Cas. No. 12,968; *Ex parte Lane*, 6 Fed. Rep. 34; *Re J. L. Young Mfg. Co.* [1900] 2 Ch. 753.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this \*subject are singularly few, it is [375] clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. *Smith v. Luce*, 14 Wend. 237; *Re Bliss*, 7 Hill, 187; *Proctor v. Prout*, 17 Mich. 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts.



*Waddell v. Bruen*, 4 Edw. Ch. 671; *Armstrong v. Sanford*, 7 Minn. 49, Gil. 34.

We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the government for that purpose, and Rev. Stat. § 5271, makes special provision that in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence, of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions, which are admissible upon the hearing, should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, "in every case of complaint," seem to contemplate this very use of them. If the officer of the foreign

[376] government has no personal knowledge \*of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant.

But while, as already observed, the first count is bad by reason of its unsupported allegations upon information and belief, the second count contains a wholly different charge of larceny of a horse, cart, and harness; the third of breaking and entering a private bank in Aurora; and the fourth of breaking and entering a building in Toronto. Each of these counts charges a distinct offense, and each purports on its face to be made upon the personal knowledge of the complainant. While it is possible that he may have intended to make all these charges upon information and belief, the natural intendment of the last three counts is that the

affiant swore to facts within his personal knowledge. If it be true, as stated by writers upon criminal procedure (Bishop, Crim. Pro. § 429), that each count must be sufficient in itself, and averments in one cannot aid defects in another, it would seem to follow by parity of reasoning that defects in one ought not to impair the sufficiency of another. Upon the whole we think the complaint is sufficient.

3. By the second assignment, petitioners insist that the commissioner lost jurisdiction in the premises by continuing the proceedings from June 14 to June 25, a period of eleven days, in supposed violation of § 67, article 7, of chapter 79 of the Revised Statutes of Illinois, governing continuances by justices of the peace and examining magistrates, which enacts that "the justice before the commencement of the trial may continue the case *not exceeding ten days* at any one time on consent of the parties or on any good cause shown." It is insisted that this statute controls proceedings before commissioners of the United States in extradition cases, by virtue of the treaty and of the several acts of Congress prescribing the duties of commissioners. \*The treaty only provides [377] in art. 6 (26 Stat. at L. 1508, 1510), that "the extradition of fugitives under the provisions of this convention and of the said 10th article" (of the treaty of August 9, 1842) "shall be carried out in the United States and in Her Majesty's dominions respectively, in conformity with the laws regulating extradition, for the time being in force in the surrendering states." This evidently contemplates the laws of the United States regulating extradition, and has no reference whatever to the laws of the particular state within which the proceedings are taken.

Provision is made by Rev. Stat. § 627, for the appointment of commissioners of the circuit court (now called United States commissioners' act May 28, 1896, § 19, 29 Stat. at L. 140, chap. 252), who shall exercise such powers as may be conferred upon them. By Rev. Stat. § 727, they are vested with such authority "to hold to security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states in cases cognizable before them." This evidently defines the extent of their powers, and not the mode in which such powers are to be exercised. By § 1014 they are vested with the power to arrest, imprison, or bail offenders "for any crime or offense against the United States" "agreeably to the usual mode of process against offenders in such state," that is, the state wherein the offender "may be found." That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offenses against the United States, and, second, because it refers only to the usual mode of process against offenders in such state, and not to the incidents of the examination. To



hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular state would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses or the procurement of properly authenticated depositions for use upon the examination. Clearly there is nothing either

[378] in the treaty or the statutes \*requiring commissioners to conform to the state practice in that regard. The only requirement seems to be that arising from the 10th section of the Ashburton Treaty, that the fugitive shall only be surrendered "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

4. The fifth assignment questions the constitutionality of Rev. Stat. § 5270, first, because it does not provide for any mode of procedure relating to continuances, change of venue, bail, etc., before commissioners appointed in extradition matters; second, because Congress had no power to confer upon a district judge of the United States authority to create such inferior courts; third, because Congress has not created such court and established its jurisdiction. We are unable to appreciate the force of this objection. Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under art. 2, § 2, ¶ 2 of the Constitution, to invest the district or circuit courts with the power of appointment. The only qualification required of a commissioner to act in extradition cases is that suggested by Rev. Stat. § 5270, that he shall be "authorized so to do by any of the courts of the United States." We know of no authority holding that Congress may not vest the courts with this power, and we are reluctant to create one.

The other assignments question the power of the commissioner to deny bail, which becomes immaterial here, as well as the finding of the district judge upon the facts, which is not examinable upon a writ of habeas corpus. There is nothing, too, in the additional assignment that the commissioner took the matter under advisement and abused his discretion in the matter of continuance, of which we see no evidence.

There are also noticed in appellant's brief certain objections to the complaint, which might have been successfully urged against a formal indictment for the same offense, but which do not constitute "a plain error not assigned or specified," of which, under rule 21 of this court, subd. 4, we may take

[379] notice \*at our option in the absence of a special assignment. The technicalities of an indictment are not requisite in a complaint. *State v. Holmes*, 28 Conn. 230; *Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477; *Rawson v. State*, 19 Conn. 292; *Keeler v. Mill-edge*, 24 N. J. L. 142; *Williams v. State*, 88 180 U. S.

Ala. 80, 7 So. 101; *State v. McLaughlin*, 35 Kan. 650, 12 Pac. 32.

Petitioners have no just reason to complain of the action of the District Court in remanding them to the custody of the marshal, and its judgment is therefore affirmed.

JOSEPH WHELESS, William M. Reed,  
Halstead Burnet, et al., Appts.,  
v.

CITY OF ST. LOUIS et al.

(See S. C. Reporter's ed. 379-383.)

*Courts—amount to give jurisdiction—uniting claims.*

Distinct and separate interests of complainants in a suit for relief against assessments, whether they have been made or merely threatened, cannot be united for the purpose of making up the amount necessary to give jurisdiction to a circuit court of the United States.

[No. 161.]

*Argued January 31 & February 1, 1901.  
Decided February 25, 1901.*

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dismissing a bill for lack of jurisdiction. *Affirmed.*

See same case below, 96 Fed. Rep. 865.

Statement by Mr. Chief Justice Fuller:  
In this case the jurisdiction of the circuit court was in issue, and the question of jurisdiction was certified.

The question was whether the matter in dispute exceeded, exclusive of interest and costs, the sum of \$2,000. The circuit court held that jurisdiction did not exist, and dismissed the bill. 96 Fed. Rep. 865.

The suit was brought by Joseph Wheless and others against the city of St. Louis, the president of the board of public improvements \*of that city, and the Gilsonite Roofing & Paving Company, to restrain the city and the board from levying or assessing the costs and expenses of improving a public street whereon complainants' property abutted, against the property, and to enjoin the paving company from demanding or receiving from the city any special tax bills issued therefor. The certificate of the circuit court states the facts thus:

"That the above-entitled cause came on to be heard by the court at, to wit, the September, 1899, term of the court, upon the application for a temporary injunction, as prayed in the bill, it being alleged in said bill that complainants are severally the owners of certain and nearly all the lots of land

NOTE.—As to jurisdiction of United States circuit court as dependent upon amount—see *Auer v. Lombard*, 19 C. C. A. 72, and note; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

abutting on Whittier street, between Washington boulevard and Finney avenue, in the city of St. Louis; that the defendant city, acting under the provisions of its charter and ordinances, had entered into a contract with the defendant paving company to improve said street in front of complainants' property, and said company was engaged in doing the work, which was a public improvement; that the cost of making said improvement is, according to the terms of said charter, ordinance, and contract, a charge upon complainants' abutting property, and is about to be levied and assessed against it as a special tax, according to the frontage of said lots on said street, and special tax bills are about to be issued separately against each lot of complainants, which would be liens upon their said property and subject the same to being sold to satisfy said special assessment; which assessment and levy, it is averred, are in violation of complainants' rights under the Federal Constitution. Wherefore an injunction was prayed to restrain said city from levying and assessing the cost of said public improvement against complainants' property and from issuing special tax bills against them for the same, and for a decree declaring said charter, ordinance, and contract provisions void; that the cost of said improvement, which was about to be assessed and levied against all the abutting property, is largely in excess of the sum of \$10,000.

[381] "Defendants filed a plea to the jurisdiction of the court, supported by an affidavit showing that the amount of special tax which would be assessed and levied against the property of any \*one of the complainants severally would not exceed \$1,400, and would not be an amount equal to \$2,000, and that hence the matter in dispute between the parties was not of the sum or value necessary to give jurisdiction to the circuit court of the United States, and that the bill should be dismissed for want of jurisdiction.

"Complainants demurred to the said plea and submitted the question of jurisdiction thus raised to the determination of the court, and thereupon the court, after due hearing and consideration, did overrule said demurrer, the court being of the opinion, as set out in the written opinion filed in said cause and accompanying this appeal, that the court was without jurisdiction of said cause in respect of the sum or value in dispute, and upon complainants confessing the matter of the plea in point of fact and refusing to plead further, their said bill was by the court dismissed for want of jurisdiction."

Mr. Joseph Wheless argued the cause, and, with Mr. Minor Meriwether, filed a brief for appellants:

The matter in dispute in a suit in equity is the whole object sought by the decree. The value of that object is the "sum or value" of the "matter in dispute."

*Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Lee v. Watson*, 1 Wall. 337, 17 L. ed. 557; *Foster*, Fed. Pr.

§ 16; *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; *Estes v. Gunter*, 121 U. S. 183, 30 L. ed. 884, 7 Sup. Ct. Rep. 854; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; *Brown v. Trousdale*, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308; *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *The Connemara*, 103 U. S. 754, sub nom. *Sinclair v. Cooper*, 26 L. ed. 322; *The Mamie*, 105 U. S. 773, sub nom. *Parcher v. Cuddy*, 26 L. ed. 937; *Farmers' Loan & T. Co. v. Waterman*, 106 U. S. 265, 27 L. ed. 115, 1 Sup. Ct. Rep. 131; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547; *Symonds v. Greene*, 28 Fed. 834; *Whitman v. Hubbell*, 30 Fed. 81; *Smith v. Bivens*, 56 Fed. 352; *Herbert v. Rainey*, 54 Fed. 248; *Clapp v. Spokane*, 53 Fed. 515; *Dickinson v. Union Mortg., Bkg. & T. Co.* 64 Fed. 895; *Oleson v. Northern P. R. Co.* 44 Fed. 1; *Rainey v. Herbert*, 5 C. C. A. 183, 3 U. S. App. 592, 55 Fed. 443; *Simon v. House*, 46 Fed. 317; *Hoover & A. Co. v. Columbia Straw-Paper Co.* 68 Fed. 945; *Western U. Teleg. Co. v. Norman*, 77 Fed. 13; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 1; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Humes v. Ft. Smith*, 93 Fed. 857.

In cases where several parties are joined in one suit, seeking a common remedy or contesting a like liability, the test of jurisdiction is whether the interest or liability of each is separate and distinct, or whether they have a common and mutual interest in the whole of the relief sought, joint as against the party opposed, though unequal or separable among themselves.

*Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4.

If the whole relief sought is one and entire against the party opposed, and he has no interest or concern in any ultimate separability or distribution of benefit among the parties joined, he cannot object to the jurisdiction that, as between themselves, the "matter in dispute" is separable. As to him it is one.

*Shields v. Thomas*, 17 How. 3, 15 L. ed. 95; *The Connemara*, 103 U. S. 754, sub nom. *Sinclair v. Cooper*, 26 L. ed. 322; *Freeman v. Dawson*, 110 U. S. 264, 28 L. ed. 141, 4 Sup. Ct. Rep. 94; *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603.

It is the direct and immediate relief sought,—the present object of the decree,—and not any mediate or collateral relief, or incidental effect or result of the decree,



which is the object of suit and determines the jurisdiction.

*Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Clay Center v. Farmers' Loan & T. Co.* 145 U. S. 224, 36 L. ed. 685, 12 Sup. Ct. Rep. 817; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066.

Mr. B. Schnurmacher appeared for appellees, but the court did not desire to hear argument on that side. Messrs. Charles Claflin Allen and Edward C. Kehr were with him on the brief:

Where the interests are distinct, and they are joined for convenience only and because they form a class of parties whose rights or liabilities arise out of the same transaction, or because they have some relation to a common fund or mass of property sought to be administered, the distinct demands or liabilities cannot be united for the purpose of giving jurisdiction, but each must stand or fall by itself alone.

*Oliver v. Alexander*, 6 Pet. 143, 8 L. ed. 349; *Rich v. Lambert*, 12 How. 352, 13 L. ed. 1017; *Seaver v. Bigelow*, 5 Wall. 208, 18 L. ed. 595; *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *Fishback v. Western U. Teleg. Co.* 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Sioux Falls Nat. Bank v. Swenson*, 48 Fed. 621; *Holt v. Bergevin*, 60 Fed. 1; *Putney v. Whitmire*, 66 Fed. 385; *Busey v. Smith*, 67 Fed. 13; *Smithson v. Hubbell*, 81 Fed. 593.

The distinct and separate interests of claimants in a suit for relief against assessments cannot be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.

*Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989.

[381] \*Mr Chief Justice Fuller delivered the opinion of the court:

The bill alleged that defendants were about, under the charter of the city of St. Louis, and the ordinance authorizing and directing the improvement in question, to impose the cost thereof upon the several lots of ground adjoining the improvement, in the proportion that the frontage of each lot bore to the total frontage thereon. And it was admitted that the various lots of land threatened with assessment were owned in severalty; that no one complainant was in-

terested in the lot of any other; and that the assessment against no one lot would amount to \$2,000. \*We think that the circuit court [382] rightly held that it was without jurisdiction under the circumstances. The general rule was thus stated by Mr. Justice Bradley in *Clay v. Field*, 138 U. S. 464, 479, 34 L. ed. 1044, 1049, 11 Sup. Ct. Rep. 419, 425: "The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered; such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

Accordingly it has often been held that the distinct and separate interests of complainants in a suit for relief against assessments cannot be united for the purpose of making up the amount necessary to give this court or the circuit court jurisdiction. *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348.

The "matter in dispute" within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation; as, for instance, in this suit the amount of the assessment levied or which may be levied, as against each of the complainants separately. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected or relieved in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment each of the complainants would be relieved from payment of less than \$2,000. If the assessment were sustained, neither of them would be compelled to pay so much as that.

It is true that the assessment has not been made, but the charge is that it is threatened to be made, and the purpose of \*the bill is [383] to enjoin proceedings about to be taken to that end. We agree with the circuit court that in these circumstances there is no force to the suggested distinction between a case where the assessment has not in fact been made and a case where it has already been made. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of \$2,000 nor will any one of the lots be assessed to that amount.

Decree affirmed.

CLARENCE W. HOBBS *et al.*, *Petitioners*,  
v.

FRED H. BEACH.

(See S. C. Reporter's ed. 383-401.)

*Patents—for machines to make paper boxes—device for pasting strips on corners—anticipation—reissue—amending claims—infringement—effect of words “substantially as described.”*

1. The Beach reissued patent No. 11,167, for a machine for attaching stays to the corners of boxes, was not anticipated by the Denna and York addressing machine for pasting printed addresses upon newspapers, although the change necessary to make the Beach machine was merely to make the addressing machine much heavier and stronger, and to substitute clamping dies with diverging faces in place of the flat head and platen of the addressing machine, since this change had not previously occurred to anyone engaged in the manufacture of paper boxes, though the addressing machine had been for many years upon the market; nor is this Beach patent anticipated by the Cohn patent, the Lieb patent, or the English patent to Hadden, covering machines for stitching wire or attaching metallic stays, which have clamping dies with diverging faces, but lack most of the other elements of the Beach patent; nor is it anticipated by the Maxfield and Terry patents for making paper boxes, which relate to mechanism for pressing a strip of glued paper upon the edge of circular collar boxes at the junction of the bottom and sides or rim, so, as to form a union of the circular end with the cylindrical side of the box, as the operation of these machines seems to be only partly mechanical, and differs widely from the Beach patent.

2. The 6th claim of the Beach reissued patent No. 11,167, for a machine to attach stays to the corners of boxes, introduces a novel and patentable feature, which consists of making one of the opposing clamping dies having diverging faces elastic, so as to enable the dies to operate upon box corners of different thicknesses.

3. The reissue of a patent merely to correct an obvious error in one of the drawings is within the jurisdiction of the Commissioner of Patents, although the error is not such as would impair the patentee's rights under his original design, where the application for the reissue is made in good faith and with a design only of securing to the patentee what he has actually invented.

4. Amendments of the claim of a patent to correct defects in the original application,

NOTE.—On *anticipation of patents*—see notes to *Leggett v. Standard Oil Co.* 37 L. ed. U. S. 737, and *Wollensak v. Sargent*, 38 L. ed. U. S. 138.

On *patentability of invention*—see notes to *Thompson v. Boisselier*, 29 L. ed. U. S. 76; *Corning v. Burden*, 14 L. ed. U. S. 683; *Grant v. Walter*, 37 L. ed. U. S. 553; *Wollensak v. Sargent*, 38 L. ed. U. S. 138; *Market Street Cable R. Co. v. Rowley*, 39 L. ed. U. S. 285, and *Dashleil v. Grosvenor*, 40 L. ed. U. S. 1025.

As to the *validity of the reissue of a patent*—see note to *National Meter Co. v. Yonkers Water Comrs.* 37 L. ed. U. S. 644.

On *what constitutes infringement of patent*—see notes to *Royer v. Coupe*, 36 L. ed. U. S. 1073, and *Dashleil v. Grosvenor*, 40 L. ed. U. S. 1025.

which have been discovered in the course of litigation, will not invalidate the patent, if this is not essentially broadened thereby to cover intervening devices.

5. A patent for an invention does not expire at the same time with a foreign patent for the same invention, by force of U. S. Rev. Stat. § 4887, unless the foreign patent was obtained by the American patentee or with his consent.

6. The words “substantially as described or set forth,” in the claim of a patent, do not limit the patentee to the exact mechanism described in his specifications, or prevent recovery against infringers who have adopted mechanical equivalents for such mechanism.

7. The Horton patented machine for applying stays to box corners is an infringement of the Beach reissued patent No. 11,167, as it accomplishes the same result by the employment of the same combination of the same elements, though it introduces the strip to be pasted on the corner of the box by a back feed on a line parallel to the line of the box corner, instead of by a side feed as in the Beach machine, and containing no mechanism for turning the strip into the inside of the corner, as does the Beach machine.

[No. 139.]

*Argued January 16, 17, 1901. Decided March 5, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the First Circuit to review a decision reversing a decree of the Circuit Court on a bill for infringement of patent. *Affirmed.*

See same case below, 34 C. C. A. 248, 63 U. S. App. 626, 92 Fed. Rep. 146.

Statement by Mr. Justice **Brown**:

This was a bill in equity by Fred H. Beach against Clarence W. Hobbs and Richard Sugden, now deceased (whose estate is \*rep-[384] resented by his executors), doing business under the name of the Hobbs Manufacturing Company, for an injunction and a recovery of damages for the infringement of reissued letters patent No. 11,167, dated May 26, 1891, for a “Machine for Attaching Stays to the Corners of Boxes.”

In his specification the patentee makes the following statements:

“That it has been customary heretofore in making paper or straw-board boxes to apply a stay or fastening strip over the joints at the corners of the boxes, which strip is pasted down on the outside of the box or is folded over the edge of the box and secured by paste both outside and inside of the corner; and such work, as far as I am aware, has heretofore been done by hand.”

“My invention relates to a machine for doing this work; and it consists in the matters hereinafter set forth, and pointed out in the appended claims.”

Following are fifteen drawings of the machine and distinct portions thereof, and a minute description of the same. The patentee continues:

“The machine herein shown is, as hereinbefore stated, constructed to turn into the inside of the box the projecting end of the



stay, and for this purpose the stay-strip is made of such width, and its guides are so arranged, that the inner edge of the strip extends over or past the edge of the box-wall, so that when the stay is pasted down on the outside of the box-corner, a loose or free end projects outward beyond the inner edge of the box. After the plunger G has pressed the stay upon the box the secondary plunger or strip-bender H then descends and bends or turns this loose end vertically downward."

"In many boxes the stay is simply pasted against the exterior surface of the box-corner, and is not turned in or over the edge of the same; in which case the work can be done by using a nonreciprocating angular lower die, or anvil, and a single upper die or plunger. In such case the form B will obviously be not necessary as a part separate from the die; or, in other words, a single lower die or form will take the place of the form B and movable lower die I."

[385] "As far as the main features of my invention are concerned, forms other than those illustrated of the several parts of the machine may be employed without departure from my invention—as, for instance, in place of the particular mechanism shown for feeding or delivering fastening-strips or stay-strips to and between the clamping dies, or for applying paste or glue to the said stay-strips, other forms of strip-feeding and pasting devices may be used in practice with the same general result, as above described."

The following are the claims alleged to have been infringed by the defendants:

"1. The combination, with opposing clamping-dies, having diverging working faces, of a feeding mechanism constructed to deliver stay-strips between said clamping-dies, and a pasting mechanism for rendering adhesive the stay-strips, said clamping-dies being constructed to co-operate in pressing upon interposed box-corners the adhesive stay-strips, substantially as described.

"2. The combination, with opposing clamping-dies, having diverging working faces, said clamping-dies being arranged to co-operate in pressing adhesive fastening strips upon interposed box-corners, a feeding mechanism constructed to feed forward a continuous fastening-strip, and a cutter for severing the said continuous strip into stay-strips of suitable lengths, substantially as described.

"3. The combination, with opposing clamping-dies, having diverging working faces, said clamping-dies being arranged to co-operate in pressing an adhesive fastening-strip upon the corner of an interposed box, a feeding mechanism constructed to feed between the dies a continuous fastening-strip, a pasting mechanism for applying adhesive substance to the strip, and a cutter for severing the strips into stay-strips of suitable lengths, substantially as described."

"6. The combination of opposing clamping-dies having diverging working faces constructed to co-operate in pressing an adhesive stay-strip upon an interposed box-corner, one of said clamping-dies being constructed to act with an elastic or yielding

pressure to enable the dies to operate upon the box-corners of different thicknesses, substantially as described."

\*Upon a hearing, upon pleadings and [386] proofs, the case resulted in a decree in favor of the plaintiff Beach upon the 6th claim, and a further finding that the 1st, 2d, and 3d claims had not been infringed. 82 Fed. Rep. 916.

Both parties appealed to the circuit court of appeals, which reversed the decree of the circuit court with respect of the first three claims of the patent, and affirmed it as to the 6th claim, and remanded the case for further proceedings in conformity with the opinion. 34 C. C. A. 248, 63 U. S. App. 626, 92 Fed. Rep. 146.

Mr. Samuel T. Fisher argued the cause, and, with Mr. Edward S. Beach, filed a brief for petitioners:

The reissue in suit is invalid because issued without statutory warrant and in violation of the reissue statute. A draughtsman's error cannot militate against a patent.

*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 59 Fed. 903; *Giant Powder Co. v. California Vigorit Powder Co.* 6 Sawy. 508, 4 Fed. 720.

It is not for courts to tamper with the words of a statute.

*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508. See also *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; Walker, Patents, §§ 221 et seq.

The Jaegar British patent was in law a prior patent to Beach's original patent, for the reason that it was applied for and issued during the pendency of Beach's original patent application.

*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

There are no words in U. S. Rev. Stat. § 4887, that will justify the court in holding that an invention patented in a foreign country before being patented here is to be exempt from the operation of a provision limiting the term of the American patent to expire with the foreign patent.

*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

In patents for combinations of mechanism, limitations and provisos imposed by the inventor—especially such as were introduced into an application after it had been persistently rejected—must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.

*Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 29 L. ed. 67, 5 Sup. Ct. Rep. 1021; *New York Belting & Packing Co. v. Sibley*, 15 Fed. 389; *Boyden Power-Brake Co. v. Westinghouse Air-Brake Co.* 17 C. C. A. 440, 25 U. S. App. 475, 70 Fed. 816; *Beale v. Spate*, 74 Fed. 869; *Corn-Planter Patent*, 23 Wall. 181, sub nom. *Brown v. Guild*, 23 L. ed. 161; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627.

A machine patent is not to be interpreted as for a function.

*Boyden Power-Brake Co. v. Westinghouse Air-Brake Co.* 17 C. C. A. 440, 25 U. S. App. 475, 70 Fed. 816.

It does not require invention to make dies of any particular shape.

*Butler v. Steelkel*, 137 U. S. 29, 34 L. ed. 585, 11 Sup. Ct. Rep. 25, and cases cited.

Where the combination is not only of old elements, but of old results, and no new function is involved by such combination, it is not patentable.

*Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.* 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641.

The thing operated on is not an element of a combination.

*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 431, 38 L. ed. 503, 14 Sup. Ct. Rep. 627.

Interchangeability or noninterchangeability is an important test in determining the question of infringement.

*Miller v. Eagle Mfg. Co.* 151 U. S. 208, 38 L. ed. 138, 14 Sup. Ct. Rep. 310; *Prouty v. Ruggles*, 16 Pet. 336, 10 L. ed. 985; *Brooks v. Fiske*, 15 How. 212, 14 L. ed. 665; *Eames v. Godfrey*, 1 Wall. 78, 17 L. ed. 547.

Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has in the meantime gone into public use.

*Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. ed. 1053; *Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 111 U. S. 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 593.

Function must be performed in substantially the same way by an alleged equivalent as by the thing of which it is alleged to be an equivalent, in order to constitute it such.

*Burr v. Duryee*, 1 Wall. 573, 17 L. ed. 658; *Werner v. King*, 96 U. S. 230, 24 L. ed. 614; *Dryfoos v. Wicse*, 124 U. S. 37, 31 L. ed. 364, 8 Sup. Ct. Rep. 354; *Forncrook v. Root*, 127 U. S. 181, 32 L. ed. 99, 8 Sup. Ct. Rep. 1247; *Sargent v. Burgess*, 129 U. S. 19, 32 L. ed. 604, 9 Sup. Ct. Rep. 220; *Siekels v. Borden*, 3 Blatchf. 535, Fed. Cas. No. 12,832; *Peard v. Johnson*, 23 Fed. 509; *Tondue v. Chambers*, 37 Fed. 337; *Pacific Cable R. Co. v. Butte City Street R. Co.* 58 Fed. 420.

Neither primary nor secondary patents are infringed by any substitutions that do not fully respond to two tests, (1) identity of function; (2) substantial identity of way of performing that function.

*Walker, Patents*, § 352; *Steam Gauge & Lantern Co. v. Rogers*, 29 Fed. 453; *Clark v. Wilson*, 30 Fed. 373; *Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co.* 36 Fed. 195; *Harmon v. Struthers*, 43 Fed. 443.

That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other.

*Burr v. Duryee*, 1 Wall. 531, 17 L. ed. 650.

If the ingredient substituted in defendant's machine was a new one, or performs a substantially different function, or was not known at the date of plaintiff's patent as a proper substitute for the one omitted from his patented combination, the defendant does not infringe.

*Career v. Hyde*, 16 Pet. 514, 10 L. ed. 1051; *Vance v. Campbell*, 1 Black, 427, 17 L. ed. 168; *Roberts v. Harnden*, 2 Cliff. 504, Fed. Cas. No. 11,903; *Mabie v. Haskell*, 2 Cliff. 511, Fed. Cas. No. 8,653; *Brooks v. Fiske*, 15 How. 219, 14 L. ed. 665; *Prouty v. Ruggles*, 16 Pet. 341, 10 L. ed. 987; *Barrett v. Hall*, 1 Mason, 477, Fed. Cas. No. 1,047; *Howe v. Abbott*, 2 Story, 194, Fed. Cas. No. 6,766; *Fuller v. Yentzer*, 94 U. S. 299, 24 L. ed. 107; *Gould v. Rees*, 15 Wall. 193, 21 L. ed. 41.

*Mr. John Dane, Jr.*, argued the cause and filed a brief for respondent:

The combination of elements embraced in the 1st, 2d, 3d, and the 6th claims of the Beach patent, being new, useful, and almost indispensable in the paper-box-making business, the structures constituting the inventions are clearly patentable, are not anticipated, and the claims are therefore good and valid.

*Barbed Wire Patent*, 143 U. S. 283, *sub nom. Washburn & M. Mfg. Co. v. Beat 'em All Barbed Wire Co.* 36 L. ed. 158, 12 Sup. Ct. Rep. 443, 450; *Gandy v. Main Belling Co.* 143 U. S. 594, 36 L. ed. 276, 12 Sup. Ct. Rep. 598; *Kremnitz v. S. Cottle Co.* 148 U. S. 560, 37 L. ed. 559, 13 Sup. Ct. Rep. 719; *C. & A. Potis & Co. v. Creager*, 155 U. S. 609, 39 L. ed. 279, 15 Sup. Ct. Rep. 194; *Du Bois v. Kirk*, 158 U. S. 63, 39 L. ed. 898, 15 Sup. Ct. Rep. 729.

The feed of defendant's machine is the equivalent of that described in the Beach patent.

*Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; *Miller v. Eagle Mfg. Co.* 151 U. S. 207, 38 L. ed. 130, 14 Sup. Ct. Rep. 310; *Foster v. Moore*, 1 Curt. C. C. 291, Fed. Cas. No. 4,978; *Carter v. Baker*, 4 Fish. Pat. Cas. 409, Fed. Cas. No. 2,472; *Johnson v. Root*, 1 Fish. Pat. Cas. 363, Fed. Cas. No. 7,411.

The words "substantially as described," in the claims of the Beach patent, do not impose limitations that justify the court in not including the combinations of defendant's machines, for they contain all of the factors of the Beach combination, in the same arrangement, for the same purposes, and they accomplish the same results.

*Telephone Cases*, 126 U. S. 537, 31 L. ed. 990, 8 Sup. Ct. Rep. 778; *Corn-Planter Patent*, 23 Wall. 181, *sub nom. Brown v. Guild*, 23 L. ed. 161; *Metallie Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 350.

The words "substantially as described," whether added to the word "mechanism," or otherwise, do not limit the Beach claims as contended by petitioners. The rules laid down by this and other courts are counter to their contention.

*Waterbury Brass Co. v. Miller*, 9 Blatchf. 92, Fed. Cas. No. 17,254; *Clough v. Gilbert*



& *B. Mfg. Co.* 106 U. S. 171, 27 L. ed. 136, 1 Sup. Ct. Rep. 188; *National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 559, 3 U. S. App. 340, 53 Fed. 367; *Wheeler v. Clipper Mower & Reaper Co.* 10 Blatchf. 181, Fed. Cas. No. 17,493.

The claims are not to be limited to an extent that will permit defendants to escape the charge of infringement as urged by petitioners.

*Telephone Cases*, 126 U. S. 537, 31 L. ed. 990, 8 Sup. Ct. Rep. 778; *McCormick v. Talcott*, 20 How. 402, 15 L. ed. 930; *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. ed. 1053; *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; *Metallic Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 350.

The 1st claim of the Beach patent is for an operative combination of factors in an entirely new arrangement, serving a useful purpose in a mechanical operation never before attained by a machine; therefore patentable.

*Hancock Inspirator Co. v. Jenks*, 21 Fed. 915; *Furbush v. Cook*, 2 Fish. Pat. Cas. 668; *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26 L. ed. 1177; *Holloway v. Dow*, 54 Fed. 516; *Bresnahan v. Tripp Giant Leveller Co.* 43 C. C. A. 48, 102 Fed. 900.

G. L. Jaeger and M. D. Knowlton, who applied for and took out English patents, were parties to the interference proceedings in the United States patent office, and priority of invention was declared in favor of Mr. Beach against both; and the fact that the Jaeger English patent has lapsed cannot possibly affect the rights of Beach under his patent in the United States.

*Kendrick v. Emmons*, 2 Bann. & Ard. 210, Fed. Cas. No. 7,695.

A patentee on finding the descriptive parts of the patent defective and erroneous in essential features is bound (in justice to the public) to correct the errors by reissue.

*Mahn v. Harwood*, 112 U. S. 362, 28 L. ed. 668, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451.

Where the drawings and models exhibit matters set out in the amended specifications, it is proper to include them; and the privilege of amending the specifications to this extent continues so long as the application is pending.

*Singer v. Braunsdorf*, 7 Blatchf. 521, Fed. Cas. No. 12,897. See also *Godfrey v. Eames*, 1 Wall. 317, 17 L. ed. 684; *Hayden v. Suffolk Mfg. Co.* 4 Fish. Pat. Cas. 86, Fed. Cas. No. 6,261, 3 Wall. 315, 18 L. ed. 76.

The combinations specified which compose the 1st, 2d, 3d, and 6th claims of the Beach patent are not aggregations, but, on the contrary, such as coact in their new relations in such a manner that each factor qualifies the other, and together perform results not before attained, said results being due to the joint and co-operative action of all the elements, and therefore patentable and valid.

*Pickering v. McCullough*, 104 U. S. 318, 26 L. ed. 751.

The claims in the present instance are not to be restricted or limited to a scope narrow-  
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er than implied by their language and the rules defined by the courts in cases where patents are granted for the original and the first invention in a wholly new art. The claims in this case should be given the scope that their language implies. The specification justifies it.

*Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; *Providence Rubber Co. v. Goodyear*, 9 Wall. 793, 19 L. ed. 567; *Winans v. Denmead*, 15 How. 341, 14 L. ed. 721; *O'Reilly v. Morse*, 15 How. 123, 14 L. ed. 627.

The combinations described in the 1st, 2d, 3d, and 6th claims of the Beach patent are new, useful, and the embodiment of great utility and value, and, although apparently simple after Beach disclosed them, have wrought most desirable and beneficial results in the box-making business, and are therefore patentable.

*Barbed Wire Patent*, 143 U. S. 283, *sub nom. Washburn & M. Mfg. Co. v. Beat 'em All Barbed Wire Co.* 36 L. ed. 158, 12 Sup. Ct. Rep. 443, 450; *Gandy v. Main Belting Co.* 143 U. S. 594, 36 L. ed. 276, 12 Sup. Ct. Rep. 598; *Krementz v. S. Cottle Co.* 148 U. S. 560, 37 L. ed. 559, 13 Sup. Ct. Rep. 719; *C. & A. Potts & Co. v. Creager*, 155 U. S. 609, 39 L. ed. 279, 15 Sup. Ct. Rep. 194; *Du Bois v. Kirk*, 158 U. S. 63, 39 L. ed. 898, 15 Sup. Ct. Rep. 729.

Beach was in fact the first person to contrive and produce a machine for the work of applying stay strips of paper and other fibrous materials to and upon the corners of paper boxes, consisting of the new employment of principles or powers in a new mode of operation, embodied in a form by means of which a new result is produced. Therefore he was a pioneer and the first in a new art created by himself, and consequently entitled to a broad scope for his claims.

*O'Reilly v. Morse*, 15 How. 62, 14 L. ed. 601; *American Whip Co. v. Lombard*, 3 Bann. & Ard. 319, Fed. Cas. No. 319; *Union Paper-Bag Mach. Co. v. Murphy*, 97 U. S. 123, 24 L. ed. 935; *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; *National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 559, 3 U. S. App. 340, 53 Fed. 372; *Winans v. Denmead*, 15 How. 343, 14 L. ed. 722.

A pioneer in the art, whose invention goes into universal use, will receive for his patent a broad and liberal construction.

*Sessions v. Romadka*, 145 U. S. 44, 36 L. ed. 615, 12 Sup. Ct. Rep. 799.

A pioneer is entitled to a generic claim under which will be included every species included within the genus. In addition to such generic claim he may include in the same application specific claims for one or more of the species.

*Von Schmidt v. Bowers*, 25 C. C. A. 348, 48 U. S. App. 120, 80 Fed. 121, and cases cited.

Domestic patents do not expire with the expiration of a foreign patent which has lapsed for nonpayment of annuities.

*Pohl v. Anchor Brewing Co.* 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577; *Wels-*

*bach Light Co. v. Apollo Incandescent Gas-light Co.* 37 C. C. A. 508, 96 Fed. 332; *Huber v. Nelson Mfg. Co.* 148 U. S. 274, 37 L. ed. 448, 13 Sup. Ct. Rep. 603; *Paillard v. Bruno*, 29 Fed. 864; *Pohl v. Heyman*, 58 Fed. 568; *Diamond Match Co. v. Adirondack Match Co.* 65 Fed. 803.

[386] \*Mr. Justice **Brown** delivered the opinion of the court:

The art of making paper boxes requires that the better class of square or other angular shapes be stayed or reinforced at the corners, where a union of the sides and ends is to be brought about by the application of adhesive strips of paper or muslin placed upon the joints, and the corners thereby strengthened, before receiving their final covering of paper. Prior to the Beach invention, the work of thus strengthening the corners of paper boxes by these adhesive strips had always been performed in a tedious and irregular way by hand.

The Beach machine and its operation are thus described by the plaintiff's expert:

"The machine consists of an anvil or lower die, having at the upper portion two working faces which diverge downward from one another at a right angle. Working in connection with this anvil or die, and above it, is a vertical movable die or plunger, having also two diverging working faces, the working faces of the plunger forming a notch therein, which notch co-operates with the upper portion of the lower anvil or die, the dies being adapted to operate upon the right-angle corner of a box to compress the said [387] corner between the working faces of \*the opposing dies. A strip of paper suitable for the stay is fed by automatically moving mechanism over a pasting device, and between a pair of shears, and thence between the upper and lower die when separated. The operation of the machine briefly described is as follows: A box whose corner is to be strengthened by the addition of a stay-strip is placed upon the lower anvil or die, the inside of the corner of the box resting upon the apex of the lower die. The machine as it is revolved then feeds forward the stay-strip which has the paste upon it, and as the upper die descends the shears also operate, severing from the continuous stay-strip a portion sufficient for the stay. As the cutting operation is completed the upper die or plunger is descending, and forces the gummed stay-strip into position upon the outside of the box-corner, and the stay-strip and box corner are pressed between the working faces of the two opposing dies, and thus the stay-strip is caused to conform to and be stuck upon the corner of the box. When the upper die or plunger rises, the box with its attached stay-strip can be removed and another corner presented, when the operation will be repeated. The upper die or plunger is provided with a spring of rubber or metal, so that it may yield slightly in the direction of its motion, so that it may give an elastic pressure upon the box, and also be made to operate upon different thicknesses of box or stay-strips."

"Briefly, this description describes the machine, so far as it is necessary to describe the same for the purposes of this case. I must state, however, that the machine is also arranged to fold in the end of the stay-strip within and into the interior of the box, and this it accomplishes by having the lower die longitudinally movable, and by supporting the box upon both the working faces of the lower die and upon the faces of the block within which the lower die can move. The faces of the upper portion of the die and of the block are arranged so that they form two planes at right angles to one another, the planes of the upper working faces of the die corresponding with the planes of the upper faces of the block. I refer to this capacity of the machine merely for the purpose of showing that I have considered the same, but such capacity, that is, the ability to turn the end of \*the stay-strip in and over the edge [388] of the box, is not a feature of the machine which need always be present. I quote as follows from the specification of the patent:

"In many boxes, the stay is simply pasted against the exterior surface of the box-corner, and is not turned in or over the edge of the same, in which case the work can be done by using a nonreciprocating angular lower die or anvil, and a single upper die or plunger."

"From the above quotation it will be clearly evident that the patentee contemplated using his machine in the simple form in which I have described it, and divested of that mechanism which is involved when the stay-strip is turned over the edge of the box and into the same. As the issue in this case involves a mechanism which does not turn the stay-strip over and into the box, I have deemed it best not to put into the record a description of the mechanism necessary to accomplish that result."

The 1st claim of the patent is for (1) two opposing clamping-dies, having diverging working faces; (2) a feeding mechanism which delivers the stay-strip between the clamping-dies, when the upper die is raised; and (3) a pasting mechanism. The clamping-dies are so constructed as to co-operate with one another in pressing upon interposed box-corners the adhesive stay-strips, substantially as described.

The 2d claim also includes the opposing clamping-dies with diverging working faces; the same feeding mechanism, and a cutter for severing the continuous strip into stay-strips of suitable length, substantially as described.

The 3d claim includes the same dies, the feeding mechanism, the pasting mechanism, and the cutter; in short, a combination of all the elements of the two preceding claims.

The 6th claim includes the same clamping-dies having the diverging working faces, one of which clamping-dies is constructed to act with an elastic or yielding pressure, to enable the dies to operate upon box-corners of different thicknesses.

1. The first three claims were vigorously assailed by the defense upon the ground that, in view of the prior state of the art.



they involved no invention. Unfortunately, [389] however, this \*defense comes to us so loaded down with adverse decisions that we should hesitate to sustain it, unless it were made clear that, through some misunderstanding or omission, it had not been fully presented to the various tribunals which had passed upon it, or that their rulings had been based upon a misapprehension of the facts.

The proofs show that Mr. Beach made application for his patent in June, 1885; that while pending in the Patent Office it was placed in interference with five other claims, and that the patentee was awarded priority of invention by the examiner of interferences, by the board of examiners-in-chief on appeal, and finally by the Commissioner of Patents. It also appears that, in a suit in the northern district of New York, defended by two of the contestants in the interference proceeding, these three claims were sustained by the circuit court (*Beach v. American Box-Mach. Co.* 63 Fed. Rep. 597), and on appeal, by the circuit court of appeals for the second circuit. 18 C. C. A. 165, 35 U. S. App. 667, 71 Fed. Rep. 420. Nor do we understand that in the case under consideration the circuit court for the district of Massachusetts differed from the New York courts as to the validity of the first three claims. Indeed, the learned circuit judge says expressly: "On the questions of anticipation and the state of the art, we therefore follow the conclusions of the circuit court of appeals for the second circuit." The difference between him and the circuit court of appeals, to which this case was carried, related to the proper construction of these claims, and to the question of their infringement. Of course, we are bound to give to this question of anticipation an independent consideration. At the same time, we feel ourselves bound to defer somewhat to this unanimity of opinion upon the part of so many learned and distinguished judges, whose lives have been largely devoted to the examination of patent causes.

Taking up these prior patents, our attention is at once challenged to the fact that none of them covers a machine for attaching paper or muslin stays to the corners of boxes; and the question arises whether the uses to which these machines are adapted are so nearly analogous to the use made of [390] them by \*Beach that the applicability of the old device to the new use would occur to a person of ordinary mechanical skill, within the case of *Potts v. Creager*, 155 U. S. 597, *sub nom. C. A. Potts & Co. v. Creager*, 39 L. ed. 275, 15 Sup. Ct. Rep. 194, in which we said (p. 608, L. ed. p. 279, Sup. Ct. Rep. p. 199): "If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produces a new result, it may at least involve an exercise of the inventive faculty."

It is sufficient to observe of the patents to Cohn, of 1874, to Lieb, of 1880, and of the 180 U. S.

English patent to Hadden, of 1884, that they cover machines for stitching wire or attaching metallic stays, and that, while all three of them have the clamping-dies with diverging faces, they lack most of the other elements of the first three claims of the Beach patent. The possibility of adapting these devices to the attaching of gummed strips to the corners of paper boxes might occur to an ordinary mechanic, but could scarcely be carried into effect without the employment of something more than mechanical skill.

Most of the other prior patents relate to machines for making paper tags, wherein a piece or patch is gummed or cemented to the side of the tag to strengthen it; to preparing paper for covering paper boxes; to covering such boxes with pasted paper; to machines for making match or other paper boxes; forming heel stiffeners; shaping or working sheet metals, or addressing machines.

The only patents requiring special notice are the Maxfield and Terry patents for making paper boxes, which relate to mechanism for pressing a strip of glued paper upon the edge of circular collar boxes at the junction of the bottom and sides, or rim, so as to form a union of the circular end with the cylindrical side of the box. The operation of the machines seems to be only partly mechanical, and differs so widely from the Beach patent that they can hardly be seriously insisted upon as anticipating it. It would seem from the specifications that a great part of the work is done by hand; indeed, in the Terry patent, it is said "that the invention connects the circular parts with the strips, said parts forming the tops and bottoms and \*sides of boxes; the remaining work, such as the pasting of the strip [391] in one part, being done by hand, as also the covering of the boxes, if desired, with colored paper." The machine is in no sense automatic, and if it were, its functions are so different from those of the Beach device it is clearly no anticipation.

None of these patents approximates so nearly to the Beach patent as that of Dennis and York's addressing machine, which was the only one deemed worthy of special notice in the courts below. This relates to "addressing machines in which a strip of paper, with the addresses printed thereon, is run through the machine, the addresses cut off in slips, and automatically affixed to the newspapers, envelopes, or other articles by a descending knife and platen." The object of the invention is stated to be "to change or adjust the feed automatically by the running of the machine itself so that addresses of greater or less width can be cut accurately without attention of the operator, the machine adjusting itself accurately to the work to be done; and, second, to enable the addresses to be affixed to single sheets beneath the platen." The machine has a feeding, pasting, and cutting mechanism, combined with a vertical reciprocating plunger armed at its lower end with a knife to cut off the addresses, and descending with a flat head upon a flat platen, a newspaper being



interposed between. The bed on which the papers rest is called a "follower," and instead of being rigid, is supported upon light, coiled springs, and by lever action, so that it will move up and down freely and produce just enough pressure under all circumstances to receive the pasted slip upon the upper sheet. Being designed for light work it is not built with the solidity required for pasting strips upon boxes, and in other particulars differs from the Beach device.

In its operation it approaches much more nearly to the Beach device than any other which has been put in evidence, and we agree with the circuit court of northern New York that, if this be not an anticipation, none of the others are. By changing the flat head and the flat platen to clamping dies with diverging faces, and strengthening and changing the machine in some minor particulars, [392] it could be used to fasten stay-strips \*to box corners. Indeed, a model of the Dennis and York machine so altered was put in evidence, and shown to be capable of doing the work of the Beach patent, though somewhat crudely and imperfectly. It is insisted that, as the only material change in the Dennis and York machine is the substitution of dies with diverging faces for the flat head and platen of that structure, this involves no invention, and that it would at once occur to a mechanic of ordinary skill.

It appears from the testimony that several of these addressing machines, of which that of Dennis and York is a type, and which are now claimed to have inspired the Beach patent, had been upon the market for many years, and yet it never seems to have occurred to anyone engaged in the manufacture of paper boxes that they could be made available for the purpose of attaching strips to the corners of such boxes. This very fact is evidence that the man who discovered the possibility of their adaptation to this new use was gifted with the prescience of an inventor. While none of the elements of the Beach patent—taken separately or perhaps even in a somewhat similar combination—was new, their adaptation to this new use and the minor changes required for that purpose resulted in the establishment of practically a new industry, and was a decided step in advance of any that had heretofore been made.

We agree that if the Dennis and York machine were designed for the purpose of attaching together the edges of paper boxes, where each surface was in line with the other, with the aid of flat dies and platen, it would require no invention, in view of other anticipating devices, to change this to dies with diverging faces for gluing boxes at their corners. But that is not all. Beach did not have before him a machine for attaching strips to the corners of paper boxes, but a machine for attaching addresses to newspapers, and while there is an analogy, there can scarcely be said to be a similarity in these functions. We agree with the courts below that it did involve invention to see that a machine of the Dennis and York type was adaptable to the work of the Beach

device, and, second, to make such changes as were necessary to adapt that device to its new function. With all the anticipating devices before us, it is apparent that \*the mere change in the shape of the dies was a minor part of the work involved in so changing the Dennis and York machine as to make it perform a wholly different function, the invention consisting rather in the idea that such change could be made than in making the necessary mechanical alterations. As stated by Judge Coxe in his opinion in *Beach v. American Box-Mach. Co.* 63 Fed. Rep. 597: "The question is whether a mechanic, before anyone had thought of pasting stay-strips to the corners of boxes by machinery, would construct the Beach machine after seeing the labeling machine. Would the latter suggest the idea and the embodiment of the idea? Would the thought enter the mind of the skilled mechanic with the Dennis and York device before him on his work bench; and if it did, would it not be a creative thought whose presence would convert the mechanic into an inventor?"

In passing upon the question of novelty we feel at liberty to consider the fact that the Beach machine and its congeners have completely supplanted the former method of applying strips by hand; that no manufacturer can successfully compete for the trade without adopting such machine; that it not only applies these strips with much greater rapidity than is possible by hand, but the work done is stronger, cheaper, cleaner, and more uniform; that the machine attaches the strip more rigidly about the corner, and that, by reason of its greater compression, forces out the moisture and dries the box for immediate use; that there is also a saving of material by cutting the strips of the proper length instead of tearing them, and that, by reason of the greater compression, heavier and stronger material may be employed than was possible when the work was done by hand. We find no difficulty in holding that the first three claims of this patent were not anticipated by any prior devices.

What we have said regarding these claims applies with even greater potency to the 6th claim, which introduces a new feature of a clamping die constructed to act with an elastic or yielding pressure, to enable the dies to operate upon box-corners of different thicknesses. While the mere introduction of springs to enable the plunger to act with an elastic pressure may not of itself have been a novelty, its introduction into a machine \*which was itself novel certainly did not de- [394]stroy its novel character. The claim does not cover simply a die constructed in this manner; but the elastic feature introduced into one of opposing clamping dies, having diverging working faces, constructed to co-operate in pressing an adhesive stay-strip upon an interposed box-corner, was clearly novel; and while the introduction of this feature into an old and nonpatentable machine may not itself involve invention, in this case it is merely an additional element introduced into a machine which did itself in-



volve invention. This feature was introduced into Beach's claim as early as May 4, 1886, by an amendment to his specification, before the patent was issued, and hence could not have been inserted to cover the Horton patent used by defendants, which never was known to the trade before 1889 or 1890.

2. The validity of the reissue is attacked upon the ground that the original patent was neither "inoperative nor invalid by reason of a defective or insufficient specification," as required by statute (Rev. Stat. § 4916), to justify a reissue. The reissue was applied for April 9, 1891, but a few weeks after the original patent was issued, merely to correct, as it would seem, an obvious error in one of the drawings. Possibly the error was such as would not have impaired the patentee's rights under his original designs; but he was entitled to the full scope of his invention, and if he were dissatisfied with the drawings as they stood, and the error was purely an inadvertent one, we think it was within the jurisdiction of the Commissioner of Patents to order the patent to be reissued. The defense is purely a technical one. There was no attempt to enlarge the claims or to alter the specifications. There is no evidence that anyone could have been prejudiced by the reissue, and we see no reason to doubt that it was applied for in good faith, and with a design only of securing to the patentee what he had actually invented. To justify a reissue it is not necessary that the patent should be wholly inoperative or invalid. It is sufficient if it fail to secure to the patentee all of that which he has invented and claimed. The reissue was applied for so promptly that no question can arise, upon the facts of this case, of an attempt to cover devices which had been patented, \*or meantime had come to the knowl-  
[395] edge of the patentee. As was said in *Topliff v. Topliff*, 145 U. S. 156, 171, 36 L. ed. 638, 664, 12 Sup. Ct. Rep. 825, 831: "This court will not review the decision of the Commissioner upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record." The only alternative of a reissue was a suit upon the original patent, in which the patentee would be compelled to take his chances of success, notwithstanding the error in his drawing, when in case of defeat the time in which to obtain a reissue might have expired. We do not think he should be driven to this expedient.

3. The defense that the claims of the Beach patent were unlawfully expanded pending the litigation in the Patent Office and before the final issue of the patent, by omitting the secondary plunger or strip bender H, was considered by the courts in both the first and second circuits, and was held to be unsupported by the facts. In his first application, made June 10, 1885, Beach claimed, not only a plunger coming down "to press the stay upon the box," but a secondary plunger coming down "to turn the projecting end of the stay down at right angles," although in the 3d claim the secondary plunger is not mentioned as an element; and in his specification

he says "in some kinds of work the stay can be applied and the projecting edge turned under without the use of the secondary plunger H; but in ordinary work it is necessary." In his first amendment, filed May 4, 1886, he states that "in some cases, with the use of thin stays, the edge that projects beyond the edge of the box will be turned down sufficiently by the action of the plunger G, and without the use of the secondary plunger H;" and that "in many boxes the stay is simply pasted down over the corner of the box, and is not turned under, in which case the work can be done by using the angular form and one plunger with a corresponding angular notch." He also amended his 1st claim to fit this contingency, by omitting mention of the secondary plunger, and adding a 4th claim, in which he describes the plunger as "formed with an elastic or yielding foot."

All this was prior to the invention of the Horton machine, which was first put into use in September, 1889. Of course, the amendment of May, 1886, could not have been made with \*reference to this device. It [396] is true that in November, 1890, after application had been made for the Horton patent, new specifications and claims were filed, in which the invention was stated much more in detail, and with much fuller and more accurate language than before. But there appears to have been no attempt to expand the original claims for the purpose of including the Horton patent.

The patent had been the subject of an earnest contest in the Patent Office for four years; had been put in interference with five other devices, and it was scarcely possible that, after this long litigation, the patentee should not have detected defects in his original application, and have taken this opportunity of correcting them. His experience in this litigation had doubtless apprised him of the weak points in his prior specification and claims, and it was perfectly competent for him to restate them, provided his patent was not essentially broadened to cover intervening devices.

In *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. ed. 1053, application for patent was made in June, 1847, and rejected. The application remained unaltered until 1852, when it was amended, and a patent granted with considerable modifications. In the meantime other devices were introduced, including that used by the defendant. It was with reference to this state of facts that the court observed: "If the amended application and model, filed by Tanner five years later, embodied any material addition to or variance from the original,—anything new that was not comprised in that,—such addition or variance cannot be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and dis-



favor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use."

[397] Had there been any expansion of the original specification\*and claimssubsequent to the introduction of the Horton machine, especially if made with reference thereto, we should not have hesitated to apply the doctrine of that case, but we see no evidence of an intent to cover that machine, unless it were already covered, and agree with Judge Lacombe, that "the original drawings and specifications suggest the claims finally made, which recognize and claim the two different operations of outside and inside applications."

4. The assignment that the court erred in holding that the reissue expired April 5, 1892, in consequence of the expiration on that date of the British Reed-Jaeger patent of April 5, 1888, for the same invention, is not supported by any evidence that this patent was obtained by Beach, or that the application for the same was authorized, directly or indirectly, by him. It is true that by Rev. Stat. § 4887, "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent;" but this obviously presupposes that the foreign patent shall have been obtained by the American patentee or with his consent. This is evident from the somewhat awkward phraseology of the 1st clause of the section, which declares that "no person shall be debarred from receiving a patent for his invention, . . . by reason of its having been first patented or caused to be patented in a foreign country," which evidently means that the patentee shall not be debarred from his patent by reason of his having first patented, or caused his invention to be patented, in a foreign country. Indeed, it would be so manifestly unjust that a patentee should lose the full fruits of his patent by the fact that some intermeddler had caused the invention to be patented abroad, that we could not give that construction to the section, unless its phraseology imperatively demanded it. This construction would suggest an excellent device to an enemy to bring about the termination of an inconvenient patent. It seems that this patent was applied for by Reed April 5, 1888, at the instigation of Jaeger (who was one of the contestants in the interference proceedings before the Patent Office), and was allowed to expire April 5, 1892, through non-payment of the renewal fee required by British law. The \*fact that this patent was obtained through the instigation of one who was at that very time contesting Beach's right to the patent before the Patent Office, indicates almost conclusively that it was not obtained by Beach's authority.

This reply to defendants' assignment is so conclusive that we have not thought it worth

while to inquire whether the Jaeger British patent and the Beach patent were for substantially the same invention. Nor do we find it necessary to express an opinion whether the lapsing of a foreign patent by the failure of a patentee to pay a renewal fee required by British law would shorten the term of his patent here. *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, *sub nom. Bate Refrigerating Co. v. G. H. Hammond & Co.* 32 L. ed. 645, 9 Sup. Ct. Rep. 225; *Pohl v. Anchor Brewing Co.* 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

5. The most important question in the case is that of infringement. Defendants are manufacturing under a patent to James A. Horton of December 9, 1890, in the specification of which the patentee declares that his "invention relates to that class of machines for applying stays to the corner of boxes and box-covers, in which a rectangular mandrel is employed to support the box or cover internally, while a reciprocating plunger, having a re-entrant angle in its operating face, descends and bends the stay into angular form, and presses it upon the corner of a box body or cover while the same is supported by the mandrel." Substitute for the word "mandrel" the "lower die or anvil" of the Beach patent, and for "a plunger having a re-entrant angle in its operating face" a "clamping die having a diverging working face," and these elements of the two machines are identical. There is also a reel attached to the frame of the machine for carrying a continuous stay-strip, a pasting mechanism consisting of a wheel rolling in a trough of water which moistens the gummed strip, a feeding mechanism by means of which a sufficient length of the stay-strip is pushed forward at each revolution, and a cutting device for severing the stay-strip when it is fed in between the opposing dies.

The blade of the cutting mechanism consists of the inner edge of the plunger operating in connection with a portion of the frame of the machine. As the Horton machine is only intended \*to apply stay-strips[399] to the exterior of a box, all the mechanism shown in the patent which specifically relates to the turning in of the stay-strip within the box is absent. The principal difference between the two devices consists in the details of the mechanism, and in the fact that under the Beach patent the stay-strip is fed at right angles to the line of the opposing dies and the corner joint of the box, while in the Horton machine the stay-strip is fed on a line parallel to the line of the box-corner, in other words, a back feed instead of a side feed; but they are both alike in that they grasp the paper and project it forward over the corner of the box when the dies are open. There is also a dissimilarity in the fact that the lower clamping die of the Horton machine is not movable into and out of its usual working position, is not moved when the machine is in operation, and is made movable only for the purpose of ad-



justment; but as the device is only used for the purpose of applying stay-strips to the exterior of the box-corner, such movability becomes unnecessary, or, as explained in the Beach patent, "the said anvil I is herein shown as constructed to move horizontally and as extending through a horizontal bearing aperture *a* in the frame, by which it is supported, a horizontal movement being given to the said anvil to aid in turning in or pasting stay-strips to the inside of the box-corner."

In the case of a pioneer patent like this (and while the patent is not a great one, we are not speaking too highly of it in calling it a pioneer in its limited field), there would be no difficulty in holding that these differences were immaterial, were it not for the fact that each one of the claims is limited by the words "substantially as described." In other words, that unless the infringing device contains mechanism substantially such as is described in the patentee's specification, and shown in his drawings, there can be no infringement. It was upon this point, and upon this alone, that there appears to have been any difference of opinion between the circuit court and the court of appeals. While the words "substantially as described or set forth" are not absolutely meaningless, they do not limit the patentee to the exact mechanism described in his specification, or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism. In determining the range of [400] such \*equivalents much depends upon the question whether the machine is a primary one, or whether the patent covers some novel feature introduced into an old machine. It is difficult to say exactly what effect should be given to these words. In one sense it may be said that no device can be adjudged an infringement that does not substantially correspond with the patent. But another construction, which would limit these words to the exact mechanism described in the patent, would be so obviously unjust that no court could be expected to adopt it. The authorities really throw but little light upon their proper interpretation. In *Seymour v. Osborne*, 11 Wall. 516, 20 L. ed. 33, it was intimated that a claim which might otherwise be held bad as covering a function or effect, when containing the words "substantially as described," might be construed in connection with the specification and be limited thereby; and when so construed, might be held to be valid. So in the *Cornplanter Patent*, 23 Wall. 181, 218, *sub nom. Brown v. Guild*, 23 L. ed. 161, 168, it was said that "this clause throws us back to the specification for a qualification of the claim, and the several elements of which the combination is composed." This rule, however, is equally applicable whether these words be used or not. While, as stated in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 558, 42 L. ed. 1136, 1144, 18 Sup. Ct. Rep. 707, 717, "these words have been uniformly held by us to import into the claim the particulars of the specification," it was 180 U. S.

also said in *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. ed. 125, that "words of such import, if not expressed in the claim, must be implied, else the patent in many cases would be invalid as covering a mere function, principle, or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements." If these words are used, the patentee may still prove infringement in the use of a mechanical equivalent; if they are omitted, he is bound to prove no less. Perhaps it would be sufficient to say that, if a doubt arose upon the question whether the infringing machine was the mechanical equivalent of the patent device, that doubt should be resolved against the patentee where the claims contain the words "substantially as described or set forth."

Without determining what particular meaning, if any, should be given to these words, we are of opinion that they are not to be construed as limiting the patentee to the exact mechanism \*described; but that he [401] is still entitled to the benefit of the doctrine of equivalents, and that it is still true, as observed in *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 273, 32 L. ed. 715, 719, 9 Sup. Ct. Rep. 299, 302: "Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements," although the subsequent machine may contain improvements in the separate mechanism which go to make up the machine.

The Horton machine not only accomplishes the same result as the Beach device, but accomplishes it by the employment of the same combination of the same elements. The mere fact that the continuous strip is introduced between the dies from a different direction is immaterial. The fact that the Horton device contains no mechanism for turning the strip into the inside of the corner merely indicates that it does not perform all the functions of the Beach patent. But it is no less an infringement if it performs its primary function in practically the same way. We are not concerned with the subordinate differences in the mechanism, least of all with the different names given by Horton to parts of his machine similar to the corresponding parts in the Beach patent. As the two machines are alike in their functions, combination, and elements, it is unnecessary to go further and inquire whether they are alike or unlike in their details.

There seems to be no denial of defendants' infringement of the 6th claim. Plaintiff's expert testifies that he finds "in the defendants' machine two opposing clamping dies having diverging working faces, the upper one of which is constructed to act with an elastic or yielding pressure to enable the die to operate upon box-corners of different thicknesses. This is the combination referred to in the 6th claim, and it is found in the defendants' machine." We do not find this

to be denied. Both the circuit court and the court of appeals found this claim to have been infringed, and we accept their conclusion.

*The decree of the Court of Appeals is therefore affirmed.*

[402]\*HENRY L. MITCHELL, Governor of the State of Florida, William D. Bloxham, Comptroller of the State of Florida, et al., Appts.,

v.

CHARLES M. FURMAN, in His Own Right, and as Administrator of Charles M. Furman, Deceased, et al.

(See S. C. Reporter's ed. 402-440.)

*Private land claims—Spanish grants—authority to make grant—limitations in acts of Congress—claims barred.*

1. A suit to establish a land claim by virtue of the treaty of 1821 with Spain is properly brought by direct appeal from the circuit court to the Supreme Court of the United States.
2. Authority of a Spanish officer to make a conveyance of the public domain cannot be presumed from the mere fact of the conveyance, in the absence of other evidence, where he had no authority *ex officio* to do so.
3. A mere recitation in papers alleged to constitute a Spanish grant, that a document was executed by a certain person in consequence of the illness of the governor, without anything to show that such person had been appointed governor *pro tempore*, is insufficient proof of his right to exercise such authority.
4. An alleged Spanish grant of lands in East Florida, which was not in itself a royal title, and was neither made nor confirmed by the lawful authorities of the King, was insufficient to constitute a perfect title, at the time of the cession of Florida to the United States, without further action of the Spanish government to perfect it.
5. The limitations of the act of Congress of May 23, 1828, confirming Spanish land claims recommended for confirmation to the extent of a league square on condition that a full and final release of all claims to the residue be filed, were applicable to all claims, whether perfect or imperfect; and a failure to comply with the conditions of the statute barred a claim.
6. The conditions of ascertaining Spanish land claims in Florida, imposed by the act of Congress of March 23, 1828, confirming every claim that had been recommended for confirmation to the extent of a league square and requiring a release of the residue to be filed within a certain period, were within the constitutional power of Congress.

[No. 23.]

*Argued March 1, 2, 1900. Ordered for Re-argument March 26, 1900. Reargued October 17, 18, 1900. Decided March 11, 1901.*

**A**PPPEAL from the Circuit Court of the United States for the Southern District

of Florida to review a decree in favor of a claimant under an alleged Spanish grant. *Reversed.*

Statement by Mr. Chief Justice **Fuller**:

This was an amended bill of complaint filed November 30, 1895, in the circuit court of the United States for the southern district of Florida by Charles M. Furman in his own right, and as administrator of the estate of Charles M. Furman, Bolivar B. Furman, and Alester G. Furman, all citizens of the state of South Carolina, against Henry L. Mitchell, governor, William D. Bloxham, comptroller, Charles B. Collins, treasurer, William B. Lamar, attorney general, and Lucius B. Wombwell, commissioner of agriculture, of the state of Florida, and citizens thereof, as the board of trustees of the internal improvement fund of the state of Florida; the Florida Coast Line Canal & Transportation Company, a corporation of Florida, having its principal place of business at St. Augustine; the St. Johns Railway Company, a corporation of Florida, having \*its principal place of business at Jack-[403]sonville; Horace S. Cummings, residing in the District of Columbia; and John A. Henderson, a citizen of the state of Florida, alleging: "That they own and hold title in fee simple, as tenants in common, to all that tract, parcel, or piece of land lying, situate, and being in the county of St. Johns in the state of Florida, and within townships 7, 8, and 9, south of range 30 east, known as 'Anastasia,' or 'St. Anastasia,' Island, said to contain 10,000 acres, but which in fact contains about 7,500 acres, excepting therefrom what was known at the time of the Spanish grant hereinafter mentioned as the King's Quarries, the boundaries of which were marked by stakes, the same being about 200 acres, lying on and east of the old King's Road, between the same and the old lighthouse, which exception does not embrace the lands or any part thereof hereinafter alleged to be claimed by the defendants or any of them."

"That the said tract of land was granted by the government of Spain to José, or Joseph, Fish—otherwise known as Jesse Fish—(hereinafter designated as Joseph Fish), on or about the 19th day of June, A. D. 1795, which said grant was ratified and confirmed by the United States by the treaty with Spain ratified by the United States on the 19th day of February, A. D. 1821."

The bill then set up title to Anastasia island as derived from Joseph Fish, through his mother Sarah Fish, her granddaughter, Jessie B. Perpall, who married Charles M. Furman, who became sole heir at law of his wife and their son, Gabriel, and left a will under which complainants claimed. It was averred that Joseph Fish died intestate in 1798; that his mother died intestate in 1825; that her granddaughter died intestate in 1827; that Mrs. Furman's son Gabriel died in infancy in 1836; and that Charles M. Furman died in 1872.

It was further alleged that Joseph Fish



[405] was placed in possession of the said land so granted, and resided thereon in his dwelling house, and cultivated an orange grove and fields, inclosed by a fence; that he used the woodlands on the island, and exercised such acts of possession of the whole of the island as it was capable of; and that from his death to the present time those claiming under Fish have done the same.

The bill averred that the state of Florida claimed title under the act of Congress of September 28, 1850, relating to swamp lands, of certain lands on Anastasia island, which complainants asserted were part of the grant to Joseph Fish, and owned by them; these were described according to the public surveys and alleged to contain 1,465.15 acres, more or less, all in township 7, south of range 30 east; and that the United States on September 18, 1856, issued its patent to the state of Florida therefor.

That the state of Florida by an act of June 6, 1855, vested in the governor, the comptroller, the state treasurer, the attorney general, and the register of public lands, now known as the commissioner of agriculture, of that state, and their successors in office, as the board of trustees of the internal improvement fund of the state, the title to all lands granted to the state under the act of Congress, with power to sell and transfer the same; that defendants, Mitchell, governor, and others, now constitute the board of trustees; that the board on May 13, 1885, executed a deed of conveyance to the Florida Coast Line Canal & Transportation Company of certain lots and parts of sections, in township 7, containing in all 549 acres, being part of the lands patented to the state, which land, except that conveyed to Horace S. Cummings, was claimed by the transportation company adversely to complainants; that of these lands the transportation company executed a deed of conveyance to Cummings of 160 acres, which was claimed by Cummings adversely to complainants.

[405] That the board of trustees September 21, 1886, executed a conveyance to the St. Johns Railway Company of certain lots and parts of sections in township 7, containing in all 328.10 acres, being part of the land patented to the state, which land was claimed by the railway company adversely to complainants; that the board of trustees on July 30, 1892, executed a deed of conveyance to defendant Henderson of certain lots in township 7, containing 286.28 acres, which land was claimed by Henderson adversely to complainants. It was further averred that "the United States issued to the state of Florida on June 27, 1895, a patent for certain other lands, being part of Anastasia island, described by the public surveys, in township 7, containing 393.30 acres; that the United States issued to the state of Florida on April 8, 1895, a patent for certain other lands described by the public surveys, in township 7, containing 120 acres; that these lands were selections made by the state under an act of Congress of June 9, 1880, entitled "An Act to Confirm Certain Entries and to Warrant Locations in the Former Palatka Military Res-

ervation in Florida;" that in addition to the lands so patented the state had selected under said act certain lands on Anastasia island in township 7 containing 367.32 acres; that entries of these selections had been allowed by the Commissioner of the General Land Office of the United States, and the same were held to be patented to the state under the act of Congress of June 9, 1880; that the lands so patented to the state and those selected by the state for patent under the act aforesaid were in lieu of selections under the act of Congress of September 28, 1850, and were vested by the legislature of Florida, by the act of January 6, 1855, in said board of trustees, if the United States held the title thereto at the time of the issue of the patents, and that the board of trustees claimed title to the same adversely to complainants.

The bill charged "that the said patents from the United States and the said deeds of those claiming thereunder, and said entries and selections of the state of Florida, whereby the said defendants claim title, respectively, to the said lands as aforesaid, are invalid, and do not vest a title in the said defendants to the lands so claimed by them, respectively, as aforesaid, for the reason that the United States, under whom the defendants claim, did not, at the time of issuance of such patents or at any other time, have or hold title to the said lands, or any part thereof, but that the title to the same is in your orators, holding and claiming under the said grant of the government of Spain to the said Joseph Fish as aforesaid."

The bill also alleged that none of the defendants were in actual possession of the lands or any part thereof; that the lands exceeded in value the sum of \$2,000; and "that this \*cause arises under the said treaty between the United States and Spain, which ratified and confirmed the said grant to the said Joseph Fish, under whom your orators claim title. And the controversy involved in this case necessarily involves the construction of said treaty."

It was then charged "that the said patents, entries, and deeds by and under which the defendants respectively claim title to said lands as aforesaid, are clouds upon the title of your orators in the said lands, and tend to depreciate the value and sale thereof, to the great damage and injury of your orators in the premises."

The prayer was "that the said patents, entries, and deeds by and under which the said defendants respectively claimed title to the lands so respectively claimed by them as aforesaid may be set aside and declared void as clouds upon the title of your orators, and that the defendants and each of them may be enjoined from entering upon or taking possession of said lands, or in any manner disturbing the possession of your orators thereof, and that your orators may have such other and further relief in the premises as equity may require and as to your honors shall seem meet."

The defendants Mitchell and others, members of the board of trustees, moved to dis-



miss the bill for want of jurisdiction, which motion was overruled. Defendant Cummings made a similar motion. The trustees also filed a demurrer for want of jurisdiction, and a demurrer for want of equity. The defendants, the canal and transportation company and the St. Johns Railway Company, also demurred. All the demurrers were overruled.

[407] The trustees and Cummings then filed their answer, denying that Anastasia island was granted by the government of Spain to José or Joseph Fish, June 19, 1795, or at any other time, or that the title to the lands in controversy was ever granted by the King of Spain or by his lawful authorities, and averring that the only part of Anastasia island, the title to which was ever granted by the King of Spain or by his lawful authorities, was a tract of about 300 acres granted to Lorenzo Rodriguez in 1793, and a tract of about 20 acres granted to \*F. X. Sanchez in 1802, both of which tracts had been confirmed by the United States and surveyed and platted as private grants upon the maps and plats of the Land Department of the United States. They denied that the treaty with Spain ratified or confirmed any grant of the lands in controversy in this suit to the ancestor of complainants or gave title thereto to any other person save only to the United States; and denied that Joseph Fish was placed in possession of Anastasia island except the King's Quarries, as a grant thereof to him by the King of Spain or his lawful authorities, or that he or his successors exercised such acts of possession of the whole of Anastasia island except the King's Quarries, as it was capable of, under claim of title, or that he claimed title as the owner of said island. But they said that the occupancy and acts of possession alleged, if true, applied to no other lands than those embraced in the Fish homestead, which was a point of land on the extreme west shore of Anastasia island, nearly surrounded by water, and cut off from the main island of Anastasia, embracing about 100 acres of land, well known by general reputation as "Fish's island." They admitted the patenting by the United States to the state of Florida of the several tracts of land described in said bill, and averred that before any patent could be issued for these lands the state of Florida was required to establish before the Land Department of the United States that the lands were vacant and unappropriated public lands of the United States; that Furan in behalf of complainants appeared before that tribunal and contested the matter, and presented and urged their claim to the same under the same title set up in the bill, and that there was a final determination by said tribunal which was adverse to complainants' claim, and decided that the lands were not private lands.

Also that, in addition to the lands so patented to the state of Florida, the state had selected the lands set out in the bill, and that the entries had been allowed by the land office, and were held to be patented; and said that such allowance and holding

for patent was an adjudication of a competent tribunal that the lands were public lands of the United States, which adjudication for the issue of the patent was subject to review in the Land \*Department, and [408] might be corrected if erroneous. They denied that the patents, deeds, entries, and selections whereby defendants claim title to the lands in controversy were invalid, and asserted that the United States had title to said lands, and that it was not in complainants.

"They admit that this controversy involves the construction of the treaty between Spain and the United States, and they aver that complainants in their said bill have set out as their title an incipient and inchoate title under the 'government of Spain,' not cognizable in the courts of the government until recognized or confirmed by the Congress of the United States; that by the rules established in the territory of Florida by the authority of the King of Spain for the granting of lands, a grant from the government of Spain signified only the first concession or right of occupancy of the royal domain; that perfect or complete grants were recognized by the treaty with Spain, but incomplete grants were ratified by the treaty, to the same extent they would have been valid had the territory remained under the King of Spain; that if there had been a complete grant of Anastasia island at the date of the treaty the owners thereof were authorized under the laws of the United States to have the same surveyed without expenses as a private claim by the United States, but by the averments of their said bill complainants show that said lands have been surveyed as public lands."

The answer stated "that Anastasia island is a barrier of the sea, consisting chiefly of high sand hills blown in from the sea beach, covered with 'scrub,' a low growth of hard wood; that through the center of the northern part, in township 7, there runs north and south a ledge of coquina rock from one half to three quarters of a mile wide; that all the lands are barren and wholly unfit for any purpose whatever save seashore residence, and of no value apart from their proximity to a city patronized as a winter resort; that on the western shore of said island, nearly separated from the main island by a strip of low ground or 'swale,' is a neck of land called Fish's island, containing about 60 to 100 acres, which is arable land, and on this point \*was an orange grove and cultivated fields of about 30 acres under enclosure, and houses and outbuildings." [409]

It was further averred that complainants or their ancestor never had any title whatever to the lands described in the bill unless it were to a part of lots 2, 3, and 6 of section 29, township 7, range 30 east, which embraced the orange grove of "Vergel" plantation, alleged to have been sold by the Spanish government in probate proceedings upon the estate of Joseph Fish about March 21, 1792; that to this plantation the heirs of Fish might have had an equitable title, but



this had been forfeited by failure to present or record such claim and have it surveyed.

Defendants further said that Anastasia island was officially turned over in behalf of the King of Spain to the United States, in 1821, as one of the adjacent islands named in the treaty, and as a part of the royal domain, and the lands delivered as such by the lawful authorities of the King of Spain to the United States, whose authorities then went into actual occupancy of part, and the possession of the whole, of Anastasia island, save two Spanish grants, one to Rodriguez and the other to F. X. Sanchez.

That June 19, 1795, the Spanish law in force in the Floridas vesting in the Spanish governors the power to make grants of lands was the royal order of 1790, under which Governor Quesada, Spanish governor of East Florida in 1795, required ten years of continued and uninterrupted possession before full title was granted to claimants, who upon petition had received a grant or concession and had been put in possession of lands, etc., etc.

The answer further set forth that no person except the governor of the province was entitled to make grants of land under the Spanish law, and if any other person had authority to make grants the titles so granted were incipient until confirmed by the governor, etc.; and alleged on information and belief that any proceedings purporting to be a concession for 10,000 acres, dated June 19, 1795, to Joseph Fish, found among the archives at the date of the cession, were either forgeries, or so irregular as to render their genuineness too doubtful to be accepted as evidence.

[410] \*Defendants averred that any claim which Fish ever had would be found to be an alleged grant purporting to be signed by one Morales, the commandant of the third battalion of Cuba, and not by the governor, an unauthorized proceeding under Spanish law; that no authority existed in Morales to make the grant, and no other claim in East Florida is based on action by him; that the law required an official survey to be filed in the records and a certified copy delivered to claimants, but there was none in this instance; that the archives relating to property in Florida, both public and private, contain a complete list of all real titles or patents for lands granted by the lawful authorities of the King of Spain in East Florida, but that list contains none to Joseph Fish for the lands on Anastasia island.

The answer restated that the lands claimed by complainants to have been granted to Joseph Fish were never segregated from the royal domain, and were not measured, bounded, or platted or otherwise located by official survey, and could not be identified by natural boundaries.

Defendants further averred that by the act of Congress of May 23, 1828, Congress confirmed all claims recommended for confirmation to the extent of a league square, and enacted that no more than a league square should be confirmed in any grant, and that no confirmation should be effectual until a  
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full release by the claimant of all the lands claimed by any one grant in excess of a league square, but authorizing all claimants who were not willing to accept a league square to present their titles to the district court of the United States within one year from the date of the act or be barred; that claimants never released the excess of a league square, nor presented their claim to the district court of the United States, as did all others having claims in Florida in excess of that amount; that the legislative council of the territory of Florida published the acts of May 23, 1828, May 26, 1830, and February 8, 1827, with the treaty with Spain, for circulation in Florida, and though often notified of the limitations in said acts, the claimants under Joseph Fish did not avail themselves of the acts, and abandoned and forfeited their claims to said land, so that the United States would have acquired title by prescription even if the lands were private \*property; that in 1833, having given [411] public notice that unless the private claims within the district were presented to the surveyor general he would survey the same as public land of the United States, the claim of Fish not having been presented and having been abandoned, the United States extended the surveys over all of Anastasia island except the grants to Rodriguez and Sanchez, and in 1839 advertised the lands for sale as public lands; that on May 6, 1851, the maps and plats of said lands surveyed as public lands were formally approved by the surveyor general for Florida; that the United States patented to the state of Florida certain lands in 1866 as vacant lands, and in 1867, 1868, and 1869 a large area of lands on Anastasia island were entered under the homestead laws of the United States, and settled upon and improved, and wood was cut therefrom and sold; that some of the homestead settlers failed to make final proof of their entries, but final proof of homestead and settlement under the homestead laws for lands on the island was made and final certificates issued to several persons named in 1875, in 1876, and in 1882; that in 1867 the trustees executed a conveyance for lands on that island to Rogero for lots 2 and 3, section 29, to Hopkins and Rogero for lot 6, section 29, and to Magruder and Logan for lots 2 and 3, section 32, all in township 7, range 30 east, being part of the lands patented to Florida; that September 16, 1868, Sanchez applied to the Land Department of the United States for the issue of a patent upon the Fish claim, and in 1870 Furman advised the Land Department that he claimed to be the owner of Anastasia island under an alleged grant prior to 1763, and made application for the issue of a patent from the United States to him.

That from 1831 to June 22, 1860, the claim was wholly barred; that June 22, 1860, Congress again authorized claimants to present their claims, if an imperfect grant, to commissioners for confirmation, but if a complete grant, to the district court for the northern district of Florida, but those claim-



ing under Fish neglected to avail themselves of this right to have the validity of their claim determined, but did apply to the Land Department for further adjudication; that after application to the Land Department [412] for an adjudication by Furman "in 1870, Congress extended the act of June 22, 1860, until June 10, 1875, by an act approved June 10, 1872, by the 2d section of which act no proof of title was required of claimants, provided they and those from whom they claimed had held continuous possession of the lands claimed; that having submitted their claim to a tribunal of their own choice they are now estopped to deny its jurisdiction.

That in June and July, 1888, the state of Florida applied to the land office at Gainesville to enter certain portions of land at the north end of Anastasia island under the act of June 8, 1880, as vacant and public land, but because there was on file at the land office a letter from the Commissioner dated March 7, 1887, advising that the island was claimed by Furman, and that the claim had not been adjudicated by the Land Department, the register and receiver rejected the selections of Florida, and the state appealed to the Commissioner; that the claim of Furman was taken under advisement by the Commissioner on briefs submitted by the state, and by Furman and others claiming under Fish, and on August 2, 1890, the Commissioner rendered his decision that the lands were public lands of the United States, whereupon complainants took an appeal from the decision of the Commissioner to the Secretary of the Interior, and submitted arguments in support of their contention that the said lands were owned by them under a valid Spanish grant, and on June 22, 1893, the Secretary rendered his decision affirming the decision of the Commissioner, that said claim had no validity; that complainants failed to file any motion for review, and the decision became final, and is a complete and final adjudication of complainant's want of title, and that the lands were public lands subject to disposal by the United States; that complainants caused a bill to be introduced in the Fifty-third Congress for confirmation and release to them by the United States of the lands on Anastasia island as claimed under Fish, but Congress refused to consider the same.

The answer denied that complainants were in possession of any part of the land on Anastasia island, and set forth the possession of many persons claiming title under the United States. It averred that the St. Augustine & South Beach Railroad \*Company [413] was in possession of a roadbed and right of way across the island through sections 17, 21, 27, and 28 in township 7, range 30 east, under authority of an act of Congress approved March 3, 1875, granting a right of way over the public lands of the United States; that lot 1 of section 21 was reserved for lighthouse purposes by order of the President dated June 22, 1869; that part of lot 2 of section 21 of township 7 was declared a reservation for lighthouse purposes 600

by order of the President dated February 1, 1883, that afterwards by a like order the remainder of said lot 2 was declared a United States reservation for lighthouse purposes; and that by executive order dated May 4, 1893, the President reserved 700 acres of land in sections 21, 22, and 28 of township 7 for military purposes.

That the requirement by Congress that all claimants under grants from the King of Spain in the Floridas should relinquish all in excess of a league square of the lands claimed in any one grant, was a declaration of the policy of the political department of the United States as to the territory acquired from a foreign power and a determination by Congress of the extent of the obligations imposed on the United States by the treaty with Spain.

The answer further averred that the failure to release the excess forfeited the entire claim, and that, without any release, the excess over a league square was subject to sale as public land; that the issue of the patents depended upon the existence of facts which the Land Department of the United States had determined existed; that by the survey of the lands of Anastasia island as public lands and their offer for sale by the proclamation of the President, and confirmation of portions thereof to the state of Florida by patent, the reservation of portions thereof by executive order, and the opening of all to homestead entry, the United States had become seised of the whole of said Anastasia island by the equivalent of office found.

The St. Johns Railway Company and the Florida Canal & Transportation Company also filed an answer of similar purport. Numerous exceptions to these answers were filed, and some of them were sustained to certain paragraphs. Replication having been filed, the cause was referred to a master, who \*subsequently made a report containing [414] findings of facts, findings of mixed law and fact, and conclusions of law, to which numerous exceptions were filed by defendants, all of which were overruled by the court, and a decree was entered in accordance with the prayer of the bill and the recommendations of the report. A decree *pro confesso* was entered against John A. Henderson.

From this decree all the defendants except Henderson, in respect of whom an order of severance was entered, prosecuted this appeal.

The master also filed with his report an elaborate and careful opinion on the whole case.

Complainants introduced in evidence from the American State Papers, Public Lands, vol. IV. Duff Green Edition, 256, "Minutes of the proceedings of the commissioners appointed to ascertain claims and titles to land in East Florida for the year 1824."

Meeting of the board, March 29, 1824, pursuant to an act of Congress of February 19, 1824.

Meeting, September 13, 1824, when "Sarah Fish, 10,000 acres; same 600 acres," and three other "cases being called and not being



prepared for trial," were "placed at the foot of the docket."

Minutes of meeting, March 28, 1825, pursuant to the act of Congress of March 3, 1825. April 21, 1825: "Permission was given by the board to the executors of the estate of Sarah Fish, deceased, to amend the memorials in the claims of said Sarah Fish."

December 16, 1825: "The following claims were this day reported to Congress for confirmation, viz.: . . . Sarah Fish's heirs, for 10,000 acres; . . ."

Report of commissioners to the Secretary of the Treasury, January 31, 1826, transmitting claims and titles examined and disposed of, class 3 comprehending "claims exceeding 3,500 acres, the titles to which were found among the public archives of the country, and are ascertained by the commissioners to be valid Spanish grants, and reported accordingly to Congress for confirmation." 4 Am. State Papers, Public \*Lands, D. G. ed..[415] p. 276. The Fish claim was included in class No. 3, as follows:

Register of claims to land exceeding 3,500 acres in East Florida, which are founded on patents or royal titles derived from the Spanish Government, and which in the opinion of the commissioners are valid.

Number.	Names of—		Date of the patent or royal title.	Date of the concession or order of survey.	Quantity of land.	By whom conceded.	Authority or royal order under which the concession was granted.	Conditions.	Date of survey.	By whom surveyed.	Where situated.	Occupation and cultivation.	
	Present claim-ants.	Original claim-ants.			Acres, hdths.							From.	To.
*	* *	* *	*	*	*	*	*	*	*	*	* *	*	*
Cases reported this session.													
21	Heirs of Jessie Fish.	Jessie Fish.	.....	19 June, 1795.	10,000	Mo- rales.	1790	Com- plied with.	.....	.....	Anastasia Island		
*	* *	* *	*	*	*	*	*	*	*	*	* *	*	*

The petition of Mrs. Fish, dated August 31, 1823, asserted that she "claims title to the island lying in front [i. e., to the east] of the city of St. Augustine, and running south about 18 miles, more or less, along the east bank of the river Matanzas, known by the name of the island of St. Anastasia, supposed to contain 10,000 acres, as belonging to the deceased husband, Jesse Fish, senior, in the year 1763. That in the year 1792 this island was sold at public sale by order of the Spanish governor, Quesada, when her son, the late Jesse Fish, Jr., deceased, became the purchaser."

Accompanying this memorial were certain papers and proceedings as follows: A petition of José Fish (erroneously dated December 2, 1796), stating that at the auction of his father's property for the payment of his creditors, he purchased the place called the Vergel for \$1,605, which sum he gave only with a view to the fruit trees of said place, and the timber which is on the land belonging to it, as the land is entirely useless for planting; that several of the neighbors had been cutting the wood, and therefore he begs to be declared owner of the lands which his said father possessed, annexed \*to the place of the Orange Grove, which, according to the deeds granted in the time of the British possession, amounted to 10,000 acres, whether as a new settler or by the right which his 180 U. S.

deceased father had to them. That if he does not obtain this favor he will consider himself the loser of the greatest part of his purchase, because the lands will not produce crops of any kind and a great number of the fruit trees have dried up, which is likely to occur to the balance of them.

Governor Quesada, who described himself as "brigadier of the infantry of the royal armies, governor, commander in chief, vice royal patron, and subdelegate of the royal domain of this city of St. Augustine, Florida, and its province, for His Majesty," referred the petition December 15, 1794, to the assessor general, who, on the same day, reported that if Fish had asked to prevent trespassing or to recover possession, he would render an opinion, but as Fish asked to be declared owner, it was for the governor to determine judicially the extent of Fish's purchase or his right as a new settler.

Thereupon Governor Quesada directed Fish to make proof of the facts on which he based his right or claim to favor.

Sundry depositions were then taken, and the governor on the 12th of February, 1795, referred the petition and proof to the collector of the exchequer, that as fiscal of it he may represent him in the discharge of his functions. February 27 the fiscal reported that at the sale of the orange grove to Joseph Fish the boundaries of the land were not

taken into consideration, and only the valuation of the trees within the orchard was made, without including the 10,000 acres of land annexed to it. And he was of opinion that Fish was not entitled to anything more than he could prove by the inventory, valuation, and sale, and that after this land had been laid off, the remainder ought to be sold as belonging to his deceased father and for the benefit of the creditors of his estate; that the inventory, valuation, and sale of the orchard should be annexed; and that in case Fish had occasion for the use of more public land, and without injury to a third person, the fiscal minister did not find any objection to granting them to him as a new settler, "according to what His Majesty has commanded of this particular."

[417] \*The governor then directed, March 6, 1795, that the testimony indicated "be placed in continuation and with it those proceedings returned to the assessor general, that he may consult with me as to what is proper as respects the other points to which the foregoing fiscal representation refers."

The inventory, valuation, and sale of the orange grove in 1792 was accompanied by the commission of the governor dated January 18, 1792, appointing the appraisers, and specifying the "9th item" thus: "The place called 'El Vergel,' which belongs to the deceased, although the title under which he enjoyed it does not appear in the proceedings."

March 26, 1795, this entry was made by the governor: "Seen: Passed over to Don José Fish: Thus decrees and orders Senor Don Juan Nepomuceno de Quesada, Brigadier of the Infantry of the Royal Armies, Governor, Commander General, Vice Royal Patron, and Subdelegate of the Royal Domain of this City of St. Augustine, Florida, and its province, for His Majesty, who signs it, with the opinion of Senor the assessor general, the twenty-sixth of March, one thousand seven hundred and ninety-five."

There then appears a new petition by Fish, without date, setting out that he is a new settler in the province; that the above-mentioned documents have been given him, and he, being advised of their contents as also of the sale at auction of the Vergel, considers that the fiscal was in error when he reported adversely on the first petition; that he has produced proof that his father had ancient possession of "El Vergel," for which he paid an excessive price, and prays that a grant of "said island" be made to him, and that a copy of the writing which he presented to the notary after the sale, asking for the island at a valuation, be placed in continuation.

On April 17, 1795, the assessor general, Ortega, who recites that he is "advocate of the royal council, lieutenant governor, auditor of war, and assessor general of the city of Saint Augustine, Florida, and its province, for His Majesty, who signs it in consequence of the illness of the governor and commander in chief," directed that the copy be put in continuation, and the whole passed over to the representation fiscal. The writ-

ing \*referred to is dated March 22, 1792, and [418] Fish states therein that at the public sale, the day before, of the property of his father, there was no person who would bid "for the island del Vergel;" that he obligated himself to pay \$1,605; and "he prays your excellency to have the kindness to order that he be placed in possession of it." On May 4, 1795, the first officer of the chief comptroller's department, "and who is charged with the administration and court of justice of the royal treasury on account of the illness of his excellency, the governor, and as attorney fiscal of the royal treasury," reviewed the papers, and concluded that under the circumstances the governor might "order the boundaries of the Vergel to be marked off to the number of 10,000 acres." This was followed by this entry: "Having examined the proceedings, it was thus decreed and ordered by Senor Don Bartolome Morales, colonel of the infantry of the royal armies, commandant of the third battalion of Cuba which garrisons this city of Saint Augustine, Florida, and political and military governor of it and its province from the indisposition of the governor, who signed it on the sixteenth of May, 1795; which I attest." This was signed by Morales, and attested by Ortega, assessor general, before the notary.

June 12, 1795, Morales and Ortega directed notice to be given to the defender of the estate of Fish, and that the proceedings be returned.

June 17, 1795, the defender of the estate reported that the 10,000 acres might be granted.

Then follow the alleged grant and delivery of possession, namely:

Having examined those proceedings and seen the proof adduced in them by Don José Fish, it appears not only his father of the same name possessed since the time of the old Spaniards and in that of the British dominion the 10,000 acres of land, possession of which he claims at the place called the Orange Grove, which he purchased at public auction, but also that he made a bid for the said land, under which his purchase ought to be understood, which defect in not explaining it thus at that time should not be prejudicial to him, and has given cause to \*this litigation. His excellency said that de- [419] claring it, as he declared now, he ordered in consequence that whether by the right which the burdensome acquisition of the said land gives Fish, which cost him 1,605 dollars, which it appears he paid for the purchase of the Orange Grove, or by the right which the ancient possession of his father gives him to the said 10,000 acres of land, or finally in consequence of the petition of Fish, that they should be granted to him as a new settler, he be placed in possession of the said land which it appears his said father possessed, and is already laid off, with the reserve of the quarries, and the remainder, which was not granted to his said father, and which the King has reserved, renewing, in case of necessity, at the cost of the interested, the boundaries by said appraisers, Don Manuel



Solana, who at the time of the old Spaniards and at the new possession by them of the province laid off by order of the government, the aforesaid quarries, to give possession, as is proven, to the father of the memorialist of the land which he claims, and let them be granted to him on the terms above set forth, the present notary, who is commissioned for the purpose, when with the said appraisers, and any other workman that may be necessary, he shall assist at marking the boundary, at which also shall assist, to represent the royal treasury, the person whom the minister of the royal domain may depute for the purpose. All of which shall be made appear on the proceedings with which, and the taxation of the costs, which the interested shall satisfy, this proceeding shall be held as concluded. It was thus decreed and ordered by Senor Don Bartolome Morales, colonel of infantry of the royal armies, commandant of the third battalion of Cuba, which garrisons this city of St. Augustine, Florida, and political and military governor, who signs this, with the opinion of his honor the assessor general, on the 19th June, 1795, which I attest.

Bartolome Morales.  
Licentiate Josef de Ortega.

*Proof of boundary and possession.*

Being at the plantation called the Orange Grove, in the island of St. Anastasia, on the [420] tenth of July, 1795, in conformity \*with what is provided in the foregoing decree, we proceeded to the marking the boundaries of the land comprised in these proceedings. Don Manuel Solano, the appraiser appointed for the purpose, passing from said place to where the quarries of the King and of individuals are situated, who, passing along the ancient boundaries with Don José Lorente, chief master of the royal works, who accompanied him to inform himself, Don Tadeo Arribas, officer of the royal comptroller's office, from the employment of the collector, for his fiscal cognizance, and I, the present notary, went fixing up stakes to point out said boundaries across the island, and separated the said quarries, saying that all besides them was what corresponded to Don José Fish; to whom, being also present, I, the said notary, in discharge of the commission which was conferred upon me, put him in possession of the land pointed out, leading him into it by hand, and riding together on horseback by various places, until arriving at the dwelling house; all of which I did as a token of said possession, which he took quietly, peaceably, and without contradiction. In testimony of which and for the due proof I have extended the present proceedings, which all signed with the exception of Solano, who said he did not know how.

Signed by Arribas, Lorente, and Fish.

The Secretary of the Treasury transmitted the report of the commissioners, with the evidence and decisions, to Congress, February 21, 1826. Vol. 4, p. 400.

The act of Congress of May 8, 1822 (3 Stat. at L. 709, chap. 129), provided that 180 U. S.

"for the purpose of ascertaining the claims and titles to lands within the territory of Florida, as required by the treaty," commissioners should be appointed with power "to inquire into the justice and validity of the claims filed with them," but not to have "power to confirm any claim or part thereof, where the amount claimed is undefined in quantity, or shall exceed 1,000 acres; but in all such cases shall report the testimony with their opinions to the Secretary of the Treasury, to be laid before Congress for their determination." A surveyor was also to be appointed.

Section 4 provided that "every person, or the heirs or representatives of such persons, claiming title to lands under any \*patent [421] grant, concession, or order of survey, dated previous to the twenty-fourth day of January, one thousand eight hundred and eighteen, which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, before the commissioners, his, her, or their, claim, setting forth, particularly, its situation and boundaries, if to be ascertained, with the deraignment of title, where they are not the grantees, or original claimants; which shall be recorded by the secretary, . . . and said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions, and orders of survey, agreeably to the laws and ordinances heretofore existing of the governments making the grants, respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of a treaty concluded at Washington, between His Catholic Majesty and the United States, on the twenty-second of February, one thousand eight hundred and nineteen; that any claim not filed previous to the thirty-first day of May, one thousand eight hundred and twenty-three, shall be deemed and held to be void and of none effect."

This act was amended by an act approved March 3, 1823 (3 Stat. at L. 754, chap. 29) confining the existing board of commissioners to West Florida, and authorizing the appointment of three commissioners for East Florida. The 2d section of this act provided that in the examination of titles, the claimant or claimants "shall not be required to produce in evidence the deraignment of title from the original grantee or patentee; but the commissioners shall confirm every claim in favor of actual settlers at the time of session [cession] of the said territory to the United States, where the quantity claimed does not exceed thirty-five hundred acres, where such deraignment cannot be obtained, the validity of which has been recognized by the Spanish government, and where the claimant or claimants shall produce satisfactory evidence of his, her, or their, right to the land claimed. And said commissioners shall have the power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish government in favor of actual settlers,



[422]\*where the quantity claimed does not exceed three thousand five hundred acres."

It was enacted by the 5th section "that all claims not filed with the commissioners of the district, where the land claimed is situated, in the manner prescribed by the act to which this is an amendment, on or before the first day of December next, shall be held to be void and of none effect."

The act further provided for the appointment of a surveyor for the territory, for the opening of land offices in each district, and for the appointment of a register and a receiver for each of said offices.

February 28, 1824, an act was passed (4 Stat. at L. 6, chap. 25), which extended the time limited for the settlement of private land claims in Florida by the act of March 3, 1823, until January 1, 1825; declared that no person should be taken and deemed to be an actual settler unless he, or those under whom he claimed title, should have been in the cultivation or occupation of the land at and before the period of the cession; and that it should be lawful for claims to be filed any time previous to September 1, 1824, "but all and every claim not filed by that time shall be held and deemed void and of none effect."

On the 3d of March, 1825, another act was passed (4 Stat. at L. 125, chap. 83), which provided that it should "be lawful for claims to be filed before the board of commissioners in East Florida any time prior to the first day of November, one thousand eight hundred and twenty-five;" and the commissioners were authorized to continue their session until the 1st Monday of January, 1826. The act provided for the appointment of keepers of the public archives.

February 8, 1827, an act was passed (4 Stat. at L. 202, chap. 9) to confirm title to lands and lots favorably passed on or reported not exceeding 3,500 acres. This act provided "that the several claimants to land in said district, whose claims have not been heretofore decided on or filed, before the late board of commissioners, be permitted to file their claims, and the evidence in support of them, with the register and receiver of said district, and evidence in support of those filed before said board, at any time before the [423] 1st of November next, whose duty it \*shall be to report the same, with their decision thereon, and those already filed, to the Secretary of the Treasury, on or before the 1st day of January, one thousand eight hundred and twenty-eight, to be laid before Congress at the next session." Surveys were to be made and certificates granted, and claims for which the surveyor refused to issue certificates designated on the township plats. Holders of claims exceeding 3,500 acres were required to furnish the surveyor with such information as would enable him to exhibit the claims on said plats.

This was followed by the act of May 23, 1828 (4 Stat. at L. 284, chap. 70), which confirmed claims which had been recommended for confirmation "to the extent of the quantity contained in 1 league square, to be located by the claimants, or their agents,

within the limits of such claims or surveys filed as aforesaid;" "that no more than the quantity of acres contained in a league square shall be confirmed within the bounds of any one grant; and no confirmation shall be effectual until all the parties in interest, under the original grant, shall file with the register and receiver of the district where the grant may be situated, a full and final release of all claim to the residue contained in the grant; and where there shall be any minors incapable of acting within said territory of Florida, a relinquishment by the legal guardian shall be sufficient; and thereafter the excess in said grants, respectively, shall be liable to be sold as other public lands of the United States."

The 4th section provided that the register and receiver should continue to decide the remaining claims in East Florida, subject to the same limitations and in conformity with the provisions of the several acts of Congress for the adjustment of private land claims in Florida, until the 1st Monday in the next December, when they should make a final report of all the claims aforesaid in said district to the Secretary of the Treasury; and provided that it should never be lawful after that time for any of the claimants to exhibit any further evidence in support of said claims.

It was further enacted by § 6 "that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States of the twenty-second of February, \*one thousand eight hundred [424] and nineteen, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act; and which have not been reported, as antedated or forged, by said commissioners, or register and receiver, acting as such, shall be received and adjudicated, by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the state of Missouri, by act of Congress, approved May twenty-six, eighteen hundred and twenty-four, entitled 'An Act Enabling the Claimants to Lands within the Limits of the State of Missouri, and Territory of Arkansas, to Institute Proceedings to Try the Validity of Their Claims;' *Provided*, That nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners or register and receiver, in conformity with the several acts of Congress, providing for the settlement of private land claims in Florida." An appeal was provided for from the decision of the judge of the district court to this court within four months after the decision should be pronounced.

The 12th section read: "That any claims to lands, tenements, or hereditaments, with-



in the purview of this act, which shall not be brought by petition before said court within one year from the passage of this act, or which, after being brought before said court, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever."

[425] The act of May 26, 1824 (4 Stat. at L. 52, chap. 173), in respect of land claims in Missouri and Arkansas, which "might have been perfected into a complete title" under the prior government, provided that it might be lawful for claimants to lands in Missouri and Arkansas to institute proceedings to try the validity of their \*claims in the manner set forth; that the court should have full power and authority "to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States."

The decision of this court, if an appeal were taken, or, if not, of the court below, was to be final and conclusive. By the 5th section of the act, any claim not brought before the court within two years, or not prosecuted to final decision within three years, was barred.

May 26, 1830 (4 Stat. at L. 405, chap. 106), an act was passed confirming the claims and titles to lands filed before the register and receiver of the land office acting as commissioners in the district of East Florida under the quantity contained in 1 league square, which had been recommended for confirmation, and referred to Congress January 14, 1830; and "all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of Congress approved twenty-third May, one thousand eight hundred and twenty-eight."

By the 8th section, claimants who were entitled to avail themselves of the act of May 23, 1828, or might avail themselves of the provisions of this act, by taking a quantity of land equal to a league square in lieu of the whole grant, were allowed a further time of one year from the passage of the act in which to make their relinquishments, etc.

By an act of June 22, 1860 (12 Stat. at L. 85, chap. 188), "for the final adjustment of private land claims in the states of Florida, Louisiana, and Missouri, and for other purposes," claimants of lands lying within those states by virtue of any grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States, were au-

thorized \*to make application for confirma-[426] tion of their title to lands so claimed, and the registers and receivers of the land offices in Florida were appointed commissioners to hear and decide under such instructions as might be prescribed by the Commissioner of the General Land Office, and according to justice and equity, in a summary manner, such claims within the district aforesaid as came within the provisions of the act. The claims were to be divided into three classes, first, all claims which in their opinion ought to be confirmed where the lands claimed had been in possession and cultivation by the private claimants or those under whom they derived title for a period of at least twenty years preceding the date of the filing of the claim, by virtue of some grant, concession, order of survey or permission to survey, or other written evidence of title; second, all claims which in their opinion ought to be confirmed, where the lands were claimed under written evidence of title, but where there had been no actual cultivation or possession for a period of twenty years; third, all claims which in their opinion ought to be rejected; that whenever the Commissioner of the General Land Office should approve the report of the commissioners in cases embraced in classes first and second, he should report the same to Congress for its action; and that whenever it should appear that the lands claimed and the title to which might be confirmed had been sold in whole or in part by the United States prior to confirmation, or where the same could not be surveyed or located, the party in whose favor the title was confirmed should have the right to enter upon any of the public lands of the United States a quantity of land equal in extent to that sold by the government.

Section 11 provided for proceedings where lands had not been possessed or cultivated for twenty years, but were claimed "by complete grant, or concession, or order of survey, duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain," by petition in any district court of the United States, within whose jurisdiction the lands or any part thereof might lie; and for an appeal from the decree to this court.

\*Section 12 enacted that the act should re-[427] main in force for five years, unless sooner repealed, "and all claims presented or sued upon according to the provisions of this act within the said term of five years may be prosecuted to final determination and decision, notwithstanding the said term of five years may have expired before such final determination and decision."

The provisions of this act were extended by an act of June 10, 1872 (17 Stat. at L. 378, chap. 421), putting it in force for a period of three years; and it was provided that all persons claiming land as specified in the 1st section of the act might have their claims confirmed, in all cases where it should be satisfactorily proved that the claimants, and those from whom they derived title, had "held continuous possession of the land

claimed, from the date of the cession to the United States of the territory out of which" the state of Florida was formed.

**Mr. William W. Dewhurst** argued the cause and filed a brief for appellants:

The words of the act of May 23, 1828, are, "all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States," not finally settled by the preceding provision of the act. Where the legislature makes no exception the courts can make none.

*French v. Speneer*, 21 How. 228, 16 L. ed. 97; *De Ylurbide v. United States*, 22 How. 290, 16 L. ed. 342.

Language not as comprehensive in the California act was held to comprehend every species of title.

*United States v. Fossatt*, 21 How. 446, 16 L. ed. 186.

The court had no power to restrict the terms of the statute.

*Martin v. Hunter*, 1 Wheat. 326, 4 L. ed. 102; *Delassus v. United States*, 9 Pet. 135, 9 L. ed. 78; *Bank of Alabama v. Dalton*, 9 How. 529, 13 L. ed. 245; *Saltmarsh v. Tut-hill*, 12 How. 389, 13 L. ed. 1035; *Lake County Comrs. v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Had there been any uncertainty in the language used, a construction embracing grants of every nature was necessary to protect the interests of the United States in the newly acquired territory of Florida, and this court, in case of doubt, was bound to give it such construction.

*Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *United States v. Fisher*, 2 Cranch, 386, 2 L. ed. 313.

But there never was any uncertainty in the meaning of the act of 1828. It has been many times construed by this court.

*United States v. Arredondo*, 6 Pet. 721, 8 L. ed. 547; *United States v. Clarke*, 8 Pet. 436, 8 L. ed. 1001; *United States v. Percheman*, 7 Pet. 51, 8 L. ed. 604; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283; *United States v. Kingsley*, 12 Pet. 476, 9 L. ed. 1163; *United States v. Wiggins*, 14 Pet. 334, 10 L. ed. 481; *United States v. Miranda*, 16 Pet. 153, 10 L. ed. 920; *United States v. Delespine*, 15 Pet. 226, 10 L. ed. 719; *Glenn v. United States*, 13 How. 250, 14 L. ed. 133.

Under both the Louisiana and California treaties it has been held that the acts of Congress required presentation and filing of complete titles, and imposed a bar for failure.

*McDonogh v. Millaudon*, 3 How. 693, 11 L. ed. 787; *United States v. Power*, 11 How. 570, 13 L. ed. 817; *Snyder v. Sickles*, 98 U. S. 203, 25 L. ed. 97; *Maguire v. Tyler*, 8 Wall. 650, 19 L. ed. 320; *United States v. Pillerin*, 13 How. 10, 14 L. ed. 28; *Tameling v. United States Freehold & E. Co.* 93 U. S. 644, 23 L. ed. 998; *More v. Steinbach*, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525.

This court has in numerous cases refused

to take jurisdiction of complete titles under the act of 1824, while under the act of 1828 very many of the cases determined are declared by the court to be perfect or absolute grants.

*United States v. Roselius*, 15 How. 34, 14 L. ed. 590; *United States v. Power*, 11 How. 580, 13 L. ed. 821.

So, under the act of 1860, this court denied any jurisdiction of inchoate titles, and declared such cases must be dismissed whatever their merit.

*Scull v. United States*, 98 U. S. 410, 25 L. ed. 164.

By the Spanish laws, lands were vested, not in the state, but in the Crown, to be disposed of by the King's own officers at his sovereign pleasure.

1 White, *Recopilacion*, p. 52; *De Armas v. New Orleans*, 5 La. 132.

In East Florida the governor was the lawful authority referred to in the treaty.

*United States v. Clarke*, 8 Pet. 449, 8 L. ed. 1006; *Mitchel v. United States*, 9 Pet. 735, 9 L. ed. 292.

"Lawful authorities" in the 8th article of the treaty, and "competent authorities" in the ratification by the King, mean those persons who exercise the granting power by authority of the Crown.

*United States v. Clarke*, 8 Pet. 449, 8 L. ed. 1006.

The term "lawful authorities" designates the governor as certainly as if he had been expressly named in the 8th article of the treaty. He is the officer who was empowered by his sovereign to make grants of land.

*United States v. Clarke*, 8 Pet. 452, 8 L. ed. 1007; *Menard v. Massey*, 8 How. 296, 12 L. ed. 1086; *Pollard v. Kibbe*, 14 Pet. 393, 10 L. ed. 512; *United States v. Acosta*, 1 How. 26, 11 L. ed. 34; *United States v. Wiggins*, 14 Pet. 334, 10 L. ed. 481.

It is to be noted that, while in the Louisiana territory there were deputy governors, there were no such officers in Florida, which was under the intendancy of Cuba. Even in Louisiana the deputy governor could not issue a complete title, but might make the first decree of grant and order of survey, if he was also subdelegate.

*Delassus v. United States*, 9 Pet. 134, 9 L. ed. 78; *Chouteau v. United States*, 9 Pet. 145, 9 L. ed. 81; *Carmichael v. Brisler*, 8 Mart. (La.) 727.

The title papers of a grant must be of a character to convey an absolute title, by whomsoever executed, to be the basis of a suit as against a patent from the United States.

*Burgess v. Gray*, 16 How. 62, 14 L. ed. 845; *Menard v. Massey*, 8 How. 306, 12 L. ed. 1090; *De La Croix v. Chamberlain*, 12 Wheat. 599, 6 L. ed. 741; *United States v. King*, 3 How. 787, 11 L. ed. 830.

The presumptions attaching to the act of a public officer can never be invoked to sustain the act of the officer outside the usual and recognized functions of his office.

*Sheldon v. Wright*, 7 Barb. 39; *International & G. N. R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171.



No evidence of the existence of a condition calling for action by any person beside the lawful governor has been offered, or exists so far as known to counsel, and no record or matter of record has been produced indicating that Governor Quesada was not in the exercise of the duties of his office during the term of his incumbency, outside of the mere recitations in the papers themselves. The recitations in the alleged grant itself are not evidence of the facts.

1 Am. & Eng. Enc. Law, 2d ed. p. 969; *United States v. Hughes*, 13 How. 7, 14 L. ed. 27; *United States v. Cambuston*, 20 How. 59, 15 L. ed. 828; *Hayes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735; *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *Brunson v. Wirth*, 17 Wall. 32, 21 L. ed. 566; *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283.

This alleged grant purported on its face to have been made by virtue of the power held by Morales as governor. Before the instrument could be used in evidence this power must be shown.

*Tolman v. Emerson*, 4 Pick. 160; 2 Phillips, Ev. 4th Am. ed. note 429, p. 472.

Until appellees had shown that Morales was an officer authorized to grant lands, even if they had established the fact that he was exercising the duties of the existing governor, the grants made by him were not evidence of title, but were void upon their face.

*McGarrahan v. New Idria Min. Co.* 49 Cal. 332; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875.

It would seem unnecessary to argue that, even according to the principles of the common law, Morales could not be deemed to be a *de facto* officer in the absence of evidence that he was performing the duties of the office, much more that such performance was under circumstances of reputation or acquiescence such as were calculated to induce submission to acts performed by him in the office he is alleged to have assumed.

*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; *State v. Murphy*, 32 Fla. 138, 13 So. 705.

He cannot be held to have been a *de facto* officer, where the only official act shown to have been performed by him is the very act in dispute. A man's doing a single act in question as an officer will not prove his commission.

*Hall v. Manchester*, 39 N. H. 295; *Rockbold v. Barnes*, 3 Rand. (Va.) 473; 8 Am. & Eng. Enc. Law, 2d ed. p. 784.

Morales could not be *de facto* governor while Quesada was *de jure* governor, performing the duties of his office.

*Boardman v. Halliday*, 10 Paige, 223; *Cronin v. Stoddard*, 97 N. Y. 273.

Not having shown any color of title to the office in Morales, and it being apparent that all persons dealing with him during the presence at St. Augustine of Quesada, the lawful governor, must have known that he was not a legal officer, the appellees are not in a position to avail themselves of the rule  
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that the acts done by this individual may not be inquired into.

*Dabney v. Hudson*, 68 Miss. 292, 8 So. 545; *Vaccari v. Maxwell*, 3 Blatchf. 368, Fed. Cas. No. 16,810; *United States v. Alexander*, 46 Fed. 728.

A subdelegate of the royal domain could not grant his power to grant lands.

*United States v. Power*, 11 How. 579, 13 L. ed. 820.

Under the liberal principles of the common law such power could not be delegated. It was a personal trust. The duties of the governor in respect to the granting of lands were judicial, as well as ministerial, and the proceedings in the case at bar purport to establish a judicial decree.

*Shankland v. Washington*, 5 Pet. 395, 8 L. ed. 167; *Warner v. Martin*, 11 How. 224, 13 L. ed. 673; 1 Bacon, Abr. *Authority*, D; *Runkle v. United States*, 122 U. S. 557, 30 L. ed. 1171, 7 Sup. Ct. Rep. 1141; 1 Am. & Eng. Enc. Law, 2d ed. p. 972; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

If Quesada was incapacitated by sickness, only routine duties could be delegated.

*Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273; 1 Am. & Eng. Enc. Law, 2d ed. p. 974.

Mr. Francis P. Fleming argued the cause, and, with Messrs. Horatio Bisbee, Francis P. Fleming, Jr., and C. D. Rinehart, filed a brief for appellees:

The authority of the Spanish governors of East Florida to grant lands without limitation, and in excess of the royal orders and rules as to head rights, has been repeatedly decided by this court.

*United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547; *United States v. Percheman*, 7 Pet. 51, 8 L. ed. 604; *United States v. Clarke*, 8 Pet. 438, 8 L. ed. 1002; *United States v. Rodman*, 15 Pet. 130, 10 L. ed. 685.

It is uniformly held that the acts of *de facto* officers are valid and cannot be attacked collaterally.

*Cocke v. Halsey*, 16 Pet. 71, 10 L. ed. 891; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. ed. 707; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Mechern*, Pub. Off. §§ 318-320.

The distinction between a perfect or complete title, and a mere concession or inchoate title, is that the former is without conditions to be performed and without the necessity of a preliminary survey to segregate the land granted from the public domain, while the latter concedes to the grantee the right which, upon the performance of conditions, or a survey when necessary, will entitle him to a full title.

*United States v. Clarke*, 8 Pet. 467, 8 L. ed. 1012; *United States v. Wiggins*, 14 Pet. 334, 10 L. ed. 481; *United States v. Hanson*, 16 Pet. 200, 10 L. ed. 936.

The long possession of Fish, Sr., under claim of title, and the adjudication in favor of Fish, Jr., recognizing his right as a son, justify the conclusion that there was a grant in fee to Fish, Sr., by either the old Spanish or the British government.

*United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

The United States derived no title to the Fish grant by the cession of Florida.

*United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547; *United States v. Percheman*, 7 Pet. 51, 8 L. ed. 604; *United States v. Clarke*, 8 Pet. 438, 8 L. ed. 1002; *United States v. Wiggins*, 14 Pet. 334, 10 L. ed. 481; *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57; *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28; *MaGee v. Doe ex dem. Alba*, 9 Fla. 382; *Doe ex dem. Magruder v. Roe*, 13 Fla. 611; *Keech v. Enriquez*, 28 Fla. 597, 10 So. 91.

The word "claims," as used in the act of May 23, 1828, should be construed to refer to those titles which the court designates as inchoate.

*Stowel v. Zouch*, 1 Plowd. 359; *Lawrence v. Miller*, 2 N. Y. 245; *Prigg v. Pennsylvania*, 16 Pet. 615, 10 L. ed. 1089; *Orvis v. Jennings*, 6 Daly, 446.

The act of May 23, 1828, must be construed in the light of the decisions holding the treaty to be self-operating.

*United States v. Wiggins*, 14 Pet. 350, 10 L. ed. 489.

There was no occasion or necessity for those holding under Fish to avail themselves of the privilege to sue the United States. They held a perfect title, combining possession, right of possession, and right of property.

*United States v. Marvin*, 3 How. 620, 11 L. ed. 753.

The distinction is drawn in *MaGee v. Doe ex dem. Alba*, 9 Fla. 397, between the treaty ceding Louisiana and that ceding Florida, the court holding that the former imposed a political obligation on the government to perfect titles, while the latter operated as a confirmation thereof.

*Story*, Eq. Pl. 10th ed. § 469.

Even if Congress had the right to forfeit one's property, except for taxation, punishment of treason or other crime, or in the exercise of the right of eminent domain, the courts would not sustain such action by implication, in the absence of an express statute.

*Rutherford v. Greenc*, 2 Wheat. 203, 4 L. ed. 220.

The contention that the failure to institute proceedings under the act of 1828 or of 1830 vests the land in the United States is contrary to the 5th Amendment to the Constitution, that no person shall be deprived of life, liberty, or property without due process of law.

*Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 500; *Cooley*, Const. Lim. 5th ed. chap. 11, \*357.

This court has no jurisdiction unless the circuit court was required to pass on the question of validity or construction in disposing of the rights asserted.

*Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34.

The construction of the treaty with Spain could not be drawn in question, for it had

been settled by repeated adjudications of this court, and was thus beyond question.

*State v. Bradley*, 26 Fed. 289.

If the Spanish grant were a complete one, which vested title in the grantee, it stood confirmed by the treaty. If it were not, it did not.

*United States v. Wiggins*, 14 Pet. 334, 10 L. ed. 481; *United States v. Percheman*, 7 Pet. 51, 8 L. ed. 604.

The determination of the category within which the grant fell in no way involved either the validity or the construction of the treaty. The treaty was an entirely collateral matter.

*Muse v. Arlington Hotel Co.* 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct. Rep. 109; *Gill v. Oliver*. 11 How. 529, 13 L. ed. 799; *The Pilot*, 3 C. C. A. 392, 7 U. S. App. 457, 53 Fed. 11.

\*Mr. Chief Justice **Fuller** delivered the [427] opinion of the court:

Appellees submitted motions to dismiss or affirm, the consideration of which was postponed to the hearing on the merits.

The contention is that the appeal should have been taken to the circuit court of appeals, and not to this court.

We do not concur in that view. The bill alleged "that this cause arises under the said treaty between the United States and Spain, which ratified and confirmed said grant to the said Joseph Fish, under whom your orators claim title. And the controversy involved in this cause necessarily involves the construction of said treaty."

By motions to dismiss and demurrers appellants set up various objections to the jurisdiction of the circuit court, the disposition of which involved the construction of the treaty. These \*being overruled, appel-[428]

lants by their answer admitted "that the controversy involves the construction of the treaty between Spain and the United States; . . . that perfect or complete grants were recognized by the treaty with Spain, but incomplete grants were ratified by the treaty, to the same extent they would have been valid had the territory remained under the King of Spain."

It was contended on the one hand that the title was absolutely confirmed by the treaty, and on the other that as this was not a suit brought under any of the acts of Congress in that behalf, the treaty could not be held to be self-executing.

The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the circuit court, and to justify an appeal from its decree directly to this court. The record differs from that in *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109, which fell short of affording adequate grounds for the maintenance of our jurisdiction.

This is a bill to remove clouds on title, and rests on complainants' alleged legal title, connected with possession.



The general rule is that complainants in such suits must be in actual possession. *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129. And such is the rule in Florida, where, however, it is enough if the land be wild and unoccupied, or if some independent head of equity jurisdiction exists. *Richards v. Morris*, 39 Fla. 205, 22 So. 650; *Hughes v. Hannah*, 39 Fla. 376, 22 So. 613; *Sloan v. Sloan*, 25 Fla. 53, 5 So. 603.

In this case actual possession was claimed of a plantation styled the Orange Grove, of about 100 acres, situated on what was called "Fish's" island, which the master found was not an island in itself, but part of Anastasia island; and constructive possession of the whole of Anastasia island, a certain part excepted as reserved. Relief was not sought as to the Orange Grove, and some homesteads, and proof was introduced tending to show that the tracts in controversy were wild and unoccupied. It was insisted as to them that the legal title drew possession to it.

[429] The master found as matter of mixed law and fact that the lands granted to Jesse Fish in 1795 were "an island, well known and designated by name, and entirely surrounded by water," and that they were completely and sufficiently segregated from the royal domain by proceedings taken under the decree of 1795, and Fish placed thereby in possession thereof; that the grant and the segregation of the lands from the royal domain constituted "a complete and perfect title to the said lands, to wit, to the whole of the island of St. Anastasia," certain lands, "marked off by the officials as reserved," excepted.

He also found that "on August 31st, 1823, Sarah Fish presented her memorial to the board of commissioners appointed by Congress to investigate as to land claims in East Florida, claiming title to the island of St. Anastasia under the grant to Jesse Fish in 1795, aggregating 10,000 acres of land; that on December 16th, 1825, the board of commissioners for East Florida reported to Congress the claim of Sarah Fish, heir to Anastasia island, for 10,000 acres, as a valid claim for confirmation, and that said claim was reported to Congress by the Secretary of the Treasury of the United States for confirmation, with his report under date of February 23d, 1826."

The master ruled as matter of law "that the grant of Fish, being a valid and complete title, properly segregated from the public domain prior to January 24th, 1818, stood ratified and confirmed both by the King of Spain and the United States by virtue of the eighth article of the treaty of cession. That this grant, having been passed upon by the commissioners of East Florida under the acts of Congress and reported by them to Congress for approval as a valid grant in 1826, was further confirmed as to its validity by the United States by the act of Congress of May 23d, 1828. That the limitation in the 12th section of the act of 1828 and the acts supplemental thereto and

amendatory thereof, enacted by Congress in regard to private land claims in Florida, did not apply to complete valid grants of land properly segregated from the royal domain and in possession by the grantees prior to Jan. 24th, 1818, and therefore did and do not apply to the grant to Fish so as to bar the present action."

If, then, the limitations of the acts of Congress properly applied to complete and perfect titles and this was such, or if they \*applied to the claim of Fish because it was not such a title, or under the particular circumstances, the conclusions reached were erroneous, and the decree must be reversed. [430]

And, apart from these limitations, if the grant did not amount to an absolute title, requiring no confirmation, the bill, of course, could not be maintained.

It must be remembered that this is not a suit under any of the acts passed by Congress in reference to the settlement of claims in East Florida, but entirely independent of them. According to the theory of appellees, those acts have no application whatever. Appellees assert their title to have been absolutely perfect and complete prior to the treaty, and, in any aspect, they must stand or fall by their contention that the Fish grant was a complete and perfect royal title.

And while we can perceive that equitable grounds may have justified the recommendation to Congress for confirmation in 1826, we cannot hold as matter of law that a grant couched in the terms of this one, and not made by the governor of East Florida or ratified by him, was an absolute conveyance of the fee.

By the Spanish law the King was the source and fountain of title to all lands, which could only be disposed of by him, or his duly authorized representative. In the Province of East Florida the governor acted in the granting of lands in the name and by the authority of the King as his direct representative. It was in that point of view that Quesada described himself as "Vice Royal Patron and Subdelegate of the Royal Domain." Quesada was governor from July 13, 1790, to July 20, 1796. His last participation in the matter of Fish's application was on March 26, 1795, when the papers were returned to Fish. What appears afterwards purports to have been done by one Morales during an alleged illness of the governor. There is nothing to indicate that Governor Quesada was not in the exercise of the duties of his office during his entire term, except the mere recitation in these papers. There is no evidence that Morales performed the duties of the office of governor unless the single act under consideration is to be so treated, and that would not make out a *de facto* incumbency, if there could be such, which, \*as to the exercise of this power, we cannot concede. There is no pretense that Morales was appointed governor *pro tempore*, and, indeed, he could not have been save by the King, or the captain general of Cuba and the Floridas, which appointment would have been formally made and duly recorded. 2 White's New Recopilacion, 270, [431]



271. No evidence to that effect was introduced. Morales clearly cannot be held to have had the power to make a royal grant, nor was any ratification of what he did do shown.

In *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547, and in *United States v. Peralta*, 19 How. 343, 15 L. ed. 678, it was held, in view of the rules of decision prescribed by the statutes under which the courts exercised jurisdiction, that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the official executing the grant, but that the court would assume as a settled principle that a public grant was to be taken as evidence that it was issued by lawful authority. But under the act of March 3, 1891, creating the court of private land claims, inasmuch as it was made essential before a grant could be held legally valid that it must appear that the title was "lawfully and regularly derived," it was held that such presumption could not be indulged in; that the language of the act imported "that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified." *Huyes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735. The question involved in that case was whether the territorial deputation of New Mexico had authority to make the grant in controversy. Mr. Justice White, delivering the opinion, said, among other things: "Further, while it is reasonable to presume that any order or decree of the supreme executive of Mexico conferring authority to alienate the territorial lands or ratifying an unauthorized grant to the extent authorized by law was made matter of official record, the petition does not aver and the grant does not recite, nor was there any evidence introduced showing a prior authorization or subsequent ratification. In fact, it was not even shown that at or about the time of the grant the territorial deputation habitually \*assumed to grant lands, particularly under circumstances which would justify an inference that the supreme executive was informed of such procedure."

In *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53, which was a case under the act of 1891, it was held that the presumption indulged in *United States v. Arredondo* could not supply the want of power in the alleged granting officer.

In the case at bar, as we have said, complainants were not proceeding under any act of Congress permitting the United States to be sued, but as at common law, and on the basis of absolute legal title. That title they were obliged to make out, and could only avail themselves of such presumptions as would ordinarily obtain. Without going into the question of the presumptions which might on occasion be indulged in, it is enough to say that it is clear that where the officer who assumed to convey the public domain had no authority *ex officio* to do so,

such authority cannot be presumed from the mere fact of the conveyance in the absence of other evidence.

We do not think that Governor Quesada could have delegated his power as subdelegate, and it cannot be assumed that he attempted to do so.

But, furthermore, we are not persuaded that Morales undertook to make an absolute grant in fee. He did not profess to be acting as "Vice Royal Patron and Subdelegate of the Royal Domain." The grant did not run in the name of the King; did not purport to make the grant as "in absolute property;" did not assert the legal right to make such a grant; and the terms of the paper were consistent with a grant of possession merely, or, at the most, of a concession, which required a title in form to be subsequently issued.

The report of the land commissioners of January 31, 1826, transmitting the Fish claim among others (4 American State Papers, "Public Lands," D. G. ed. 276), states: "A royal title is the highest order of title known by any law, usage, or principle, in the province of East Florida. Titles of this description were designed to convey the fee simple to the grantee; they were usually made by the acting governors of the province in the name of the King; they recited the grant to be 'in perpetuity,' \*and also the [433] specific metes and bounds of the land. . . . This title may be said to correspond in character with that of a patent issued by our government. Concessions without condition are understood to differ from a royal title only in this, that most of the latter recite the metes and bounds, whereas the unconditional concession, although definite in quantity and location of the land, is still subject to a survey; which, when made, was followed up by maturing the concession by a royal title. . . . There is also a peculiarity in the phraseology of a royal title; in all the grants of this nature, the legal right to grant the lands is asserted."

The commissioners regarded the grant in question as a concession without condition, or with conditions fulfilled, and reported it as such for confirmation. They attributed it to the royal order of 1790 in respect of settlers. 1 Clarke's Land Laws, 996, 994; 2 White, 276; *United States v. Clarke*, 8 Pet. 436, 8 L. ed. 1001.

Referring to class one, being claims to lands not exceeding 3,500 acres in quantity, they made the observations already quoted, and further said: "In deciding on the cases comprehended in this class, the board have in all cases of royal titles and concessions without condition, where the documents were found amongst the archives of the country, and no allegations on the part of the United States appearing against them, considered themselves bound to grant certificates of confirmation to the claimants. . . . Number three comprehends claims exceeding 3,500 acres, the titles to which were found amongst the public archives of the country, and are ascertained by the commissioners to be valid Spanish grants, and



reported accordingly to Congress for confirmation."

The question on this branch of the case is not whether the grant should have been confirmed, but whether it amounted to a complete title without confirmation. At the time of the cession was further action of the government required to perfect it? As it was not in itself a royal title, and was neither made nor confirmed by the lawful authorities of the King, we think such action was necessary.

But were this otherwise it seems to us clear that the limitations of the acts of Congress applied.

[434] \*Articles II. and VIII. of the treaty between the United States and Spain, concluded February 22, 1819, ratified by Spain October 24, 1820, and by the United States February 19, 1821 [8 Stat. at L. 254, 258], read as follows:

"Article II. His Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissaries or officers of the United States, duly authorized to receive them."

"Article VIII. All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas, was made, are hereby declared, and agreed to be, null and void."

In the light of the Spanish text, to the effect that grants should "remain ratified and confirmed," the treaty has been frequently construed as meaning that grants needing no confirmation should stand confirmed, while those requiring confirmation should receive it in due course as might be provided.

Undoubtedly private rights of property to land lying within the territory ceded were [435] entitled to protection, whether they \*were complete and absolute titles, or merely equi-

table interests needing some further act of government to perfect the legal title. The duty of securing such rights belonged to the political department, and might be discharged by Congress itself, or through the instrumentality of boards, or of strictly judicial tribunals. And even grants which were complete at the time of the cession might be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they could be held valid. *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28; *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; *United States v. Clarke*, 8 Pet. 436, 8 L. ed. 1001; *Glenn v. United States*, 13 How. 250, 14 L. ed. 133.

In *United States v. Clarke*, the acts of Congress prior to 1834 were considered by Chief Justice Marshall, in the instance of a complete and perfect grant. Referring to the act of May 26, 1830, the Chief Justice said: "It was obviously the intention of Congress to extend the jurisdiction of the court to all existing claims and to have them finally settled. The purpose for which the act was made could not be otherwise accomplished. . . . The words which confer jurisdiction, and describe the cases on which it may be exercised, are 'all the remaining cases which have been presented according to law, and not finally acted upon.' The subsequent words 'shall be adjudicated,' etc., prescribe the rule by which the jurisdiction previously given shall be exercised." Quoting from the 6th section of the act of May 8, 1822, he said: "The object of this law cannot be doubted. It was to separate private property from the public domain for the double purpose of doing justice to individuals, and enabling Congress safely to sell the vacant lands in their newly acquired territories. To accomplish this object, it was necessary that all claims of every description should be brought before the commissioners, and that their powers of inquiry should extend to all. Not only has this been done, but, further to stimulate the claimants, the act declares 'that any claim not filed previous to the 31st of May, 1823, shall be deemed and held to be void and of none effect.' This primary intention of Congress is best promoted by determining causes finally, where their substantial merits can be discerned." He further \*quoted the 6th section of the act of May 23, 1828, and from the act of May 26, 1824 (referred to in the act of May 26, 1830), and as to the latter act said that it "does not define the jurisdiction conferred on the court of East Florida by the act of 1830, but directs the mode of proceeding and the rules of decision." [436]

In *Glenn v. United States* Mr. Justice Catron, referring to the case of Arredondo, said: "That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida."



The cases of *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547; *United States v. Percheman*, 7 Pet. 57, 8 L. ed. 607; *United States v. Clarke*, 8 Pet. 436, 8 L. ed. 1001,—were all instances of complete and perfect titles brought into court under these statutes.

*Botiller v. Dominguez* was a writ of error to the supreme court of California to review a judgment in favor of plaintiff in an action in the nature of ejectment. Plaintiff's title was a grant alleged to have been made by Mexico, but no claim under the grant had ever been presented for confirmation to the board of land commissioners appointed under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41); and no patent had ever issued from the United States to anyone for the land or any part of it. The state court held that the title to the land by the Mexican grant was perfect at the time California was acquired, and that the grantee was not compelled to submit the same for confirmation to the board of commissioners. This court ruled that no title to lands in California dependent upon Spanish or Mexican grants could be of any validity which had not been submitted to and confirmed by the board provided for that purpose by the act of Congress, or, if rejected by that board, confirmed by the district court or by the Supreme Court of the United States. Two propositions were urged in support of the decision of the state court: First, that the statute itself was invalid because in conflict with the treaty with Mexico, and also with rights of property under the Constitution and laws of the United States. Second, [437] that the statute was not intended \*to apply to claims which were supported by complete and perfect title from the Mexican government, but only to such as were imperfect, inchoate, and equitable in their character. As to the first of these propositions, this court held that, so far as the act of Congress was alleged to be in conflict with the treaty with Mexico, that was a matter in which the court was bound to follow the statutory enactments of its own government. As to the second point, it was held that the statute applied to perfect as well as imperfect claims, and Mr. Justice Miller, delivering the opinion, said:

"It was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected. The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government had its just influence in the board of commissioners, or in the courts to which their decisions could be carried by appeal. If the title was perfect, it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid; if it was not, then it was the right and the duty of that court to determine whether it was such a claim as the United States was bound to respect, even though it was not perfect as to all the forms

and proceedings under which it was derived. So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested. Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid. We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or \*other property is [438] at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions; and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued.

Mrs. Fish naturally took that view and memorialized the commissioners, who reported in favor of the claim, and the report was transmitted to Congress in February, 1826.

The act of May 23, 1828, followed, which confirmed all claims, which had been recommended for confirmation, of which this was one, to the extent of a league square, but provided that the confirmation should not be effectual until all the parties in interest in the original grant had filed a full and final release of all claims to the residue contained in it, with the register and receiver of the district where the grant was situated. We do not agree with the master that the effect of this was to confirm the entire grant, but, on the contrary, we think that by the action of Congress all of the claim except a league square was rejected, and that, as there was no release of the excess, the condition of the confirmation failed.

And inasmuch as this was the situation, and claimants had neither accepted the league square nor availed themselves of the legislation providing for resort to the courts, it was held when the matter was litigated in the Land Department that the claim was barred. The views there entertained were



[439] expressed by the Commissioner in his report of August 2, 1890, and by the Secretary of the Interior in his decision of June 22, 1893. 16 Land Dec. 550. The Land Department was of opinion that, even conceding that the claim was a valid grant from the Spanish government for the full quantity of 10,000 acres, \*and that the act of May 23, 1828, which governed that, among other claims, was in violation of the obligations of the treaty, the department and the courts were bound to follow the statutory enactments of their own government, and must be controlled thereby, and that, regarding the claim as coming within the provisions of the acts of 1827 and 1828, its validity could not be recognized because the claimants had failed to comply with the conditions prescribed by these acts. All claims of every description whatever, whether arising under patents, grants, concessions, or orders of survey, were required to be submitted to the board of commissioners for confirmation, or to be submitted to Congress for final action, before their validity could be recognized, and all claims reported upon by the commissioners, whether founded upon a complete or an incomplete title, were subject to the provisions of the act of Congress of May 23, 1828, and barred in accordance with its provisions. If the claim came within the provisions of the 2d section of that act, its validity was recognized only to the extent of 1 league square, and upon the condition that the claimant should relinquish all in excess of that quantity on or before May 26, 1831. If it did not come within the provisions of said section, then it was a claim not acted upon by Congress, and was barred by failure to commence the proper proceedings in the courts within the time limited in the 6th section of the act of May 23, 1828.

We accept these conclusions, and with the less reluctance as, if this were a perfect title as contended, resort to the courts might again have been had under the acts of 1860 and 1872.

It seems to us that the government was unquestionably entitled to demand the reasonable assertion of such claims as this, and that years after the public surveys had been extended over the land, and the maps and plats thereof approved; many reservations made for public purposes; patents issued; homestead entries made and final certificates issued, the exhibition of a bill to set aside the patents of the government by those who had failed to comply with the statutes came undeniably too late.

[440] In our judgment the bill cannot be maintained because complainants failed to show complete legal title from the King; \*and because the claim was barred by the statutes to which we have referred.

*Decree reversed, and cause remanded, with a direction to dismiss the bill.*

Mr. Justice Shiras and Mr. Justice Peckham dissented.  
180 U. S. U. S., Book 45.

ALVIN L. JOHNS *et al.*, Appts.,

v.

JAMES WILSON.

(See S. C. Reporter's ed. 440-451.)

*Mortgages—liability on stipulation to assume—second foreclosure to cut off secret vendee.*

1. A grantee whose deed contains a stipulation that he will assume and pay off a mortgage on the land is personally and primarily liable for any deficiency remaining after the proceeds of the land have been applied to the debt, in a direct action brought by the mortgagee in his own name.
2. The failure to make a tenant a party to a foreclosure suit will not relieve persons who are personally liable for the mortgage debt, if they are not prejudiced by his omission.
3. A second foreclosure of a mortgage may be had for the purpose of terminating the rights of a vendee under a conveyance fraudulently made and withheld from record, and of which the mortgagee had no knowledge and no means of knowledge at the time of bringing the first suit.
4. The failure to file an amended bill in a foreclosure suit on learning of a secret conveyance to a stranger to the suit will not preclude the plaintiff from having a second foreclosure, if his failure does not prejudice any of the defendants; nor will it deprive him of his rights except to the costs of the first suit.

[No. 67.]

*Submitted November 1, 1900. Decided March 11, 1901.*

**A** PPEAL from the Supreme Court of the Territory of Arizona to review a decision modifying a judgment in a suit for foreclosure. *Affirmed.*

See same case below, 53 Pac. 583.

Statement by Mr. Justice **Brown**:

This was a complaint in the nature of a bill in equity, under the Arizona Code, filed in the district court of Maricopa county, by the appellee, Wilson (who had already, in a prior suit, foreclosed a mortgage upon certain real estate against John M. Armstrong, mortgagor, and Robert E. Daggs, purchaser of the premises), against Alvin L. Johns, subsequent purchaser *pendente lite* \*of the [441] same premises, and also against William A. Daggs, tenant in possession, Robert E. Daggs, his landlord, and A. Jackson Daggs, agent of Robert E., to charge Johns and Robert E. Daggs with the payment of the mortgage debt, for a foreclosure of the mortgage against all the defendants, for a receiver, and for a judgment against all for damages.

The complaint, which was filed June 22, 1895, alleged that when the former bill foreclosing the mortgage was filed, April 26, 1894, John M. Armstrong, the mortgagor, and Robert E. Daggs, who purchased the premises December 18, 1893, were the only parties

NOTE.—On assumption of mortgage by a purchaser of premises—see note to Elliott v. Sackett, 27 L. ed. U. S. 678.



known to the plaintiff to be liable upon the notes, or to have any interest whatever in the mortgaged property; but that the defendants Robert E. Daggs and A. Jackson Daggs, conspiring together to hinder and obstruct the plaintiff in the collection of his mortgage debt, procured a deed of conveyance of the property from Robert E. Daggs to Johns for the sole purpose of hindering, delaying, and obstructing him in the collection of his mortgage debt; that the deed, though dated March 17, 1894, before the proceedings for a foreclosure were begun, was withheld from record until April 28, 1894, after the summons in the foreclosure action had been served and after the *lis pendens* had been filed; that in this deed Johns expressly agreed and bound himself to pay the plaintiff's mortgage debt; that William A. Daggs, who was at the time of the foreclosure in possession as tenant of Robert E. Daggs, did not advise plaintiff of his surrender of the premises as tenant of Robert E. Daggs, or of his having taken possession as the tenant of Johns; and that such abandonment and release of the property, and the taking possession thereof as tenant of Johns, were done secretly, without any notice to the plaintiff, with intent to deceive him into the belief that he (William A.) was still holding possession as tenant of Robert E. Daggs, and that the plaintiff, on account of such secret transfer of possession, if any was made, was deceived, as the defendant intended him to be, and that the foreclosure action therefore proceeded to judgment without his joining or making the said Johns and William A. Daggs defendants therein; that plaintiff

[442] had no knowledge or information, \*when he began his action and filed his *lis pendens*, that any other persons than Robert E. Daggs had any claim to the premises. Wherefore plaintiff prayed for a judgment against Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, for the amount of such debt, and for the sum of \$1,000 as damages; that his mortgage be adjudged unpaid and unsatisfied; and that the same be foreclosed against all the defendants and all persons holding under them; and for such further relief as the circumstances of the case required.

On a hearing upon pleadings and proof a judgment was rendered setting aside the sale had in the foreclosure suit of *Wilson v. Armstrong and Daggs*, and the satisfaction of the judgment made upon such sale; that the plaintiff Wilson recover of Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, the amount of such debt; declaring such amount (\$8,541.13) to be a lien upon the property, which was also foreclosed; ordering a sale of the premises as against Robert E. Daggs and Johns; and also finding that appellants had fraudulently conspired together to cheat, wrong, and defraud the appellee, and declaring the deed of Daggs to Johns to be fraudulent and void. It was further ordered that the former judgment stand and be carried into effect by a resale of the proper-

ty, and, in case the proceeds be insufficient to pay the judgment; that the sheriff make the deficiency out of the other property of Robert E. Daggs and Johns. The property was subsequently sold and bid in by the appellee for \$2,000, leaving a deficiency of \$6,861.26. There was no decree for damages.

An appeal was taken to the supreme court of Arizona, which modified the action of the lower court by omitting therefrom the personal judgment against Johns for the deficiency, but otherwise affirming it (53 Pac. 583), and, upon an appeal being taken to this court, made the finding of fact set forth in the margin.†

Mr. A. J. Daggs submitted the cause for appellants:

The grantee is not directly liable to the mortgagee, either at law or in equity, and the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor, and by virtue of the right in equity of a creditor to avail himself of any property which his debtor holds from a third person for the payment of the debt.

*Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

Before such an action can be maintained it must be alleged and proved by the mortgagee that his mortgagor has been exhausted.

*Union Mut. L. Ins. Co. v. Hanford*, 143 U.

† *Finding of Facts.*

1. That on the 24th day of April, 1893, one John S. Armstrong executed a mortgage on certain real estate, described in the complaint herein, to one James Wilson to secure the payment of two certain promissory notes in said complaint set forth, each being for the sum of \$3,250 and interest, and dated on said 24th day of April, 1893.

2. That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant (appellant here) R. E. Daggs, and conveyed the same by certain deed of conveyance, in which said defendant R. E. Daggs agreed and bound himself, his heirs, executors, and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

3. That on the 26th day of April, 1894, default having been made in the payment of the said notes secured by said mortgage, the said Wilson commenced an action in the district court of Maricopa county against the said Armstrong and said R. E. Daggs for the recovery of the amount due upon said notes, and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder of said county.

4. That at the time of the beginning of said suit the defendant W. A. Daggs was in the possession of the said premises, and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

5. That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the 8th day of May, 1894, against the said



S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; *Second Nat. Bank v. Grand Lodge of F. & A. M.* 98 U. S. 123, 25 L. ed. 75; *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831.

Again, it is not shown here in this bill that the grantee of the mortgagor ever had any contract or agreement with the mortgagee, and in fact it is not shown that any consideration ever passed to such mortgagee from grantees, or that he ever knew the grantees or either of them. Under such circumstances, how could there be any privity of contract?

*Shepherd v. May*, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119; *Drury v. Hayden*, 111 U. S. 223, 28 L. ed. 408, 4 Sup. Ct. Rep. 405.

This is the rule in equity.

Story, Eq. Pl. 262, 324.

A mortgagee can be entitled only to be subrogated to an existing remedy of his debtor, the mortgagor, upon legal existing stipulations; and this can never happen until it is shown that the mortgagee had exhausted his creditor, the mortgagor, before the grantee could be reached.

*Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609.

This is the rule of the common law.

*Waring v. Ward*, 7 Ves. Jr. 332; *Oxford v. Rodney*, 14 Ves. Jr. 417; *Woods v. Huntingford*, 3 Ves. Jr. 128.

There is no reason for a second decree unless the first is shown to be in some respect ineffectual to afford the relief claimed.

*Aldrich v. Stephens*, 49 Cal. 676.

Appellee when he brought his original

foreclosure suit had complete notice that the property belonged to the landlord of W. A. Daggs, as much as if A. L. John's deed had been upon the record.

1 Jones, Mortg. 5th ed. ¶¶ 586-589, and cases cited.

The doctrine is well settled that, where a party is in open and notorious possession of the property, it is the duty of those dealing with the title to that property to ascertain what he is doing there, and what his title is.

*Phelan v. Brady*, 119 N. Y. 587, 8 L. R. A. 211, 23 N. E. 1109; *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692; 2 Smith, Lead. Cas. 180, and authority cited; 1 Jones, Mortg. ¶¶ 255, 591, 592, 5th ed. ¶ 587, and cases noted; *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 260.

The remedy of the appellee was by motion in the original suit, not by separate action attempting to foreclose a mortgage, against the damage arising or purporting to arise from the alleged breach of the contract of assumption.

*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Boggs v. Fowler*, 16 Cal. 566, 76 Am. Dec. 561; *Kreichbaum v. Melton*, 49 Cal. 50; *Aldrich v. Stephens*, 49 Cal. 676.

The plaintiff's complaint shows on its face that he already has judgment against the appellant, R. E. Daggs, for the same alleged mortgage that forms the foundation of this action, in this suit. It is therefore *res judicata* as to him.

*Oregonian R. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 465; 1 Chitty, Pl. 16th Am. ed. p. 629; *Vale v. Warner*, 1 Wms. Saund. 323, *Hostler v. Hays*, 3 Cal. 302; *Smith v. Whit*

defendants J. S. Armstrong and R. E. Daggs, for the full amount due, with costs, and for the foreclosure of the mortgage.

6. That thereafter and on the 6th day of June, 1894, the said premises were sold by the sheriff of Maricopa county under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said sheriff, there having been no redemption, executed a deed conveying, or purporting to convey, the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs, then being found in possession, refused to surrender the same, and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and occupy said premises and property as such tenant of A. L. Johns, to the total exclusion of plaintiff, James Wilson.

7. That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action and the filing of the *lis pendens* aforesaid, a deed was placed on record in the office of the county recorder of said county, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns, of Chicago, Illinois.

That at the time the demand for possession, as aforesaid, was made by said Wilson upon the defendant W. A. Daggs, said W. A. Daggs claimed and asserted that on the 1st day of April, 1894, he ceased to be the tenant of R. E. Daggs, and thereupon became the tenant of

said A. L. Johns, and took possession of said property for said Johns at said time, and from that time forward held possession of said premises as the tenant of said A. L. Johns, and not as the tenant of said R. E. Daggs.

8. That at the time of the commencement of said action to foreclose said mortgage the said plaintiff in said action, James Wilson, had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim to said premises.

9. That said defendants R. E. Daggs and A. J. Daggs did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises, and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs, and for the purpose of hindering, delaying, and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.



aker, 11 Ill. 418; *German Mut. Ins. Co. v. Grim*, 32 Ind. 249, 2 Am. Rep. 341; *Crawford v. Nolan*, 70 Iowa, 97, 30 N. W. 32; *Bartholomew v. Candee*, 14 Pick. 167.

The court has no power or jurisdiction to relieve the plaintiff here from his deliberate mistake of law.

*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Story*, Eq. Pl. § 138; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. ed. 389; *Lyon v. Richmond*, 2 Johns 60; *Crosier v. Acer*, 7 Paige, 137; *Zollman v. Moore*, 21 Gratt. 313; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

Mr. D. H. Pinney submitted the cause for appellee. Mr. Louis T. Orr was with him on the brief:

It was not necessary to make Johns a party to the first foreclosure proceedings at all. He, having filed his deed after notice of *lis pendens* and after the service of summons on his grantor, was therefore bound by that proceeding, on judgment of foreclosure, to the same extent as if made a party to the suit.

13 Am. & Eng. Enc. Law, p. 907; *Wiltzie, Mortgage Foreclosures*, p. 371.

It was not necessary to make Armstrong, the mortgagor, a party to the second proceeding; his rights had already been disposed of in the first foreclosure.

*Benedict v. Gilman*, 4 Paige, 58; *Morey v. Duluth*, 69 Minn. 5, 71 N. W. 694.

[443] \*Mr. Justice Brown delivered the opinion of the court:

This case involves the right of a mortgagee to relief against one who secretly purchased the premises just prior to a bill being filed for the foreclosure of the mortgage, and who withheld his deed from record until after the summons in the foreclosure suit had been served and a *lis pendens* had been filed.

At the time the original foreclosure suit [445] was begun, the defendant \*William A. Daggs was in possession of the premises, and the title, so far as disclosed by the record, then appeared to be in Robert E. Daggs. But after it had culminated in a sale of the premises, June 6, 1894, and the sheriff had executed his deed, December 12, 1894, William A. refused to surrender possession, and claimed to hold as the tenant of Johns, and from that time continued to hold as such tenant, to the exclusion of plaintiff.

The supreme court found as a fact that the defendants Robert E. and A. Jackson Daggs had conspired together to hinder and obstruct Wilson in the collection of his mortgage debt, and to that end procured the deed from Robert E. Daggs to Johns, and withheld it from record until after the foreclosure suit had been begun; that such deed was fraudulent and void as against Wilson, and was executed and recorded by Robert E. Daggs for the purpose of hindering and delaying the plaintiff in securing possession of the mortgaged premises, and in obtaining satisfaction of his judgment by process of law.

A large number of errors are separately assigned by the different defendants, but we

shall notice only such as were passed upon by the supreme court, or pressed upon our attention in the briefs.

1. The most important is that Robert E. Daggs, the grantee of the original mortgagor, was not liable in a direct action by the mortgagee, because no privity of contract was shown between such grantee and the plaintiff mortgagee; and the action was not brought in the name of, or for the benefit of, the mortgagor Armstrong.

This assignment should be read in connection with the second finding, which is in substance that, in December, 1893, Armstrong sold to the defendant Robert E. Daggs the premises previously mortgaged to Wilson, the appellee, and conveyed the same to him by deed, in which Daggs agreed and bound himself to pay the two notes executed by Armstrong and secured by the mortgage. Under this sale and transfer Daggs entered into possession of the premises by William A. Daggs, his tenant. There was also in the deed of March 17, 1894, from Robert E. Daggs to Alvin L. Johns, as appears from a copy of \*the deed sent up with the record, a [446] similar agreement by Johns to assume and pay the Wilson mortgage; but as the supreme court held this deed to be fraudulent and void, and that there could be no recovery upon the agreement against Johns, this deed becomes immaterial. The question is whether there can be a personal judgment against Daggs upon the agreement in his deed from Armstrong to pay this mortgage. In the first decree rendered in the suit of *Wilson v. Armstrong and Robert E. Daggs* there was a personal judgment against Armstrong upon the notes which the mortgage was given to secure, and an order for a foreclosure and sale of the premises; and in case the proceeds of the sale were insufficient to satisfy the judgment, the sheriff should make the balance out of any other property of the defendant Armstrong; but there was no personal judgment against Robert E. Daggs. Such judgment was prayed for and granted in this case.

The question whether a mortgagee can recover against the grantee of the mortgagor upon a stipulation in his deed from the mortgagor to assume and pay off the mortgage, as well as the more general question how far a third party may avail himself of a promise made by the defendant to another party, has been the subject of much discussion and difference of opinion in the courts of the several states; but we think the decisions of this court have practically removed it from the domain of controversy.

In *Second Nat. Bank v. Grand Lodge of F. & A. M.* 98 U. S. 123, 25 L. ed. 75, the Masonic Hall Association, a Missouri corporation, had issued a large number of bonds which the grand lodge had assumed by resolution to pay. The bank brought an action at law against the grand lodge to compel the payment of certain coupons attached to these bonds, of which it was the holder; and this court held that it was not entitled to recover, upon the ground that the holders of the



bonds were not parties to the resolution, and there was no privity of contract between them and the lodge. In delivering the opinion of the court, Mr. Justice Strong observed: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. \*The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise."

*Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494, was a bill in equity by Keller, the mortgagee, against Ashford, the grantee of the land subject to this mortgage, which he had agreed to pay. It was held after full examination of the authorities, first, that the mortgagee could not sue at law, citing *Second Nat. Bank v. Grand Lodge of F. & A. M.* 98 U. S. 123, 25 L. ed. 75, and *Cragin v. Lovell*, 109 U. S. 194, 27 L. ed. 903, 3 Sup. Ct. Rep. 132; second, that in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee; but, third, that, under the equitable doctrine that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, the mortgagee was entitled to avail himself of an agreement in a deed of conveyance from the mortgagor, by which the grantee promised to pay the mortgage. This is upon the theory that the purchaser of land subject to the mortgage becomes the principal debtor, and the liability of the vendor, as between the parties, is that of surety.

In *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831, in error to the supreme court of the District of Columbia, it was held that the question whether the remedy of the mortgagee against the grantee of the mortgagor, to enforce an agreement contained in the deed to him to pay the mortgage debt, be at law or in equity, was governed by the *lex fori*, and that in the District of Columbia such remedy was by bill in equity only.

In *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437, it was said to be "the settled law of this court [that] the grantee is not directly liable to the mortgagee, at law or in equity; and \*the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the 180 U. S.

right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt." The court restated the rule laid down in *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831, that the question of the remedy of the mortgagee, whether at law or in equity, was to be decided by the law of the place where the suit was brought. The material question in that case was whether the giving of time to the grantee, without the assent of the grantor, discharged the latter from personal liability. It was held that it did, citing *Shepherd v. May*, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119.

As, however, under the Arizona Code, there is no distinction between suits at law and in equity, we see no reason to doubt that this action will lie. Indeed, in *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411, the supreme court of California, whose Code was practically adopted by the legislature of Arizona, thought an agreement on the part of the grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor was liable, renders the grantee liable therefor to the mortgagee; and in an action for a foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor, for the amount of such deficiency,—citing *Keller v. Ashford*, 133 U. S. 622, 33 L. ed. 673, 10 Sup. Ct. Rep. 494.

2. Further objection is made to this proceeding upon the ground that it is not shown that the mortgagor "had been exhausted," or that he is insolvent. If by this is meant that, after the sale of the property, the mortgagee is bound primarily to proceed against the mortgagor personally for any deficiency, the position is inconsistent with the doctrine of the cases above cited, in which it is assumed that the purchaser, who has agreed to pay the mortgage, is the principal debtor, and the mortgagor is surety. This view is thus concisely stated by Mr. Justice Gray in *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 190, 36 L. ed. 118, 120, 12 Sup. Ct. Rep. 437, 438: "The grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable \*to the latter, and the relation of the grantee and grantor toward the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt." Undoubtedly the mortgaged property must first be applied to the payment of the debt. This was done. The judgment, though nominally against Daggs for the amount of the mortgage debt, contemplated in subsequent paragraphs that the sheriff should only make the balance out of the property of the defendant Daggs, in case the proceeds of the sale were insufficient to pay the judgment. This, too, was the language of the order of sale.

In the case of *Biddell v. Brizzolara*, 64 Cal. 354, 30 Pac. 609, relied upon by the appellants, the general principle was recognized



that, where a purchaser of real estate from the mortgagor assumes payment of the mortgage debt, a cause of action arises, upon the principle of subrogation, in favor of the mortgagee, which he may enforce at any time within the life of his mortgage by a suit against the purchaser. In that case, however, it was held there could be no recovery, because the statute of limitations had run against the mortgage debt, and because the purchaser had reconveyed the mortgaged property to the mortgagor prior to the commencement of the action. As Armstrong could have recovered against Robert E. Daggs any deficiency he had been obliged to pay, the plaintiff could proceed against Daggs directly for such deficiency.

It is true that William A. Daggs was not made a party to the prior foreclosure bill, but his only claim to the property was that of tenant, either of Robert E. Daggs or of Johns. Robert E. Daggs was made a party to that bill, and Johns is made a party to this. We fail to see how either of them is prejudiced by William A. Daggs not being made a party to the former bill.

3. The seventh assignment, that no reason is shown for not applying for relief in the former foreclosure suit, appears to be based upon the theory that the former judgment is conclusive against the parties to the action, and that the plaintiff has no legal right to a second foreclosure. While it is true that, if the plaintiff had sought to foreclose the right [450] of William A. Daggs to this property, he should have been made a party to the former foreclosure, it is difficult to see how Johns would have been affected by a decree against Daggs, unless he also had been made a party. That he was not made such party is explained by the fact that his deed had not been put upon record, and that it was impossible for the plaintiff to have known, from aught that appeared to him, that Johns was the owner of the property. Where the mortgagee has no knowledge, and no means of knowing, that the mortgaged property has been sold by the person in whose name it stands of record,—especially where such sale is brought about by a fraudulent conspiracy between the vendor and vendee, and the conveyance is withheld from record for the purpose of misleading the mortgagee,—we know of no objection to a second foreclosure for the purpose of terminating the rights of the vendee. As stated in *Jones on Mortgages*, § 1679: "If the owner of the equity has, through mistake, not been made a party, the mortgagee, who has purchased at the sale, may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the costs of the previous sale." *State Bank v. Abbott*, 20 Wis. 570; *Stackpole v. Robbins*, 47 Barb. 212; *Shirk v. Andrews*, 92 Ind. 509; *Brackett v. Banegas*, 116 Cal. 278, 48 Pac. 90; *Morey v. Duluth*, 69 Minn. 5, 71 N. W. 694; *Benedict v. Gilman*, 4 Paige, 58; *Georgia P. R. Co. v. Walker*, 61 Miss. 481.

While it is possible that the mortgagee might have been able to obtain relief by an amended bill in the original suit, a new action is a proper remedy where he has been mistaken in his facts,—especially if such mistake has been brought about by the contrivance of the legal owners. Appellants apparently proceed upon the assumption that the possession of William A. Daggs was not only notice of his own rights to the property, and of his tenancy under Robert E. Daggs, the record owner, but also of the ownership of Johns, whose title did not appear of record, and of which the mortgagee had no actual notice. We cannot acquiesce in this assumption. It is true that plaintiff asserts in his complaint that, two days after his original bill of foreclosure was filed, William A. Daggs "claimed and \*asserted" (to whom [451] is not stated) that he had abandoned the premises as tenant of Robert E. Daggs to become the tenant of Johns. Under such circumstances, the plaintiff, if he knew of it, should have at once filed an amended bill; but his failure to do so does not seem to have resulted to the prejudice of any of the defendants; nor can it be said that plaintiff has lost his rights, except to the costs of the first suit, by failing to do so. An amended or supplemental bill is rather an alternative than an only remedy, and a failure to pursue this course ought not to debar him from resorting to another bill. *White v. Secor*, 58 Iowa, 533, 12 N. W. 586; *Bottineau v. Aetna L. Ins. Co.* 31 Minn. 125, 16 N. W. 849; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Stackpole v. Robbins*, 48 N. Y. 665; *Moulton v. Cornish*, 138 N. Y. 133, 20 L. R. A. 370, 33 N. E. 842; *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 276, 29 N. W. 936.

Defendants also claim a misjoinder of causes of action, in that the plaintiff sues Daggs, not only for a breach of his contract of assumption of the notes set out in the complaint, and to foreclose the mortgage lien, but upon an alleged conspiracy, wherein he charges him with colluding with A. Jackson Daggs to withhold the deed to Johns from record, and prays damages in the sum of \$1,000 for a refusal to surrender possession. As there was no recovery, however, upon this claim, we think it has become immaterial to consider whether there was a misjoinder. The same comment may be made upon the alleged misjoinder of parties.

We have examined the remaining assignments of error, of which there are a large number, contained in appellant's brief, and find them to turn upon questions of facts or as to the admission or rejection of testimony, which are foreclosed by the findings of the supreme court, or upon the alleged defects in procedure, which were not deemed to be of sufficient importance to be noticed in the opinion of that court. We find in none of them any sound reason for disturbing this judgment, and it is therefore affirmed.



[452]\*W. W. CARGILL COMPANY, *Plff. in Err.*,  
v.

STATE OF MINNESOTA *ex rel.* RAIL-  
ROAD & WAREHOUSE COMMISSION.

(See S. C. Reporter's ed. 452-470.)

*Constitutional law—license for elevator or warehouse—storing grain of the proprietor only—elevator as a public market—interference with interstate commerce.*

1. The requirement of a license for a warehouse by Minn. Gen. Laws 1895, chap. 148, p. 313, regulating elevators and warehouses on railroad rights of way or lands used in connection with a railway at stations and sidings, is not forbidden by U. S. Const. 14th Amend., in case of a warehouse used exclusively for the storage of the grain of the owner, where the warehouse is used for the purpose of buying grain from the public, and is a sort of public market, and the warehouseman, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain.
2. The construction of a state statute by the state court is to be accepted by the Federal court in determining whether the statute violates the Federal Constitution.
3. The acceptance of a license under a state law does not impose upon the licensee an obligation to respect or to comply with any provisions of the statute, or any regulations prescribed by state authorities, that are repugnant to the Constitution of the United States.
4. The classification of elevators and warehouses on a railroad right of way or depot grounds, and other lands used in connection with the railway at stations and sidings other than at terminal points, as made by Minn. Gen. Laws 1895, chap. 148, p. 313, requiring a license for such elevators and warehouses, does not deny to the proprietors the equal protection of the laws because a license is not required for elevators and warehouses differently situated.
5. The fact that grain stored in an elevator is to be shipped out of the state does not make a state statute requiring a license for conducting the business of such elevator in the state amount to a regulation of interstate commerce.

[No. 116.]

*Argued and Submitted December 3, 4, 1900.*  
*Decided March 5, 1901.*

NOTE.—On legislative control over business of warehousing—see note to *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529.

That the United States Supreme Court will not review the decisions of state courts construing their own statutes unless specially authorized—see note to *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

As to construction and effect of state laws and constitutions and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

On constitutionality of statutes restricting contracts in business—see note to *State v. Loomis* (Mo.) 21 L. R. A. 789.

On constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

180 U. S.

[N ERROR to the Supreme Court of the State of Minnesota to review a decision reversing a judgment for defendant in an action by the state to enjoin the operation of an elevator and warehouse until a license is obtained. *Affirmed.*

See same case below, 77 Minn. 223, 79 N. W. 962.

The facts are stated in the opinion.

*Mr. Ralph Whelan* argued the cause and filed a brief for plaintiff in error:

As applied to the facts in this case, Gen. Laws 1895, chap. 148, has no relation to, or tendency to accomplish, any matter or thing which is a proper subject of police regulation, and becomes an arbitrary and unwarranted limitation upon defendant's rights of personal liberty and private property, contravenes § 1 of the 14th Amendment to the Constitution of the United States, and is illegal and void.

U. S. Const. 14th Amend. § 1; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Rippe v. Becker*, 56 Minn. 100, 22 L. R. A. 857, 57 N. W. 331; *Stewart v. Great Northern R. Co.* 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L. R. A. 672, 71 N. W. 400; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Plessy v. Ferguson*, 163 U. S. 537, 539, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The interpretation of a state statute by the supreme court of the state, as to the divisibility of provisions, some of which are unconstitutional, is not invariably binding on this court.

*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The equal protection of the laws, guaranteed by the 14th Amendment to the Federal Constitution, is denied by state legislation that does not treat all persons subject to legislation alike under like circumstances

On license taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle* (Pa.) 9 L. R. A. 366, and *American Fertilizing Co. v. North Carolina Bd. of Agri.* (C. C. E. D. N. C.) 11 L. R. A. 179.

That state laws cannot regulate interstate commerce—see *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107, and note.

As to state laws interfering with interstate or foreign commerce—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

As to state regulation of commerce—see notes to *Ratterman v. Western U. Tele. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041, and *Postal Tele. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

and conditions, both in the privileges conferred and the liabilities imposed.

*Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

State legislation imposing upon a certain class of persons in the state special duties and burdens not resting on the general public is within the inhibition of such clause, if the classification is unreasonable and arbitrary, or based upon matters which have no reasonable relation to the object sought to be accomplished.

*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

While said clause, as to equal laws, was not intended to interfere with the power reserved in the states to enact police legislation to secure the general safety, yet state police legislation is not excepted from the requirements of said clause.

*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

To justify the state, under its police power, in interposing its authority on behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference.

*Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The classification is arbitrary, unreasonable, and unjust.

*Lunan v. Hitchens Bros. Co.* 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *State v. Bliler*, 138 Mo. 139, 39 S. W. 1117; *Los Angeles v. Hollywood Cemetery Asso.* 124 Cal. 344, 57 Pac. 153; *State v. Kuntz*, 47 La. Ann. 106, 16 So. 651; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *Curry v. District of Columbia*, 14 App. D. C. 423; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Nashville v. Althrop*, 5 Coldw. 554; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 524; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

All grain in the warehouse on its receipt therein became a part of interstate commerce, ceased to be governed exclusively by

state law, and began to be governed and protected by the national law of commercial regulation.

*Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Interstate commerce does not consist of transportation merely; it includes, among other things, the purchase and sale of articles intended to be transported from one state to another, and the articles themselves, bought for the purpose of such transit, or put in the way of it.

*United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

The state cannot, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose burdens or unusual and unnecessary restrictions upon the instruments, or subjects, or the carrying on, of interstate commerce.

*Cooley, Const. Lim.* \*574; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

*Mr. W. B. Douglas* submitted the cause for defendant in error. *Mr. W. J. Donahower* was with him on the brief:

An elevator or warehouse operated for the purpose of acquiring by purchase from the farmers of the vicinity the grain which constitutes the entire bulk of its shipment is a public market.

*Re Cooper*, 28 Hun, 515.

When a business is a proper subject of the police power, the legislature may, in the exercise of that power, adopt any measures, not in conflict with some provisions of the Constitution, that it sees fit; provided only they are such as have some relation to, and some tendency to accomplish, the desired end; and if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise or the best that might have been adopted.

*State v. Corbett*, 57 Minn. 349, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *Rippe v. Becker*, 56 Minn. 100, 22 L. R. A. 857, 57 N. W. 331; 1 Tiedeman, *State & Federal Control*, p. 235.

Because of the situation of an elevator and a warehouse, and their intimate relationship to the business of transportation of grain by rail, the legislature has subjected them to regulation.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stoeser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857.

It has been the uniform rule of this court never to depart from the construction of a state constitution by its highest judicial authority, unless such construction is manifestly unsound.

*Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Burgess v. Seligman*, 180 U. S.



107 U. S. 32, 27 L. ed. 364, 2 Sup. Ct. Rep. 10; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

[453] \*Mr. Justice Harlan delivered the opinion of the court:

The present action was brought in one of the courts of Minnesota, in the name of the state, against the W. W. Cargill Company, a Wisconsin corporation. The relief sought [454] was a decree \*perpetually enjoining the defendant from operating a certain elevator and warehouse owned by it, situated on the right of way of the Chicago, Milwaukee, & St. Paul Railway Company, in the village of Lanesboro, Minnesota, until it should have obtained a license from the railroad & warehouse commission of that state.

The suit is based on a statute of Minnesota, approved April 16th, 1895, and entitled "An Act to Regulate the Receipt, Storage, and Shipment of Grain at Elevators and Warehouses on the Right of Way of Railroads, Depot Grounds, and Other Lands used in Connection with Such Line of Railway in the State of Minnesota, at Stations and Sidings, Other than at Terminal Points." Gen. Laws, Minn. 1895, chap. 148, p. 313.

It seems to be necessary to a clear understanding of the case, and to the disposition of some of the questions presented for consideration, that the entire act be examined. It is therefore given in full in the margin.†

† § 1. All elevators and warehouses in which grain is received, stored, shipped, or handled, and which are situated on the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railroad company in this state to be used in connection with its line of railway at any station or siding in this state, other than at terminal points, are hereby declared to be public elevators, and shall be under the supervision and subject to the inspection of the railroad & warehouse commission of the state of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses.

"It shall be unlawful to receive, ship, store, or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state railroad & warehouse commission, which license shall be issued for the fee of \$1 per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm, or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm, or the names of all the officers of the corporation, owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this state and the rules and regulations prescribed by said commission, and every person, company, or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same.

"If any elevator or warehouse is operated in violation or in disregard of the laws of this state its license shall, upon due proof of this fact, after proper hearing and notice to the li-

\*We here give only the first and second sections of the act: [455]

"§ 1. All elevators and warehouses in which grain is received, \*stored, shipped or [456] handled, and which are situated on the right of way of any railroad, depot grounds, or any lands acquired or \*reserved by any rail- [457] road company in this state to be used in connection with its line of railway at any station or \*siding in this state, other than at [458] terminal points, are hereby declared to be public elevators, and shall be under the supervision and \*subject to the inspection of [459] the railroad & warehouse commission of the state of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses. It shall be unlawful to receive, ship, store, or handle any grain in any such elevator or warehouse, \*unless the owner or [460] owners thereof shall have procured a license therefor from the state railroad & warehouse commission, which license shall be issued for the fee of \$1 per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm, or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm, or the names of all the officers of the corporation, owning and operating such elevator or warehouse, and all moneys received for such licenses shall be

censee, be revoked by the said railroad & warehouse commission. Every such license shall expire on the 31st day of August of each year.

"§ 2. No person, firm, or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the preceding section; and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor, to be punished as hereinafter provided; and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed may upon complaint of the party aggrieved, and upon complaint of the railroad & warehouse commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court.

"§ 3. The railroad & warehouse commission shall before the 1st of September of each year, and as much oftener as they shall deem proper, make and promulgate all suitable and necessary rules and regulations for the government and control of public country elevators and public country warehouses, and the receipt, storage, banding, and shipment of grain therein and therefrom, and the rates of charges therefor, and the rates so fixed shall be deemed prima facie responsible and proper; and such rules and regulations shall be binding and have the force and effect of law; and a printed copy of such rules and regulations shall at all times be posted in a conspicuous place in each of said elevators and warehouses, for the free inspection of the public.

"§ 4. The party operating such country elevator or country warehouse shall keep a true and correct account in writing, in proper books, of all grain received, stored, and shipped at such elevator or warehouse, stating the weight, grade, and dockage for dirt or other cause on



turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this state and the rules and regulations prescribed by said commission, and every person, company, or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same. If any elevator or warehouse is operated in violation or in disregard of the laws of this state its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said railroad & warehouse commission. Every such license shall expire on the 31st day of August of each year.

“§ 2. No person, firm, or corporation shall in any manner operate such public country

each lot of grain received in store for sale, storage, or shipment, and shall, upon the request of any person delivering grain for storage or shipment, receive the same, without discrimination, during reasonable and proper business hours, and shall, upon request, deliver to such person or his principal a warehouse receipt or receipts therefor in favor of such person or his order, dated the day the grain was received, and specifying upon its face the gross and net weight of such grain, the dockage for dirt or other cause, and the grade of such grain, conformable to the grade fixed by the state railroad & warehouse commission and in force at terminal points; and shall also state upon its face that the grain mentioned in such receipt or receipts has been received into store to be stored with grain of the same grade under such inspection, and that, upon the return of said receipt or receipts, and upon the payment or tender of payment of all lawful charges for receiving, storing, delivering, or otherwise handling said grain, which charges may have accrued up to the time of the return of said receipt or receipts, such grain is deliverable to the person named therein, or his order, either from the elevator or warehouse where it was received for storage; or if the owner so desires, in quantities not less than a carload on track on the same line of railway at any terminal point in this state which the owner may designate, where state inspection and weighing is in force, such grain to be subject to such official inspection and weight as may be determined upon its arrival or delivery at such terminal point, and the party delivering shall be liable for the delivery of the kind, grade, and net quantity called for by such certificate, less an allowance not to exceed 60 pounds per carload for shrinkage or loss in transit, if such shrinkage or loss occurs. On the return or presentation of such receipts by the lawful holder thereof, properly indorsed, at the elevator or warehouse where the grain represented therein is made deliverable and upon the payment or tender of payment of all lawful charges, as hereinbefore provided, the grain shall be immediately delivered to the holder of such receipt, and it shall not be subject to any further charges for storage after demand for such delivery shall have been made, and cars are furnished by the railway company which the party operating the elevator or warehouse shall have called for promptly upon the request for shipment made by the holder of such receipt in the order of the date upon which such receipts are surrendered for shipment. The grain represented by such receipt shall be delivered within twenty-four

elevator or country warehouse without having a license as specified in the preceding section, and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor to be punished as hereinafter provided, and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed may, upon complaint of the party aggrieved, and upon complaint of the railroad & warehouse commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court.”

The complaint alleged that the elevator was used by the defendant company in connection with the railway for the receiving

hours after such demand shall have been made and cars or vessels or other means for receiving the same from the elevator or warehouse shall have been furnished.

“If not delivered upon such demand within twenty-four hours after such car, vessel, or other means for receiving the same shall have been furnished, the warehouse in default shall be liable to the owner of such receipt for damages for such default, in the sum of 1 cent per bushel, and in addition thereto 1 cent per bushel for each and every day of such neglect or refusal to deliver; *provided*, no warehouseman shall be held to be in default in delivering if the property is delivered in the order demanded by holders of different receipts or terminal orders and as rapidly as due diligence, care, and prudence will justify.

“On the return of said receipts, if shipment or delivery of the grain at terminal points is requested by the owner thereof, the party receiving such grain shall deliver to said owner a certificate in evidence of his right to such shipment or delivery, stating upon its face the date and place of its issue, the name of the consignor and consignee and place of destination, and shall also specify upon the face of such certificate the kind of grain and the grade and net quantity exclusive of dockage, to which said owner is entitled by his original warehouse receipts and by official inspection and weighing at such designated terminal point.

“The grain represented by such certificate shall be subject only to such freight or transportation or other lawful charges which would accrue upon said grain from the date of the issue of said certificate to the date of actual delivery, within the meaning of this act, at such terminal point.

“All warehouse receipts issued for grain received, and all certificates, shall be consecutively numbered; and no two receipts or certificates bearing the same number shall be issued during the same year from the same warehouse, except when the same is lost or destroyed, in which case the new receipt or certificate shall bear the same date and number as the original, and shall be plainly marked on its face ‘Duplicate.’ Warehouse receipts or certificates shall not be issued except upon grain which has actually been delivered in said country warehouse. Warehouse receipts shall not be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received. No receipt or certificate shall contain language in anywise limiting or modifying the liability of the party issuing the same as imposed by the laws of this state, and any such



and shipping of wheat and other grains [461] transported over \*the lines of the railway company; was essential and necessary to the railway company in order promptly, safely, and properly to handle grains received by it for shipment; and constituted, in that respect, a necessary adjunct of the railroad.

The facts upon which the case was determined are set forth in a finding based upon the stipulation of the parties, and may be summarized as follows:

On April 16th, 1895, and for more than a year prior thereto, the defendant company was engaged in the business of buying, selling, and dealing in grain,—its principal office and place of business being in the city of La Crosse, Wisconsin. It owned and operated large terminal and other grain elevators in that city, in Green Bay, and in other places in Wisconsin.

language, if inserted, shall be null and void.

"A failure to specify in such warehouse receipts or certificates the true and correct grade and net weight, exclusive of dockage, of any lot of grain to which the owner of such grain may be entitled, shall be deemed a misdemeanor on the part of the person issuing the same, for which, on conviction, he may be punished as hereinafter provided.

"§ 5. In case there is a disagreement between the person in the immediate charge of and receiving the grain at such country elevator or warehouse, and the person delivering the grain to such elevator or warehouse for storage or shipment, at the time of such delivery, as to the proper grade or proper dockage for dirt or otherwise, on any lot of grain delivered, an average sample of at least three quarts of the grain in dispute may be taken by one or both parties and forwarded in a suitable sack, properly tied and sealed, express charges prepaid, to the chief inspector of grain at St. Paul, which shall be accompanied by the request, in writing, of either or both of the parties aforesaid, that the said chief inspector shall examine the same and report what grade or dockage or both the said grain is, in his opinion, entitled to and would receive, if shipped to the terminal points and subjected to official inspection.

"It shall be the duty of said chief inspector, as soon as practicable, to examine and inspect such sample of grain, and adjudge the proper grade or dockage, or both, to which said sample is, in his judgment, entitled, and which grain of like quality and character would receive if shipped to the terminal points and subjected to official inspection.

"As soon as the chief inspector has examined, inspected, and adjudged the grade and dockage as aforesaid, he shall at once make out in writing and in triplicate a statement of his judgment and finding in respect to the case under consideration, and shall transmit by mail to each of the parties to said disagreement a copy of the said statement of his judgment and finding, preserving the original together with the sample on file in his office.

"The judgment and finding of the said chief inspector shall be deemed conclusive as to the grade or dockage, or both, of said sample, submitted for his consideration, as herein provided, as well as conclusive evidence of the grade or dockage, or both, that grain of the same quality and character would receive if shipped to the terminal points and subjected to official inspection.

"§ 6. Whenever complaint is made, in writing, to the railroad & warehouse commission  
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The village of Lanesboro contained about 1,100 inhabitants, and was situated in the county of Fillmore, Minnesota, upon the railway line of the Southern Minnesota division of the Chicago, Milwaukee, & St. Paul Railway Company, distant about 54 miles west from La Crosse, and having by the railway line referred to direct connection with that city.

Considerable quantities of grain had been annually raised in Fillmore county, and marketed, sold, and delivered into local grain elevators and warehouses in Lanesboro, and thence shipped in cars over the above-mentioned line of railway, which was the only means for such shipment.

The defendant company owned, occupied, and operated a grain warehouse situated on the right of way of the railway company and along its tracks in Lanesboro.

by any person aggrieved, that the party operating any country elevator or country warehouse under this act fails to give just and fair weights and grades, or is guilty of making unreasonable dockage for dirt or other cause, or falls in any manner to operate such elevator or warehouse fairly, justly, and properly, or is guilty of any discrimination, then it shall be the duty of the railroad & warehouse commission to inquire into and investigate said complaint and the charge therein contained; and to this end and for this purpose the commission shall have full authority to inspect and examine all the books, records, and papers pertaining to the business of such elevator or warehouse, and all the scales, machinery, and fixtures and appliances used therein.

"In case the said commission find the complaint and charge therein contained, or any part thereof, true, they shall adjudge the same in writing, and shall at once serve a copy of such decision, with a notice to desist and abstain from the error and malpractice found, upon the party offending and against whom the complaint was made, and to afford prompt redress to the party injured, and if such party does not desist and abstain, and does not give the proper redress and relief to the party injured, it shall be the duty of the said commission to make a special report of the facts found and ascertained upon the investigation of said complaint and the charge therein contained, which report shall also include a copy of the decision by said commission made therein to the attorney of the county where such elevator or warehouse is located, who shall institute and carry on in the name of the complainant such actions, civil or otherwise, as may be necessary and appropriate to redress the wrongs complained of and to prevent their recurrence in the future.

"§ 7. Any person, firm, or corporation operating any country warehouse or country elevator under this act shall, at any and all times when requested by the railroad & warehouse commission, render and furnish in writing under oath to the said commission a report and itemized statement of all grain received and stored in, or delivered or shipped from, such elevator or warehouse during the year then last past. Such statement shall specify the kind, grade, gross and net weight of all grain received or stored, and all grain delivered or shipped, and shall particularly specify and account for all so-called overages that may have occurred during the year. Such statement and report shall be made upon blanks and forms furnished and prescribed by the railroad & warehouse commission.



No machinery or mechanical appliances whatever had been used or were contained in its warehouse at Lanesboro; and all grain of every kind received into it during the period in question had been hauled to the warehouse in bags or farm wagons and there unloaded. The bags of grain were placed upon small hand trucks at the entrance of the building, and conveyed first to the weighing scale and thence to the grain bins of the warehouse into which the grain was poured from the bags.

The grain shipped from the warehouse was "spouted" by force of gravity into box cars [462] standing on the railway tracks, \*and thence carried by the railroad company over its line for the defendant company to such points as the latter might direct.

Each parcel or lot of grain received into or deposited or handled in or shipped from the warehouse had been purchased by the defendant, and was its sole and absolute property.

The defendant company during the period mentioned never received into, or shipped from, or handled or deposited or in any way stored in the warehouse any grain in which any other person or persons had any property, title, right, or interest; nor issued or offered to issue any warehouse receipt or storage ticket for grain received there; nor carried on or offered or attempted to carry on in the warehouse the business of receiving, handling, storing, or shipping grain of or for any other person or persons. But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant.

During all the time the warehouse was owned, occupied, and operated by the defendant, all grain of every kind and description received into, or deposited or handled in, or shipped from, the warehouse was purchased by it for the express purpose of acquiring, shipping, and transporting it as its property solely to its terminal elevators in the cities of La Crosse and Green Bay, or to Milwau-

kee, Wisconsin, or to Chicago, Illinois, and thence to other points in states east of Lake Michigan and upon the Atlantic seaboard.

All the grain so received into, or deposited or handled in, the warehouse had been actually shipped as its property from the warehouse in carload lots over the railway line, and directly and continuously transported by the railway company beyond Minnesota to its terminal elevators, cities, or points in Wisconsin, Illinois, and states other than Minnesota, and to no other points or places.

As fast as received into the warehouse from wagons all the grain was "spouted" into the box cars of the railway company for shipment, or was loaded into such cars severally containing different kinds of grades of grain separated from each other within the car by partitions, as sufficient grain for such a carload \*was accumulated in the warehouse, or was loaded out and so shipped as a full carload of grain of any one kind and grade was received into the warehouse; and no grain received or deposited in, or shipped from, the warehouse was handled or shipped in any manner other or different from one of the modes indicated, or kept in the warehouse longer or for any other purpose than as stated. [463]

No grain received into, or deposited or handled in, or shipped from, the warehouse had been bargained or sold or delivered to any person or firm or corporation doing business or resident in, or a citizen of, Minnesota, or shipped or transported to, or delivered at, any city, village, town, point, or place within the boundaries of that state.

During the time mentioned all grain of every kind and description received into or deposited or handled in, or shipped from, the warehouse was grown in Minnesota, and was sold and delivered to the defendant by, and received into the warehouse from, citizens and residents of, or other persons doing business in, Minnesota, the weights, grades, dockage, and inspection of all such grain having been fixed by mutual agreement between such persons and the company with-

"The commission shall cause every warehouse and the business thereof, and the mode of conducting the same, to be inspected at such times as the commission may order, by one or more members of the commission, or by some member of the grain-inspection department, especially assigned for that purpose, who shall report in writing to the commission the result of such examination; and the property, books, records, accounts, papers, and proceedings, so far as they relate to their condition, operation, and management, shall, at all times during business hours, be subject to the examination and inspection of such commission.

"§ 8. It shall be unlawful for any person, firm, or corporation, who shall operate any country grain elevator or country warehouse, under this act, to enter into any contract, agreement, understanding, or combination with any other person, firm, or corporation, who shall operate any other country grain elevator or country grain warehouse under this act, for pooling of the earnings or business of other different and competing grain elevators or warehouses so as to divide between them the

aggregate or net proceeds of the earnings or business of such grain elevators or warehouses, or any portion thereof; and in case of any agreement for the pooling of the earnings or business aforesaid, each day of its continuance shall be deemed a separate offense.

"§ 9. Any person, firm, or corporation who is guilty of any of the misdemeanors specified in this act, or who is guilty of violating any of the provisions of this act, shall, on conviction, be punished by a fine of not less than \$50 and not more than \$500, and in case a natural person is so convicted, he may be imprisoned until the fine is paid or until discharged by due course of law; and in case a corporation is so convicted, the fine may be collected by execution, as judgments are collected in civil actions, or the property of the corporation may be sequestered and charged with the same in appropriate legal proceedings.

"§ 10. All laws and parts of laws inconsistent with this act are hereby repealed.

"§ 11. This act shall take effect and be in force from and after the date of its passage."



out controversy in respect thereto, and in no other manner and by no other persons; and no weighing, grading, docking, or inspection of, or supervision or regulation of, any grain was performed or attempted or offered to be done or performed in or about the warehouse on the receipt or shipment of grain or at any other place or time by any person delegated or furnished by, or acting under the authority of, the state of Minnesota, or of any law thereof or of the railroad & warehouse commission of Minnesota, or any rule, regulation, officer, agent, or representative thereof, or by any person in any capacity whatsoever.

The defendant company never applied to the railroad & warehouse commission for license to receive, ship, store, or handle any grain in its elevator, and never procured a license therefor from the commission.

The parties stipulated and agreed that the plaintiff would make no claim of right to maintain the action except under and by virtue of the law in question.

(464) \*Such being the case made by the finding of facts, the relief asked was denied, the court of original jurisdiction holding that the statute was not a lawful exercise of the police power, and was repugnant as well to the Constitution of Minnesota as to § 1 of the 14th Amendment in so far as it declared warehouses and elevators in which only the grain of the owner was received, stored, shipped, or handled to be public elevators subject to the supervision of the railroad & warehouse commission.

The case was carried to the supreme court of Minnesota, and the judgment was reversed. That court, speaking by Judge Cauty, said: "If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede that such business would warrant but little interference or regulation of it by the state. But that business does consist of something more. It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the state. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this state. The grain crops of this state constitute by far the most important part of its commerce and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage and no more is taken; that no dishonest practices

are allowed and no undue advantage is permitted to be taken. Said chapter 148 requires the person operating such an elevator or warehouse to procure a license to be issued by the state railroad & warehouse commission, for which a fee of \$1 per \*year must [465] be paid. The act also provides that such license may be revoked by the commission if the warehouse or elevator is operated in violation or in disregard of the laws of this state. Section 2 provides that any person attempting to run such an elevator or warehouse without a license may be enjoined in a suit for that purpose. Section 3 provides that the commission may make suitable and necessary rules and regulations for the government of public country warehouses and elevators. Then follow other provisions. There are undoubtedly many provisions in the act which apply only to warehouses and elevators in which grain is stored for others or for the public, which provisions do not and cannot apply to such warehouses as the one here in question. There are, perhaps, provisions in the act which it would be unconstitutional to apply to such a warehouse as this. But these matters need not be considered at this time. The provision requiring a license is not one of these. This disposes of the only question argued which it is necessary to consider." *State ex rel. Railroad & Warehouse Commission v. W. W. Cargill Co.* 77 Minn. 223, 79 N. W. 962.

Judge Mitchell delivered a separate opinion, in which he said that in view of the fact, among others, that grain was the principal agricultural product of the state, that in its purchase and sale there was great liability to abuse in the matter of weights and grades, and that these were usually determined by the purchaser with his own instrumentalities, he agreed with the court that, although the owner of a warehouse use it exclusively for the storage of his own grain, yet if he used it for the purpose of buying grain from the public, thus rendering it, in effect, a public market, his business was a proper subject of police regulation by the state to the extent of providing such rules and regulations as were reasonably necessary to secure to the public just and correct weights and grades. He was also of opinion that the requirement of a license might be a reasonable regulation in such cases as a means of enabling state officials to ascertain who were engaged in the business. But he was of opinion that the provisions of the statute constituted a system of rules and regulations the different parts of which were so connected with, and dependent upon, each other that it was in many instances \*impos- [466] sible to separate them; that many of them were wholly inapplicable to warehouses not used for the storage of grain for others. Some of them were, in his judgment, clearly not within the police powers of the state as applied to warehouses not used for the storage of grain for others. Considering the case only upon the lines followed by the majority, Judge Mitchell was of opinion that, in view of the connection and interdependence of its various provisions, the whole act



should be held invalid as to warehouses not used for the storage of grain for others.

We have seen that the only relief asked by the state was that the defendant company be restrained and enjoined from the further operation of its elevator in receiving, storing, or handling of wheat or other grains until it was duly licensed therefor by the railroad & warehouse commission. It was, in effect, adjudged that a license from that commission was a condition precedent to the right of the defendant company to use or operate its elevator or warehouse in the manner and for the purposes indicated; also, that although the statute might contain many provisions not applicable to warehouses like the one owned by the defendant, and other provisions that, perhaps, were unconstitutional when applied to business like that in which the company was engaged, the provision requiring a license could stand and be enforced.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the state court. In *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 353, 44 L. ed. 192, 195, 20 Sup. Ct. Rep. 136, 138, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt "the interpretation of a statute of a state affixed to it by the [467] court of last resort thereof." See also *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 414, 41 L. ed. 489, 494, 17 Sup. Ct. Rep. 130; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419.

Pursuant to this rule, and without expressing any opinion on the question, we assume that the provision requiring a license from any person, firm, or corporation proposing to engage in the business described in the 1st section embraces the defendant company; that such provision may stand alone; and that its validity may be determined without reference to other provisions of the statute.

Thus considering the statute, we are of opinion that the mere requirement of a license from a person, firm, or corporation engaged in such business as that conducted by the defendant is not forbidden by the 14th Amendment of the Constitution of the United States. "The liberty mentioned in that Amendment," we have said, "means not only the right of a citizen to be free from the mere physical restraint of his person, as by

incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427, 431. But to require the defendant company to obtain a license is not forbidden by the Amendment. The authority to make such a requirement is to be referred to the general power of the state to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. *Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 162. The state court well said that the defendant's warehouse could be fairly regarded as "a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain." "We cannot question the power of [468] the state, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation.

The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) "thereby to have agreed to comply with the same." § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad & warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.

But the further contention of the defendant company is that the requirement of a li-



cense from the owners of elevators and warehouses situated on the right of way of a railroad at one of its stations or sidings other than at terminal points, without requiring a license in respect of elevators and warehouses differently situated, is a denial of the equal protection of the laws, and makes the statute obnoxious to the principle that "no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357, 359; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Assuming that the defendant is entitled, upon this record, to invoke the benefit of the clause of the 14th Amendment forbidding a state from denying to any person within its jurisdiction the equal protection of the laws, we adjudge that as the statute applies to all of the class defined in its 1st section, it is not invalid by reason of its nonapplication to those who own or operate elevators not situated on the right of way of a railroad. The railroad, as this court has often said, is a public highway established primarily for the convenience of the public, and—subject always to any right acquired by the railroad company under an inviolable contract with the state—the use of such a highway may be so regulated as to promote the public convenience, provided such a regulation be not arbitrary in its character, and does not materially interfere with the enjoyment by the railroad company of its property. The right of way is so closely connected with the operations of the railroad company that its use may be so regulated by the state as to promote the ends for which the corporation was created, and thus subserve the interests of the general public without interfering unreasonably with the company's management of its property. If in the judgment of the state it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground,—some difference that bears a proper relation to the classification made by the statute. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255. It is worthy of observation in this connection that it was neither alleged nor proved that there were in the state any elevators or warehouses that

were not situated on the right of way of a railroad company.

It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.

Without expressing any opinion as to the extent to which the railroad & warehouse commission may supervise the business of a person, firm, or corporation receiving a license under the statute, and restricting our decision to the only question necessary to be decided, we adjudge that the statute of Minnesota, so far as it requires a license for conducting such business as that in which the defendant is engaged, is not repugnant to the Constitution of the United States.

*The judgment is affirmed.*

\*H. DRUSILLA MITCHELL, *Petitioner*, [471]

v.

FIRST NATIONAL BANK OF CHICAGO.

(See S. C. Reporter's ed. 471-483.)

*Judgment—state decision affecting pending Federal case.*

An appearance in a state court of a claimant against an insolvent's estate, whose claim is denied by the highest court of the state, precludes the claimant from thereafter proceeding against the insolvent in a Federal court, in a suit begun before the proceedings were instituted in the state court, although the claimant was compelled to present the claim in the state court in order to be entitled to share in the estate there administered.

[No. 45.]

*Argued October 11, 12, 1900. Ordered for reargument October 29, 1900. Reargued January 15, 16, 1901. Decided March 5, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478.



a judgment for defendant in a suit upon a guaranty. *Reversed.*

See same case below, 34 C. C. A. 542, 92 Fed. Rep. 565.

The facts are stated in the opinion.

*Messrs. Theodore M. Maltbie* and *Charles E. Mitchell* argued the cause and filed a brief for petitioner:

The judgment of the superior court on an appeal from the action of commissioners on an insolvent estate has the same effect as a judgment in any civil action, and is conclusive as to all matters which are in issue and determined.

*Loomis v. Eaton*, 32 Conn. 552; *First Nat. Bank v. Hartford Life & Annuity Ins. Co.* 45 Conn. 22.

The respondent chose its forum, and has had its day in court, and ought not now to be permitted to retry the issues which have been judicially determined by a court of its own selection.

*Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Grant v. Buckner*, 172 U. S. 232, 43 L. ed. 430, 19 Sup. Ct. Rep. 163.

A litigant who chooses his tribunal must abide by its conclusions, and is not at liberty thereafter to present the same issues in another forum in disregard, and for the purpose of reversing the action, of the selected court.

*Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 1004.

The decision of the supreme court of errors in *Freeman's Appeal*, 68 Conn. 533, 37 L. R. A. 452, 37 Atl. 420, was practically between the same parties upon the same issues, and was a final adjudication, and should have been respected as binding and conclusive upon the principle of *res judicata*.

*Forsyth v. Hammond*, 166 U. S. 520, 41 L. ed. 1101, 17 Sup. Ct. Rep. 1004.

While it probably is true that the conclusions of the Connecticut court in *Freeman's Appeal*, 68 Conn. 533, 37 L. R. A. 452, 37 Atl. 420, are not a sufficiently formal judgment to be the basis of an action, or to be pleaded in bar to further proceedings, yet, upon issues that were precise and clear, certain questions were adjudicated. The rule is that the decision of any essential question even where the form and cause of action are different is conclusive between the parties in all subsequent actions.

*Cromwell v. Sac County*, 94 U. S. 35, 24 L. ed. 195; *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, 25 L. ed. 1072; *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Johnson Steel Street R. Co. v. Wharton*, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733.

These adjudicated questions constitute an estoppel, and, as we understand, may be offered in evidence without being specially pleaded. The decision of these questions can only be used to shut off an action or defense, and stand upon the same ground as an estoppel *in pais*.

*Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18;

*Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Bell v. Raymond*, 18 Conn. 91.

*Messrs. William C. Case* and *Percy S. Bryant* argued the cause and filed a brief for respondent:

The bank never made any such agreement or stipulation as, in the contemplation of either party, prevented it from having its day in the court of its own choice; and never at any time did the petitioner or her counsel claim that the proceedings in the state court could operate as a bar to the prosecution of the suit originally commenced by the bank in the Federal court.

*Fuller v. Naugatuck R. Co.* 21 Conn. 557; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

\*Mr. Justice **Harlan** delivered the opinion of the court: [471]

This is a suit upon a written guaranty held by the First National Bank of Chicago. It was signed in Connecticut by H. Drusilla Mitchell, she being a married woman, and by others, and was delivered in Chicago to the bank under circumstances presently to be stated.

The circuit court held that the liability of Mrs. Mitchell should be determined by the laws of Connecticut. The circuit court of appeals adjudged that, as the writing was delivered to the bank in Illinois, Mrs. Mitchell's liability was determinable by the laws of that state.

The case, however, presents the further question whether the precise matter in issue—the liability of Mrs. Mitchell notwithstanding her coverture at the time the guaranty was signed—was not adjudicated against the bank in the courts of Connecticut prior to the final judgment in the present case, and, if so, \*whether the bank was con- [472]

cluded by that adjudication, which remains unmodified.

The case as presented by the pleadings and by the agreed facts set forth in a written stipulation of the parties is this: In 1891 and prior thereto the firm of Morse, Mitchell, & Williams, composed of Francis E. Morse, Frederick C. Williams, and George H. Mitchell (the latter being the husband of H. Drusilla Mitchell), was engaged in mercantile and real-estate business at Chicago, Illinois, and kept an account with the First National Bank of that city.

The firm became indebted to the bank in the sum of \$20,000 or more, as evidenced by its notes. The bank agreed to continue giving it credit upon the condition that the firm and its individual members, together with Mrs. Mitchell, would execute a certain paper which it had directed to be prepared.

Mitchell and his wife at the time resided in Connecticut, and did not have a residence elsewhere after their marriage, which occurred in 1857. He took the paper prepared by the bank, and brought it to his residence in Connecticut, and there procured his wife to sign the same; and it was thereafter by him inclosed, addressed, and sent by mail to Morse, in Chicago, who delivered the paper to the bank.



The paper referred to was signed by Morse, Mitchell, & Williams, Francis E. Morse, Frederick C. Williams, G. H. Mitchell, and H. Drusilla Mitchell, and was as follows: "We hereby request the First National Bank of Chicago to give and continue to Morse, Mitchell, & Williams credit as they may desire from time to time, and in consideration of all and any such credit given we hereby guarantee any and all indebtedness now due or which may hereafter become due from them to said bank, to the extent of \$30,000, and waive notice of the acceptance of this guaranty and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from us of the discontinuance thereof shall be received by said The First National Bank of Chicago. Chicago, Ill., Feb. 20th, 1891."

[473] The bank continued to extend credit to Morse, Mitchell, & Williams until the firm became insolvent and made an assignment for the benefit of its creditors, on the 30th day of July, 1893. At the time of such insolvency and assignment it held and owned the notes of Morse, Mitchell, & Williams; renewals of unpaid portions of the above-mentioned notes, for \$16,500; a note of Elizabeth Ewing indorsed by that firm; also notes of F. E. Morse & Son, with whom George H. Mitchell had no connection.

It appears that on the 28th day of December, 1893, Mrs. Mitchell notified the executor of her father that she had assigned and transferred to the bank all of her right, title, and interest in so much of the testator's estate as was then undistributed, and authorized such executor to pay to the bank all money and property coming to her or to which she was entitled from that estate.

The present action was brought by the bank in the circuit court of the United States for the district of Connecticut on the 30th day of December, 1895, against Mrs. Mitchell and her husband. The complaint alleged that in reliance upon and in consideration of the above guaranty and promise the bank had extended credit and advanced money to Morse, Mitchell, & Williams from time to time and within the period specified in the instrument, to the amount of \$30,000, and for that amount it claimed judgment.

Mrs. Mitchell, by plea in abatement filed April 28th, 1896 (her husband having died the month previous), averred that at the time the above guaranty was executed, as well as at the commencement of the action, "she was a married woman, the wife of George H. Mitchell, since deceased, and was so married prior to April 27th, 1877, viz., on the — day of — 1857, and has not entered into the contract authorized by § 2798, General Statutes of Connecticut."

The section here referred to, as well as the two preceding sections, are as follows:

"§ 2796. In case of marriages on or after April 20th, 1877, neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage, except as to the share of the sur-  
180 U. S. U. S., Book 45.

vivor in the property, as provided by law. The separate earnings of the wife shall be her sole property. She shall \*have power to [474] make contracts with third persons, and to convey to them her real and personal estate, as if unmarried. Her property shall be liable to be taken for her debts, except when exempt from execution, but in no case shall be liable to be taken for the debts of the husband. And the husband shall not be liable for her debts contracted before marriage, nor upon her contracts made after marriage, except as provided in the succeeding section.

"§ 2797. All purchases made by either husband or wife in his or her own name shall be presumed, in the absence of notice to the contrary, to be on his or her private account and liability; but both shall be liable when any article purchased by either shall have in fact gone to the support of the family, or for the joint benefit of both, or for the reasonable apparel of the wife, or for her reasonable support, while abandoned by her husband. It shall, however, be the duty of the husband to support his family, and his property when found shall be first applied to satisfy any such joint liability; and the wife shall in equity be entitled to an indemnity from the property of the husband, for any property of her own that shall have been taken, or for any money that she shall have been compelled to pay, for the satisfaction of any such claim.

"§ 2798. In case of marriages existing prior to April 20th, 1877, the provisions of the two preceding sections shall apply whenever any husband and wife have entered, or shall hereafter enter, during marriage, into a written contract with each other for the mutual abandonment of all rights of either in the property of the other, under prior statutes, or at common law, and for the acceptance, instead thereof, of the rights in said sections provided, which contract shall be recorded in the court of probate of the district, and in the town clerk's office of the town, in which they reside. And thereupon said provisions shall apply to such marriage." Gen. Stat. Conn. 1888, pp. 610, 611.

It appears that at a court of probate held at Bristol, Connecticut, on the 30th day of September, 1896,—after the institution of the present suit in the Federal court, and after commissioners in insolvency in the probate court had made a report \*on the estate [475] of Mrs. Mitchell,—Edward A. Freeman, trustee of that estate, took an appeal to the superior court at Hartford from "the doings of said commissioners in allowing a claim in favor of the First National Bank of Chicago,"—*the same claim on which the bank brought this suit.*

In the superior court the bank filed a statement in which it was alleged that its claim was secured by an assignment to it of Mrs. Mitchell's interest in the estate of her father. Mrs. Mitchell filed an answer denying certain allegations in that statement, and pleading, among other things, her coverture at the time of the signing of the writing re-



lied on by the bank, and her residence in Connecticut during all her married life and since. To this answer the bank filed a reply. The parties—the bank and the trustee Freeman—consented in writing that the case be reserved “for the advice of the supreme court of errors of the state as to the judgment to be therein rendered,” and *they united in requesting the superior court* “to so reserve the case upon the issues joined and the agreed facts.” In conformity with this request the case was reserved. At the same time the parties filed in that court their agreed statement of facts.

It may be here stated that in Connecticut “questions of law may be reserved by the superior court, court of common pleas, or district court, in cases tried before either of them, for the advice of the supreme court of errors: *Provided*, That no such questions shall be reserved without the consent of all parties to the record in such cases; and the court making such reservation *shall*, in the judgment, decree, or decision made or rendered in such cases, *conform to the advice of the supreme court of errors*.” Gen. Stat. Conn. 1888, p. 260, § 1114.

The supreme court of errors of Connecticut advised the superior court to disallow every part of the claim of the bank. Speaking by Judge Baldwin it said, among other things: “Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this state until his death. Her marriage gave her, under the laws of the state then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a judicial point of view, was merged in that of her husband. [476] Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift’s Dig. 30. If she assumed to make such a contract, it was absolutely void. These personal disabilities the common law imposed partly for the protection of the husband and partly for that of the wife. To preserve what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the state. *Jackson v. Hubbard*, 36 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. *Kilbourn v. Brown*, 56 Conn. 149, 14 Atl. 784. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. Gen. Stat. Conn. § 2796. Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. Anson, Principles of

Contract, 328. If he could, his private agreements would outweigh the law of the land. *Jus publicum privatorum pactis mutari non potest*. Coverture constitutes such a status, and one of its incidents in this state at the time of Mrs. Mitchell’s marriage was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute unless both husband and wife have executed for public record a written contract by which both accede to the provisions of the statute of that year, and accept the rights which it offers to them. Gen. Stat. § 2798. No such contract was ever executed by Mrs. Mitchell.

“The claim in favor of the First National Bank of Chicago, which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing \*dated [477] in Illinois, but signed in this state. . . . He [the husband] sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented anyone but himself, it was his copartners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority as her agent to make or procure such a delivery at some subsequent time. . . . Engagements which coverture prevents a woman from making herself she cannot make through the interposition of an agent whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative by delivery here had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery. The superior court is advised to disallow all and every part of the claim of the First National Bank.” *Freeman’s Appeal*, 68 Conn. 533, 542, 37 L. R. A. 452, 455, 37 Atl. 420, 422.

The opinion of the supreme court of errors of Connecticut was rendered February 23d, 1897; and on March 2d, 1897, the superior court, in conformity with the advice of the former court, entered judgment disallowing the claims of the bank against the estate of Mrs. Mitchell.

After this judgment the bank proceeded with the case commenced by it in the circuit



court of the United States on the 30th day of December, 1895, just as if nothing had occurred in the state courts affecting its claim. Mrs. Mitchell on May 22d, 1897, filed in that court a substitute plea in abatement, asking judgment in her favor, "because she signed [478] said writing, Exhibit 'A' [the \*writing of February 20th, 1891], at her domicile in Bristol, in the state of Connecticut, and was, at the time of signing the same, a married woman, the wife of said George H. Mitchell, to whom she was married in 1857, at said Bristol, where she has ever since resided." She also filed on May 26th, 1897, an answer alleging that she signed said guaranty at her domicile in Connecticut, and not elsewhere, she being then a married woman, and stating that said copartnership at the time the alleged guaranty was signed, and prior thereto, "was indebted to the plaintiff in a large sum, viz., \$25,000 and more, and the plaintiff did not thereafter give said copartnership additional credit, but such indebtedness was largely reduced." Subsequently, June 8th, 1897, the parties, having previously stipulated in writing to waive a jury, filed in the circuit court an agreed statement of facts which did not materially differ from the one filed in the superior court at Hartford.

The circuit court of the United States gave judgment for the defendant. It referred to the above decision of the supreme court of errors of Connecticut, and said, among other things: "The capacity of citizens of a state, so long as they actually remain within the borders of the state, would seem to be a matter of local law, to be controlled by the laws of the state, and not to be evaded by the simple device of sending or mailing a letter to some other state. Suppose that the laws of some state should provide that infants might attain their majority and become capable of contracting at the age of eighteen years, could it be held that a minor eighteen years old in Connecticut could, by mailing a contract to that state, subject his property in Connecticut to execution against the will of his guardian and against the determination of the legislature and courts of Connecticut? . . . In the present case the law by which the invalidity of a contract is established is the common law, and the decisions that a married woman has capacity to make such contracts are founded upon local statutes. In these circumstances I think it is the duty of this court to follow the decision of the Connecticut court of last resort." 84 Fed. Rep. 90.

The case was carried by the bank to the circuit court of appeals, in which court the [479] judgment was reversed, with instructions \*to the circuit court to render a judgment in favor of the bank for the amount due by the terms of the guaranty of February 20th, 1891. That court, one of its members dissenting, held that the guaranty in question became effective and was to be deemed to have been made when delivered in Illinois, and that its validity as a contract was determinable by the law of that state, and not by the laws of Connecticut. The court said: 180 U. S.

"We are extremely reluctant to differ with the supreme court of Connecticut in a case involving the same facts, between substantially the same parties, not only because the opinion of that learned tribunal is always entitled to great consideration, but also because it is, in a sense, unseemly that there should be diverse judgments under such circumstances between a Federal court sitting in that state, and the highest court of the state. But the case is one which concerns the rights of a citizen of Illinois, acquired before the decision of the state court; and its decision depends, not upon the construction of local laws, but upon the application of the principles of general jurisprudence. In such cases the Federal courts are in duty bound to exercise their own independent judgment. In view of the decision of the supreme court of Connecticut, we should be glad to certify the question which we have thus considered to the supreme court for its instructions, but we do not feel authorized to do so, especially as that tribunal, under the power to issue a certiorari, can review our judgment if it sees fit." 34 C. C. A. 542; 92 Fed. Rep. 565.

In the view we take of this case it is not necessary to inquire whether the liability of Mrs. Mitchell under the writing of February 20th, 1891, was determinable by the laws of Connecticut or by the laws of Illinois. If, as the bank contends, that writing became a contract when delivered to the bank in Illinois, and not before, and if, as is also contended, Mrs. Mitchell was liable thereon by the laws of that state, although she was a married woman at the time of signing the writing in Connecticut where she resided, the question remains whether the parties were not concluded by the final judgment of the Hartford county superior court based upon the judgment rendered in the supreme court of errors of Connecticut. There can be no doubt that the identical question now presented—namely, as to the liability \*of Mrs. [480] Mitchell on the writing in suit notwithstanding her coverture—arose in the superior court upon appeal from the allowance of the bank's claim by the probate court; and, as we have seen, the parties united in the request that the case be reserved for the advice of the supreme court of errors of Connecticut, and the latter court, upon full consideration, advised the disallowance of all and every part of the bank's claim. To that advice the superior court, as it was compelled to do by the laws of Connecticut, conformed in its final adjudication of the bank's claim. The bank then turned to the Federal court as if nothing had been adjudicated in the courts of Connecticut, and sought a judgment in support of the same claim that had been rejected by the state court in the case between it and the trustee of the estate of Mrs. Mitchell.

We are of opinion that the bank was concluded by the judgment in the state court. In the recent case of *Southern P. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18, 27, we said, after 631



an extended examination of the adjudged cases, that "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." The authorities cited in the margin illustrate the rule.†

[481] \*It is said that the question here presented was one of general jurisprudence, involving the rights of citizens of different states, and that the circuit court was not bound to accept the views of the state court, but was at liberty, indeed under a duty, to follow its own independent judgment as to the legal rights of the parties. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court, when properly brought to the attention of the circuit court, would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination,—whether depending on Federal, general, or local law,—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.

It is also said that, after this suit was brought in the Federal court, the defendant

made a voluntary assignment in insolvency under the statutes of Connecticut; that a master was appointed who took possession of all of the property assigned for the benefit of creditors; that commissioners were appointed to receive and adjust claims on her estate; and that it was necessary for the bank to present its claims to the commissioners, or be forever barred from sharing in the assets of such estate. Therefore it is contended that the bank's appearance in the state court was compulsory, and that such appearance, although followed by an adverse final judgment in the state court, did not operate as a surrender of its right to thereafter proceed to final judgment in the Federal court in respect of the same matter.

These suggestions are without force. We do not suppose that the bank acquired any lien upon the property of Mrs. Mitchell \*merely by bringing its suit in the Federal [482] court, or that the bringing of that suit prevented her from making such an assignment of her property for the benefit of creditors as the laws of the state of which she was a citizen permitted. It may be that the bank could not have shared in the particular estate assigned and in the custody of the trustee Freeman without presenting its claim to the commissioners. Still if the bank had not appeared in the state court, nothing that could have been done by the tribunal administering the assigned estate would have relieved Mrs. Mitchell altogether from any obligation to the bank which she had legally incurred by having signed the guaranty of February 20th, 1891. The bank could have kept out of the state court, and proceeded to a final judgment in the Federal court, taking its chances to enforce the collection of such judgment. Instead of doing that, it presented its claim to the commissioners, and invoked the judgment of the highest court of Connecticut upon the question of the liability of Mrs. Mitchell notwithstanding her coverture at the time she signed the writing in question. Its appearance in the state court was not, in any legal sense, a compulsory one, but was made in its own interest, for the purpose of obtaining a share of the proceeds of certain property assigned for the benefit of creditors. It united with the trustee in having the case reserved for the advice of the supreme court of errors upon the question whether the coverture of Mrs. Mitchell constituted a defense against its claim; knowing, as it must be conclusively presumed it did know, that such advice when given would, under the laws of Connecticut, absolutely control the final action of the superior court. Having failed in its effort to have the state court adjudge that Mrs. Mitchell was liable on the writing in suit notwithstanding her coverture at the time of signing it, the bank cannot be permitted to relitigate that question in disregard of the final judgment against it, and seek a judgment in another court, which, if rendered in its favor, could rest only upon grounds which the state court had held, as between it and the trustee of Mrs. Mitchell's estate, could

†*Hopkins v. Lee*, 6 Wheat. 109, 113, 5 L. ed. 218, 219; *Smith v. Kernochen*, 7 How. 198, 216, 12 L. ed. 666, 673; *Thompson v. Roberts*, 24 How. 233, 240, 16 L. ed. 648, 650; *Washington, A. & G. Steam Packet Co. v. Slekles*, 24 How. 533, 340, 341, 343, 16 L. ed. 650, 652, 653; *Russell v. Place*, 94 U. S. 606, 608, 24 L. ed. 214, 215; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435; *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, 25 L. ed. 1073; *Bissell v. Spring Valley Twp.* 124 U. S. 225, 230, 31 L. ed. 411, 413, 8 Sup. Ct. Rep. 495; *Johnson Steel Street R. Co. v. Wharton*, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 691, 39 L. ed. 859, 863, 15 Sup. Ct. Rep. 733; *Forsyth v. Hammond*, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 1004; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905.



not, in law, be sustained. Although it does not appear that Mrs. Mitchell was, in form, a party to the proceedings in the state court, [483] she \*was in privity with the trustee who held her estate for the benefit of creditors. It was admitted at the bar that a judgment in that court in favor of the bank would have concluded the question of her liability. If the writing in suit was binding upon her notwithstanding her coverture when signing it, then the bank was a creditor entitled to its proportionate part of the proceeds of the estate to be administered for creditors. When, therefore, the state court adjudged that the coverture of Mrs. Mitchell protected her against liability for any claim based upon that writing, and that the bank was not entitled, in virtue of its provisions, to be regarded as a creditor of Mrs. Mitchell, there was a judicial determination, by a tribunal of competent jurisdiction, of the material question involved in this case, and consequently the bank could not, in a suit in another court against Mrs. Mitchell, reopen that question. The circuit court had before it, by agreement of the parties, a copy of the record of the proceedings in the state courts; and upon the evidence furnished by that record the question was distinctly presented whether those proceedings, in connection with the defendant's plea of coverture, constituted a defense against the plaintiff's cause of action based upon the writing of February 20th, 1891.

In our opinion, for the reasons we have given, the circuit court properly adjudged that the decision of the state court should control the rights of the parties in this case, and therefore that the law was for the defendant.

*The judgment of the Circuit Court of Appeals must be reversed, and the judgment of the Circuit Court is affirmed.*

[484] \*B. F. THOMPSON, Appt.,  
v.

D. M. FERRY, Simon J. Murphy, and  
Charles C. Bowen.

(See S. C. Reporter's ed. 484, 485.)

*Appeal—from territorial court—absence of assignments of error or specific findings.*

The evidence will be assumed to sustain the judgment, and the judgment will be affirmed by the Supreme Court of the United States, on appeal from the judgment of a territorial court, in the absence of any errors assigned on exceptions to rulings on the admission or rejection of testimony, where the supreme court of the territory merely sets forth in its opinion the facts on which it proceeds; but there are no specific findings as such.

[No. 144.]

*Submitted February 25, 1901. Decided  
March 18, 1901.*

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APPEAL from a decision of the Supreme Court of the Territory of Arizona affirming a judgment of the District Court of the Fourth Judicial District. *Affirmed.*

See same case below, 56 Pac. 741.

The facts are stated in the opinion.

Mr. J. F. Wilson submitted the cause for appellant.

Mr. G. W. Kretzinger submitted the cause for appellees:

A narration of facts in an opinion is not "a statement of facts in the nature of a special verdict," required by the act of April 7, 1874, chap. 80, § 2.

*Saltonstall v. Birtwell*, 150 U. S. 417, 37 L. ed. 1123, 14 Sup. Ct. Rep. 169.

Nor is the record aided by the fact that the territorial supreme court incorporates in its certified statement of the case, so-called, all the evidence introduced by the parties. The statute requires, not a mere report of the evidence, but a statement of the ultimate facts which such evidence establishes.

*Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Lehnen v. Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481.

In the absence of a certified statement of facts in the nature of a special verdict, there is nothing before the court from which it can judicially derive knowledge of the facts upon which the judgment proceeded. It must therefore assume that the evidence sustains the judgment.

*Marshall v. Burtis*, 172 U. S. 630, 43 L. ed. 579, 19 Sup. Ct. Rep. 290.

\*THE CHIEF JUSTICE: This appeal being [484] from the judgment of a territorial court, and no errors having been assigned on exceptions to rulings on the admission or rejection of testimony, we are limited in our review to the determination of the question whether the facts found are sufficient to sustain the judgment rendered. *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *Harrison v. Perea*, 163 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; *Marshall v. Burtis*, 172 U. S. 630, 43 L. ed. 579, 19 Sup. Ct. Rep. 290.

The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such.

In the supreme court the statement of facts is as follows:

"Statement of facts by the supreme court of the territory of Arizona, sitting as a court of appeal, on the foregoing transcript on appeal from the district court of the fourth judicial district of the territory of Arizona in and for the county of Yavapai, wherein judgment was rendered on a full hearing of the case in said district court in favor of said appellees and against the said appellant, as appears from the complete record \*of said [485] cause now on file in this court, and which said judgment has been brought to this court on appeal by appellant herein.

"The supreme court of the territory of Arizona takes the facts as certified to by the clerk of the said district court of Yavapai county, Arizona territory, as found in the

original papers in said cause, to wit, the judgment roll, and forwarded by the said clerk and now on file in the office of the clerk of this court; also the minute entries in said cause, certified to by said clerk of said district court, together with the findings of facts of the court below, the motion for a new trial, and the reporter's transcript of the evidence taken on the trial of said cause below, all certified to by said clerk of said district court as being the whole of the record of said cause, and also the assignment of errors filed by appellant herein and contained in his brief on file herein, and the facts shown by the whole record herein as the facts shown in this cause, \*and makes the same the statement of facts as found in the transcript in this cause the facts as found in this case.

"That from such transcript and from the same as the statement of facts herein this court finds that the said district court did not commit error in rendering judgment against the said appellant and in favor of said appellees; that the said appellees were the owners of all the right, title, and interest in the Poland and Hamilton mining claims, free from any claim of appellant.

"And the supreme court further finds that the judgment of the said district court should be affirmed, and therefore affirms the same."

This is not in compliance with the statute in that behalf, and as we must assume that the evidence sustained the judgment, *that judgment is affirmed.*

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\*LI SING, *Petitioner*,  
v.  
UNITED STATES.

(See S. C. Reporter's ed. 486-495.)

*Aliens—deportation of Chinese—certificate of Chinese merchant—conclusiveness of collector's decision—constitutionality of provisions casting burden of proof on alien, and refusing to accept testimony of Chinese.*

1. The decision of a customs officer admitting a Chinaman on a certificate issued by the Chinese government through its consul at New York, and viséd by the United States consul in Hong Kong, is not conclusive in his favor so as to preclude an examination of the question by a United States commissioner, since the act of Congress of August 18, 1894 (28 Stat. at L. 390, chap. 301), makes such determination of the customs officer final, unless reversed on appeal, only when it is adverse to the admission of such alien, and the provisions of the act of September 13, 1898, § 12 (25 Stat. at L. 476, chap. 1015), which declared that the collector's decision should be reviewed only by the Secretary of the Treasury, are not in force.

NOTE.—On *Chinese exclusion act*—see note to *Re Huse*, 25 C. C. A. 27.

On the *rights of aliens to equal protection of the laws*—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 583.

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2. A Chinaman seeking to enter the United States on a certificate showing that he was formerly engaged in this country as a merchant is required by the act of Congress of November 3, 1893 (28 Stat. at L. 7, chap. 14), to establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant.
3. The burden of establishing by affirmative proof his right to remain in the United States, which is put upon a Chinaman by the act of Congress of 1892 when he is arrested on the ground that he is unlawfully in this country, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.
4. The exclusion of Chinese as witnesses under the act of Congress of November 3, 1893, § 2 (28 Stat. at L. 7, chap. 14), to prove the fact that a Chinaman claiming the right as a merchant to re-enter the United States had been engaged as such for a year before his departure, is not violative of constitutional guaranties.

[No. 27.]

*Argued April 18, 19, 1900. Decided March 18, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming an order of the Circuit Court dismissing a writ of habeas corpus and remanding a Chinaman for deportation. *Affirmed.* See same case below, 30 C. C. A. 451, 38 U. S. App. 1, 86 Fed. Rep. 896.

Statement by Mr. Justice Shiras:

In June, 1893, Li Sing, a native of China, but then a resident of \*Newark, New Jersey, [487] returned to China and took with him a certificate purporting to have been issued by the imperial government of China, at its consulate at New York, and signed by its consul, that he was permitted to return to the United States and was entitled to do so, and which, furthermore, styled him a wholesale grocer. This certificate was viséd in Hong Kong by the United States consul on June 27, 1896, when Li Sing was about to return to this country. He thereafter returned by the way of Canada, presented the certificate to the United States collector of customs at Malone, New York, who canceled it on August 28, 1896, and permitted him to enter the country.

On January 6, 1897, the United States officer, who is called the United States inspector for the port of New York, represented in writing and under oath to John A. Shields, United States commissioner for the southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had been for many years a Chinese laborer. Whereupon he was brought

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before the commissioner for examination. It was claimed by the counsel for Li Sing before the commissioner that by the action of the collector of customs at Malone the question of the Chinaman's right to be and remain in this country was *res judicata*, and also that he was a merchant. Testimony as to his status as a merchant was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney of the United States. The commissioner found, upon all the evidence, that Li Sing was, at the time of the examination, a Chinese laborer, that he was such at the time he departed for China, and for several years prior thereto, and was such after his return from China in August, 1896.

The commissioner ordered his deportation, but did not order imprisonment as a punishment or penalty. A writ of habeas corpus and a writ of certiorari were thereupon allowed by the circuit court for the southern district of New York upon Li Sing's petition. After a hearing the writ of habeas corpus was dismissed, and the relator was [488] remanded to the custody of the United States marshal for deportation. An appeal was then taken by the relator from the order of the circuit court to the circuit court of appeals for the second circuit, and, on April 7, 1898, that court affirmed the order of the circuit court.

A writ of certiorari was thereafter, on February 1, 1899, allowed by this court.

**Mr. W. C. Beecher** argued the cause and filed a brief for petitioner:

The law as it now stands as amended by the act of 1894 places the power and duty of determining the admissibility of a Chinese applicant exclusively in the hands of the collector of the port of entry.

*Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

The power to exclude or expel was vested in the political departments of the government, except so far as the judicial department was empowered either by statute or treaty.

*United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Where an alien has once been admitted he cannot be arrested for deportation except by the Secretary of the Treasury, who must proceed within one year.

*Re Lifieri*, 52 Fed. 293.

The rule invoked here falls plainly within the well-known principle of *res judicata*.

*United States v. Chung Shee*, 22 C. C. A. 639, 44 U. S. App. 751, 76 Fed. 951.

The provision of § 3 of the act of 1892, purporting to cast the burden of proof upon the petitioner, is clearly a plain violation of the Constitution.

*Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

The petitioner had for many years prior to 180 U. S.

1893 been a merchant in Newark, New Jersey. When he visited China he was entitled to return without any certificate.

*Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

Assistant Attorney General Hoyt argued the cause and filed a brief for respondent:

It is only the decision of the appropriate immigration or customs officers excluding an alien which is made final in every case, unless on appeal to the Secretary of the Treasury it be reversed.

*Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

The constitutionality of § 2 of the act of August, 1893, is sustained generally by the entire line of Chinese decisions and the related decisions of the court.

*Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Lem Moon Sing v. United States*, 158 U. S. 543, 39 L. ed. 1084, 15 Sup. Ct. Rep. 967; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

\*Mr. Justice Shiras delivered the opinion [488] of the court:

The first contention on behalf of the petitioner is that the collector of customs at Malone had exclusive jurisdiction to hear and determine the right of petitioner to enter the country; that any error committed by the collector could only be reviewed by the Secretary of the Treasury, and that, consequently, the commissioner had no jurisdiction to act in the present case.

This contention is based upon the provisions of § 12 of the act of September 13, 1888 (25 Stat. at L. 476, chap. 1015), as follows: "And the collector shall in person decide all questions in dispute, . . . and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise."

Doubtless, if this section had gone into effect and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final as to the questions passed on by him. But the act of September 13, 1888, was passed to take effect upon the ratification of a treaty then pending between the United States and the Emperor of China, and it is conceded that such treaty never was ratified.

Thereupon, the treaty not having been ratified, the act of October 1, 1888 (25 Stat. at L. 504, chap. 1064), was passed, which declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been, or was then, \*or might thereafter be, a resident within [489] the United States, and who departed or might depart therefrom, and should not have returned before its passage, to return to or to remain in the United States, and that no certificates of identity, under which by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued, and it annulled



every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue of any such certificate.

The effect of this act was considered by this court in the case of *Wan Shing v. United States*, 140 U. S. 424, 35 L. ed. 503, 11 Sup. Ct. Rep. 729, decided May 11, 1891. In the opinion in that case the act of July 5, 1884 (23 Stat. at L. 115, chap. 220), was cited as still in force, which provided that any certificate given by the Chinese government, and viséd by the indorsement of the diplomatic or consular representative of the United States in China, shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States, at which the person named therein shall arrive, and after produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate might be controverted and the facts therein stated disproved by the United States authorities.

In summing up a review of the existing acts of Congress the court in that case, through Mr. Justice Field, said:

"The result of the legislation respecting the Chinese would seem to be this,—that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning."

The counsel for the petitioner cite cases in some of the circuit courts of the United States in which it has been held that some of the provisions of the act of September 13, 1888, notwithstanding the treaty was not ratified, could be regarded as in force.

[490] \*Without finding it necessary to say that there are no provisions in the act of September 13, 1888, which, from their nature, are binding on the courts, as existing statements of the legislative will, we are ready to hold that § 12 of that act cannot be so regarded. In the act of August 18, 1894 (28 Stat. at L. 390, chap. 301), it was provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

And in the case of *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967, it was held, expounding the act of August 18, 1894, that the decision of the appropriate immigration or customs officers, excluding an alien from admission into the United States under any law or treaty, is made final in every case, unless, on appeal to the Secretary of the

Treasury, it be reversed. But it is obvious that it is only when the decision of the customs officer excludes an alien from admission that his decision is final. When his decision admits the alien, then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their prima facie effect, "such certificate may be controverted and the facts therein stated disproved by the United States authorities."

Accordingly, we agree with the courts below in holding that the judgment of the collector of customs at Malone did not conclude the commissioner, and that the latter had authority, under the statutes, to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States.

The decision of the collector of customs not being conclusive as to the right of the petitioner to enter the United States, much less as to his right to remain therein, we are brought to consider the errors assigned to the acts of the commissioner in the proceedings before him.

Those proceedings were instituted under § 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat. at L. 115, chap. 220), \*which provides that "no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." Such required certificate in regard to persons not laborers, as specified in the 6th section of the said amended act, was to be obtained from the Chinese government by every Chinese person, other than a laborer, who was about to come to the United States, and was for the purpose of identifying the person and evidencing the permission of the government for his departure. The [6th] section provides that this certificate "shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

The certificate produced by the petitioner, of which we are furnished with a copy, bears date the 13th day of June, 1893, purports to permit Li Sing to return to and remain within the United States, and states that he was a wholesale grocer. But it appears, on the face of the certificate, that it was not issued to Li Sing by the Chinese government when he was about to return from China to the United States, as prescribed in the 6th



section of the act of July 5, 1884, but was a paper he had procured from the Chinese consul at New York before he left the United States. Such a paper can scarcely be regarded as the certificate provided for in the act of Congress, which, in terms, declares that "in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within [492] the \*United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government."

Without, however, insisting that the certificate produced was not in form and substance, within the act of July 5, 1884, and even if it were conceded that it was so, yet such a question was rendered irrelevant by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14), which, in its 2d section, provided that "where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

It is not pretended that any such evidence was produced by the petitioner before the collector of customs, and it is conceded that the latter acted, in admitting Li Sing to enter the United States, solely on the strength of the certificate. Accordingly, under the provisions of the several statutes hereinbefore cited, it was not only competent for the commissioner to permit the allegations of the certificate to be controverted, but also to insist on the production of the evidence prescribed as necessary by the 2d section of the act of November 3, 1893.

As the commissioner found, upon all the evidence, that Li Sing was a Chinese laborer, was such at the time he departed from China and for a term of years prior thereto, and has remained such since his return from China, his order of deportation was a legitimate conclusion and should be carried into effect, unless it can be made to appear either that the commissioner failed to obey the statutes under which he was acting, or that the provisions of those statutes, applicable to the facts of the present case, are unconstitutional and void.

We do not understand it to be asserted, on behalf of the petitioner, that the commissioner disregarded, in any particular, the provisions of the several statutes; but it is [493] claimed that "some of those provisions are invalid, and that, therefore, the sentence of deportation should be set aside.

The petitioner's counsel assails the validity of the 3d section of the act of 1892, in the following terms:

ty of the 3d section of the act of 1892, in the following terms:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." [27 Stat. at L. 25, chap. 60, § 3.]

It is said that it was not competent for Congress to cast the burden of proof upon the petitioner. This precise question was determined by this court in the case of *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016, 1028. It was there said:

"If no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves 'an unavoidable cause,' within the meaning of the act, for not procuring one. If he proves that he had procured a certificate which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof. The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof 'by at least one credible white witness that he was a resident of the United States at the time of the passage of the act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Ogden v. Saunders*, 12 Wheat. 349, 6 L. ed. 653; *Pillow v. Roberts*, 13 How. 476, 14 L. ed. 230; *Cliquot's Champagne*, 3 Wall. 143, *sub nom. 125 Baskets of Champagne v. United States*, 18 L. ed. 120; *Ex parte Fisk*, 113 U. S. 721, 28 L. ed. 1120, 5 Sup. Ct. Rep. 124; *Holmes v. Hunt*, 122 Mass. 505, 519, 23 Am. Dec. 381."

Again, it is contended that § 2 of the act of November 3, 1893 (28 Stat. at L. 7, chap. 14), prescribing that "where an application is made by a Chinaman for entrance into the United States on \*the ground that he was [494] formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States," etc., is a violation of the Constitution which guarantees equal rights and equal laws to all.

This argument was also considered in the case of *Fong Yue Ting v. United States*, and it was said:

"The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Con-

gress, which Congress may, at its discretion, modify or repeal. (Rev. Stat. 858, 1977.) The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field in *Chae Chan Ping's Case*, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' (130 U. S. 598, 32 L. ed. 1073, 9 Sup. Ct. Rep. 623.) And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' . . .

"The proceeding before a United States judge, as provided for in § 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a ban-

[495]ishment, \*in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

It may be proper here to mention that this court has held that, while the United States can forbid aliens from coming within their borders, and expel them from the country, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials, yet, when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the ac-

cused. *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977.

We cannot, however, yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and subject themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration. We can but repeat what was said to similar appeals in the case of *Fong Yue Ting v. United States*, above cited: "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

*The judgment of the Circuit Court of Appeals, affirming the order of the Circuit Court, is affirmed.*

\*ELEANOR A. H. MAGRUDER, *Plff. in* [496]  
*Err.,*  
*v.*

GEORGE A. ARMES, Jackson H. Ralston,  
Frederick L. Siddons, Harvey T. Winfield,  
and Albert A. Wilson.

(See S. C. Reporter's ed. 496-498.)

*Appeal — jurisdictional amount — pleading.*

Jurisdiction to the Supreme Court of the United States on appeal from the court of appeals of the District of Columbia is not given by allegations of damages in excess of \$5,000 caused by levy on property worth not more than \$1,800, and compelling the payment thereby of a judgment amounting to less than \$100, although the pleading charges illegality and spite, where it alleges no facts of violence or insult which could justify exemplary damages.

[No. 171.]

*Argued and Submitted March 7, 1901. De-*  
*cided March 18, 1901.*

IN ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment for defendants on demurrer in an action for damages. *Dismissed.*

See same case below, 15 App. D. C. 379.

Statement by Mr. Justice **Brewer**:

On February 13, 1896, in the Supreme Court of the District of Columbia, at the circuit court Term No. 1 thereof, a judgment was entered in favor of George A. Armes, of which the following is a copy:

"Comes here now the plaintiff, by his attorney, and prays judgment on the verdict

NOTE.—As to amount necessary to give the United States Supreme Court jurisdiction—see note to *Schunk v. Moline, M. & S. Co.* 37 L. ed. U. S. 256.



rendered in this case on the 7th instant, which is granted. Therefore it is considered that the plaintiff recover against said defendant and George C. W. Magruder, her surety, six dollars and twenty-five cents (\$6.25), being the money payable by them to the plaintiff by reason of the premises, together with the costs of suit, to be taxed by the clerk, and have execution thereof."

Thereafter an execution was issued thereon in the following form:

George A. Armes, Plaintiff,  
vs.  
Ellanore A. H. Magruder } No. 39058.  
and Geo. C. W. Magruder, }  
Surety, Defendant. }

The President of the United States to the marshal for said District, Greeting

[497] You are hereby commanded that of the goods and chattels, lands and tenements, of the defendant and Geo. C. W. Magruder, surety, you cause to be made \$6.25, with interest from February 13, 1896, which the plaintiff on the 13th day of February, 1896, by the judgment of said court in the above-entitled cause, recovered against said defendant and surety for money \*found payable to said plaintiff, and \$22.70 for costs and charges about said suit expended, as appears of record, and return this writ into the clerk's office of said court within sixty days so indorsed as to show when and how you have executed the same.

Witness the Honorable Edward F.ingham, chief justice of said court, the 19th day of February, A. D. 1896.

{ Seal of the Supreme Court }  
{ of the District of Co- }  
{ umberia Here Imprinted. }

John R. Young, Clerk,  
By — — —, Assistant Clerk.

This execution was levied upon lot K in James Crutchett's subdivision of lots in square No. 755, in this city. Advertisement of sale was made in the ordinary form, and on May 9 (the day named for the sale) the principal defendant, plaintiff herein, paid the amount of \$89.94 to satisfy the execution and prevent a sale. The value of the lot thus levied upon was \$1,800.

Thereafter, and on May 8, 1899, this action was commenced in the supreme court of the District, the declaration setting forth a copy of the judgment and execution, alleging the levy and the advertisement, averring that the lot was the separate property of the plaintiff, that she was a married woman and that George C. W. Magruder, the surety against whom judgment was also rendered, was her husband. The declaration also alleged that the judgment was rendered for witness fees, but was without law or merit; that both judgment and execution were void because not in terms limited by the rights which belonged to her as a married woman; that efforts were made by her to quash the execution and to appeal from the proceedings had upon such efforts, but that they failed, and that, therefore, she paid the sum of \$89.94 to prevent the sale and save her property.

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As damages the sum of \$6,000 was claimed. A demurrer to this declaration was sustained, judgment entered for the defendants, which judgment was affirmed by the court of appeals, and thereupon this writ of error was sued out.

Mr. Joseph J. Waters submitted the cause and filed a brief for plaintiff in error.

Mr. Jackson H. Ralston argued the cause and filed a brief for defendants in error.

\*Mr. Justice Brewer delivered the opinion [498] of the court:

The jurisdiction of this court in ordinary actions in the District of Columbia is limited to cases in which the amount in controversy is over \$5,000. 27 Stat. at L. 434, 436, chap. 74, § 8. The fact, as disclosed by the declaration, is that plaintiff paid less than \$90 to preserve from sale property worth only \$1,800. Everything which the defendants did was done by virtue of an order or judgment of a court of this district, having full jurisdiction. Whether such judgment was simply irregular or absolutely void, plaintiff canceled all her liabilities by the payment of a sum less than \$90, and the only property of hers endangered by their action she avers was worth \$1,800. It is true that in the declaration she charges illegality and spite, but such language is mere matter of epithet. We are guided by the facts as they are stated. There was no personal violence, no insult; nothing which sometimes rightfully opens the door to punitive damages. Finding that property of the value of \$1,800 was, as she thought, endangered, she paid \$90 to escape the danger. Obviously her assertion that she was damaged to the amount of \$6,000 was without legal foundation, and only made with the purpose of securing a review in this court. Nothing in the facts justified any such assertion. Jurisdiction cannot be vested in this court by a mere claim of damages, unsupported by facts. We do not care to enter into any discussion of this question, but refer simply to *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192, and cases cited in the opinion.

*The writ of error will be dismissed.*

\*STATE OF MINNESOTA, Appt., [499]  
v.

C. N. BRUNDAGE.

(See S. C. Reporter's ed. 499-505.)

*Habeas corpus — application to Federal court—remedies in state court.*

An application to a Federal court for a writ of habeas corpus to release a person imprisoned

NOTE.—On habeas corpus to test the constitutionality of a statute—see note to *Hovey v. Elliott* (N. Y.) 39 L. R. A. 450.

under a judgment of a municipal court of a state, on the ground that the statute under which he was convicted is unconstitutional, should be denied without prejudice to a subsequent renewal of it, when the accused has not availed himself of such remedies as the laws of the state afford for a review of the judgment in the state courts.

[No. 159.]

*Argued February 28, 1901. Decided March 18, 1901.*

**A** PPEAL from a decision of the Circuit Court of the United States for the District of Minnesota discharging a prisoner by writ of habeas corpus. *Reversed.*

See same case below, 96 Fed. Rep. 963.

The facts are stated in the opinion.

**Mr. W. B. Douglas** argued the cause and filed a brief for appellant.

**Mr. William D. Guthrie** argued the cause, and, with **Mr. Albert H. Veeder**, filed a brief for appellee.

[499] \***Mr. Justice Harlan** delivered the opinion of the court:

[500] The appellee Brundage was arrested under a warrant issued \*by the municipal court of Minneapolis, Minnesota, upon the complaint under oath of the inspector of the State Dairy & Food Department of that state charging him with having violated a statute of Minnesota approved April 19th, 1891, entitled "An Act to Prevent Fraud in the Sale of Dairy Products, Their Imitations or Substitutes, and to Prohibit and Prevent the Manufacture or Sale of Unhealthy or Adulterated Dairy Products, and to Preserve the Public Health." Minn. Gen. Laws 1899, chap. 295.

The specific offense charged was that the accused, in the county of Hennepin, Minnesota, "did wilfully, unlawfully, and wrongfully offer and expose for sale, and have in his possession with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Minnesota."

He was adjudged to be guilty and to pay a fine of \$25 and costs, or in default thereof to be committed to the workhouse to undergo hard labor for thirty days, unless he sooner paid the fine and costs or was thence discharged by due course of law.

Having been taken into custody in execution of the judgment, Brundage presented his application to the circuit court of the United States for a writ of habeas corpus, alleging that he was restrained of his liberty in violation of the Constitution of the United States. That court held the statute to be unconstitutional, and discharged the accused from the custody of the state authorities.

The state insists, upon this appeal, that the statute, at least in the particulars applicable to this case, was consistent with the Constitution of the United States.

This question is one of great importance, but we do not deem it necessary now to consider it; for in our opinion the circuit court should have denied the application for the writ of habeas corpus, without prejudice to a renewal of the same after the \*accused had [501] availed himself of such remedies as the laws of the state afforded for a review of the judgment in the state court of which he complains.

We have held, upon full consideration, that although under existing statutes a circuit court of the United States has jurisdiction upon habeas corpus to discharge from the custody of state officers or tribunals one restrained of his liberty in violation of the Constitution of the United States, it is not required in every case to exercise its power to that end immediately upon application being made for the writ. "We cannot suppose," this court has said, "that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' [R. S. § 761], does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, \*the courts of the United States [502] have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses." *Ex*



*parte Royall*, 117 U. S. 241, 250, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; *Ex parte Fonda*, 117 U. S. 516, 518, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; *Re Duncan*, 139 U. S. 449, 454, *sub nom. Duncan v. McCall*, 35 L. ed. 219, 222, 11 Sup. Ct. Rep. 573; *Re Wood*, 140 U. S. 278, 280, *sub nom. Wood v. Brush*, 35 L. ed. 505, 509, 11 Sup. Ct. Rep. 738; *McElvaine v. Brush*, 142 U. S. 155, 160, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156; *Cook v. Hart*, 146 U. S. 183, 194, 36 L. ed. 934, 939, 13 Sup. Ct. Rep. 40; *Re Frederick*, 149 U. S. 70, 75, 37 L. ed. 653, 656, 13 Sup. Ct. Rep. 793; *New York v. Eno*, 155 U. S. 89, 96, 39 L. ed. 80, 83, 15 Sup. Ct. Rep. 30; *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Re Chapman*, 156 U. S. 211, 216, 39 L. ed. 401, 402, 15 Sup. Ct. Rep. 331; *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297; *Iasigi v. Van De Carr*, 166 U. S. 391, 395, 41 L. ed. 1045, 1049, 17 Sup. Ct. Rep. 595; *Baker v. Griee*, 169 U. S. 284, 290, 42 L. ed. 748, 750, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; *Fitts v. McGhee*, 172 U. S. 516, 533, 43 L. ed. 535, 543, 19 Sup. Ct. Rep. 269; *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76.

There are cases that come within the exceptions to the general rule. In *Loney's Case*, 134 U. S. 372, 375, *sub nom. Thomas v. Loney*, 33 L. ed. 949, 951, 10 Sup. Ct. Rep. 584, 585, it appeared that Loney was held in custody by the state authorities under a charge of perjury committed in giving his deposition as a witness before a notary public in Richmond, Virginia, in the case of a contested election of a member of the House of Representatives of the United States. He was discharged upon a writ of habeas corpus issued out from the circuit court of the United States, this court saying: "The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the state upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice." So, in *Ohio v. Thomas*, 173 U. S. 276, 284, 285, 43 L. ed. 699, 702, 19 Sup. Ct. Rep. 453, 456, which was the case

[503] of the arrest of the acting governor \*of the Central Branch of the National Home for Disabled Volunteer Soldiers, at Dayton, Ohio, upon a charge of violating a law of that state, the action of the circuit court of the United States discharging him upon habeas corpus, while in custody of the state  
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authorities, was upheld upon the ground that the state court had no jurisdiction in the premises, and because the accused, being a Federal officer, "may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal government might in the meantime be obstructed." The exception to the general rule was further illustrated in *Boske v. Comingore*, 177 U. S. 459, 466, 467, 44 L. ed. 846, 849, 20 Sup. Ct. Rep. 701, 704, in which the applicant for the writ of habeas corpus was discharged by the circuit court of the United States, while held by state officers, this court saying: "The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the department to which he belonged."

The present case does not come within any of the exceptions to the general rule announced in the cases above cited. It is not, in any legal view, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the state and invoke its power to discharge him if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It cannot be assumed that the state court will hesitate to enforce any rights secured to him by that instrument; for upon them equally with the courts of the Union rests the duty to maintain the supreme law of the land. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544. If the state court declined to recognize the Federal right specially claimed by the accused, the case could be brought here for review.

After observing that the questions of constitutional law arising in this case had been determined in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, and *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768, \*adversely to the present contention of the [504] state, and that there was jurisdiction to discharge the petitioner on habeas corpus, the circuit court said: "Even then, for reasons of comity, such power will seldom be exercised by the circuit court to discharge a petitioner held under process from a state court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to a final decision, or unless the question has already been decided by the Supreme Court of the United States, whose decision the state court has disregarded in the proceeding. State statutes prohibiting the importation from other states and sale of articles of commerce, especially articles of food, or adapted for general use, are regarded as  
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affecting general interests and the rights of the public; and habeas corpus has frequently been resorted to in cases of imprisonment for violation of such statutes." *Re Brundage*, 96 Fed. Rep. 963, 969.

Among the cases cited in support of the action of the circuit court are *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, and *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. It must be admitted that in the first-named case the general rule announced in prior and subsequent cases was not applied. The reasons for not then applying it do not appear from the opinion of the court. It may be that the precise point now under examination was not called to its attention. *Plumley v. Massachusetts* is not in point, for it came to this court upon writ of error to the highest court of Massachusetts.

It is undoubtedly true that the state enactment in question may in its operation affect the business of many, and in some degree, but indirectly, the rights of the public; but that consideration is not sufficient to justify such interference by the Federal court as will interrupt the orderly course of proceedings in the state court. We do not think that the exercise by a Federal court of its power upon habeas corpus to discharge one held in custody by the state authorities and charged with a violation of a state enactment should be materially controlled by any consideration of the extent of particular business interests that may be affected by a prosecution instituted in a state tribunal against him, or of the indirect effect of his detention in custody upon the rights of the general public. Nor do we think that the circuit court should have interfered with the custody of the appellee because in its opinion the action of the municipal court of Minneapolis was inconsistent with the judgments of this court in the *Schollenberger* and *Collins Cases*. Upon that question the state court was entitled to form its own opinion, and give judgment accordingly. Whether, in view of the judgments in the *Schollenberger* and *Collins Cases*, the state court should have held the Minnesota statute to be repugnant to the Constitution of the United States, it is not necessary now to say. Besides, the record does not show that the attention of the municipal court of Minneapolis was called to those cases; much less is there any reason to suppose that it deliberately refused to accept the decisions of this court as controlling upon questions arising under the Constitution of the United States. As disclosed by the record, the case, we repeat, is not one of urgency within the meaning of our decisions, and does not suggest any adequate reason why the appellee should not be required, before applying to the circuit court of the United States to be discharged upon habeas corpus, to seek at the hands of the higher courts of the state a reversal of the judgment rendered against him in the municipal court of Minneapolis.

Without expressing any opinion as to the

validity of the Minnesota statute, the judgment of the circuit court must be reversed, with directions to dismiss the application for a writ of habeas corpus, without prejudice to a renewal of it when the appellee shall have exhausted the remedies provided by the state for a review of the judgment of the municipal court of Minneapolis.

*Reversed.*

\*BOARD OF COMMISSIONERS OF [506]  
WILKES COUNTY *et al.*, *Appts.*,  
*v.*

W. N. COLER & COMPANY.

(See S. C. Reporter's ed. 506-533.)

*Courts—Federal—following state decisions—law of contract—when decisions change.*

1. The decisions of the highest court of a state, to the effect that provisions of the state Constitution respecting the passage of a statute are mandatory, must be followed on that question by a Federal court, irrespective of the rule adopted by the Federal court in respect to Federal statutes.
2. The rights of the holders of county bonds are determinable in a Federal court by the law of the state as it was declared by the state court to be at the time the bonds were made and put upon the market.

[No. 167.]

*Argued October 19, 22, 1900. Decided March 18, 1901.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit stating questions as to the rights of holders of county bonds. *Questions answered.*

Statement by Mr. Justice **Harlan**:

The ultimate question in this case is whether the county of Wilkes, North Carolina, is liable upon certain bonds issued in 1889 in payment of a subscription in its name to the capital stock of the North Western North Carolina Railroad Company.

Each bond was in the usual form of such instruments, was made payable October 1st, 1913, and recited that it was "one of a series of one hundred bonds of the denomination of \$1,000 each, issued by authority of an act of the general assembly of North Carolina, ratified the 20th day of February, A. D. 1879,

NOTE.—As to when the United States Supreme Court follows decisions of state courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

On construction and effect of state laws and constitutions and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to change of decision of state court as impairing obligation of contract—see note to *Los Angeles v. Los Angeles City Water Co.* 44 L. ed. U. S. 886.



entitled 'An Act to Amend the Charter of the North Western North Carolina Railroad for the Construction of a *Second Division* from the Towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose [507] on the 6th day of \*November, A. D. 1888, and by an order of the board of commissioners of Wilkes county made on the 1st day of April, A. D. 1889. This series of bonds is issued to pay the subscription on \$100,000 made to the capital stock of the North Western North Carolina Railroad Company by said county of Wilkes."

The question of a subscription by Wilkes county to the extent of \$100,000 to the stock of that company, to be paid in bonds, was submitted to a popular vote, and a majority of the qualified voters approved of the proposition. Taxes were imposed and collected for eight years to pay the interest on the bonds, and the amounts collected were so applied; but the county officers refused to pay the interest due and payable April 1st, 1896, April 1st, 1898, and October 1st, 1898, although they had in their hands moneys collected from taxpayers for that purpose. The object of the present suit was to compel those officers to apply the moneys so collected in payment of such interest.

Was the act of 1879—which was recited in the bonds as authority for their being issued—passed by the legislature in such manner as to become a law of North Carolina? Was there power to issue the bonds without the aid of that enactment? These are the principal matters involved in or depending upon our answer to the certified questions.

The material facts upon which the decision of the case depends are as follows:

The Convention that assembled at Raleigh, North Carolina, on January 14th, 1868, for the purpose of framing a Constitution for that state, concluded its labors on March 16th of the same year. The Constitution adopted by that body was ratified April 24th, 1868, and was approved by Congress June 25th, 1868. 15 Stat. at L. 73, chap. 70.

A few days prior to its final adjournment, namely, on the 9th day of March, 1868, the Convention passed an ordinance (which, by its terms, was to take effect from its passage) that constituted the charter of the North Western North Carolina Railroad Company. The company was incorporated by the ordinance for the purpose of constructing a railroad of one or more tracks [508] "from some point on the North Carolina Railroad between the town of Greensboro in Guilford county and the town of Lexington in Davidson county, running by way of Salem and Winston in Forsyth county "to some point in the northwestern boundary line of the state to be hereafter determined."

By the 5th section of the ordinance it was provided that after the organization of the company its officers should proceed "to lo-  
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cate the *eastern terminus* of the North Western North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of 5 miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its *first division*."

By the 12th section it was declared that "all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina & Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company;" and by § 13, that "the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the state of Virginia."

The North Carolina & Atlantic Railroad Company referred to in the 12th section was the Atlantic & North Carolina Railroad Company incorporated by an act of assembly approved December 27th, 1852. By the 33d section of the charter of that company it was declared to "be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." Provision was made (§ 34) in the same act to take the sense of the qualified voters of any town or county upon the question of a subscription by it to the stock of the company, and it was declared (§ 35) that if a majority of the qualified voters of any county or town voting upon the "ques-[509] tion were in favor of the subscription, the corporate authorities of the town and the justices of the county should appoint an agent to make the subscription in behalf of such town and county, to "be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county." Laws N. C. 1852, pp. 484, 499.

By an act of assembly of August 11th, 1868, the ordinance of March 9th, 1868, was re-enacted, ratified, and confirmed. By the same act also the commissioners of Forsyth county were invested with authority to levy from time to time such tax as was sufficient to pay the subscriptions made to the capital stock of the North Western North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created in borrowing money to pay the subscription of stock. At the end of that act as published are the words, "Ratified the 11th day of August, A. D. 1868."

By the 1st section of the above act of February 20th, 1879, it was declared that "§ 13 of chapter 17 of the ordinance of the Convention of 1868, ratified the 9th day of March, 1868, be amended by

adding the words—"and one of which shall be constructed from the town of Winston and Salein, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as the *second division*." By the 1st and 2d sections the ordinance of 1868 was further amended in particulars that need not be mentioned. By the 4th section it was provided: "That any township or city, town, county, or other municipal corporation of this state shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county, or other municipal corporation may elect to take therein." After prescribing the mode in which the will of the people as to a subscription of stock should be ascertained, that section proceeded: "If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county, or other municipal corporation, favor the taking of the amount of

[510] stock \*so voted for in such election, then the authorities who, by this act, are empowered to determine what amount of stock shall be taken, shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in instalments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township or city, town, county, or other municipal corporation shall have power to issue bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon such bonds, and also for the payment of said bonds when they become due: . . ." At the close of that act, as published, are these words: "Read three times in the general assembly and ratified the 20th day of February, A. D. 1879."

Another act was passed March 2d, 1881. By that act the North Western North Carolina Railroad Company was authorized to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan, and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina Railroad, and to build and operate additional branches thereto, or from its present main line, to any important mines or manufactories in any of said counties, or counties adjacent to them; and any corporation, county, city, town, or township interested therein was empowered to subscribe to stock for those purposes, or otherwise contribute to the work in such manner and amount as should be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said North Western North Carolina Railroad Company. At the close of that act, as published, are the words:

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"In the general assembly, read three times and ratified this 2d day of March, A. D. 1881."

The validity, under the Constitution of the state, of each of the above acts of March 11th, 1868, February 20th, 1879, and March 2d, 1881, was questioned upon grounds presently to be stated.

\*In the circuit court judgment was rendered in favor of the plaintiffs, Coler & Co., who were found to be bona fide holders for value of some of the bonds. The case was carried to the circuit court of appeals, and is now here upon questions certified under the judiciary act of March 3d, 1891 (26 Stat. at L. 826, chap. 517).

The certified questions are as follows:

"1. Whether, upon the averment of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the circuit court of the United States was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases: *Wilkes County Comrs. v. Call*, 123 N. C. 308, 44 L. R. A. 252, 31 S. E. 481; *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966; *Stanly County Comrs. v. Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539; *Rodman v. Washington*, 122 N. C. 39, 30 S. E. 118; *Buncombe County Comrs. v. Payne*, 123 N. C. 432, 31 S. E. 711, considered in connection with prior decisions of said court and the following provisions of the Constitution of said state: Article 2, §§ 14 and 16, and article 5, §§ 1, 4, 6, and 7, and article 7, § 7.

"2. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"3. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the Constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the state of their invalidity."

Mr. A. C. Avery argued the cause and filed a brief for appellants:

It is the duty of courts to enforce mandatory provisions inserted in the organic law for the protection of helpless minorities of taxpayers from burdens such as the appellees are seeking to impose upon the taxpayers of Wilkes county.

*Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215.

An act of the legislature of the state, which has been held by its highest court not to be a statute of the state because never

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passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state.

*Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. ed. 1204; *Claiborne County v. Brooks*, 111 U. S. 410, 28 L. ed. 474, 4 Sup. Ct. Rep. 489; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

The rights of purchasers of bonds issued under such defective power were not impaired by a construction of the Constitution which followed a previous declaration of the court, whose province it is to determine when contracts are impaired.

*Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Lewis v. Pima County*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 22; *Davies County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; *Hopper v. Covington*, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025; *Doon Twp. v. Cummins*, 142 U. S. 376, 35 L. ed. 1048, 12 Sup. Ct. Rep. 220.

The ruling of the state's highest appellate court, that a statute is consistent with a provision of its Constitution, and upon the same principle that it is inconsistent with its organic law, is conclusive upon the Federal tribunal.

*Merchants' & Mfrs'. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

It must be regarded as a settled question that whether statutes of a legislature of a state have been duly enacted in accordance with the requirements of the Constitution of each state is not a Federal question, and the decisions of the state courts as to what are the laws of a state are binding upon the courts of the United States.

*Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

The decision of the state court in this case cannot be reviewed unless it clearly appears that a right claimed under the Constitution, art. 1, § 10, has been impaired by the adjudication complained of.

*Cooley*, Const. Lim. 6th ed. 20-22, and note on p. 310; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

While it may be true that the court will be inclined to uphold the validity of bonds in the hands of innocent purchasers, this rule does not prevail where the highest court of a state has held that the authority to create the debt does not exist. In such cases any doubt as to the existence of the power ought to be determined against its existence.

*Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559.

The Federal courts will lean toward an agreement of views with the state court if

the question seems to them balanced with doubt.

*Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. See also *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *May v. Tenney*, 148 U. S. 60, 37 L. ed. 368, 13 Sup. Ct. Rep. 491; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Lewis v. Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; *Balkam v. Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 1004; *Folsom v. Township Ninety Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 432, 14 L. ed. 1003.

Division of a state court does not alter the binding effect of the state decisions.

*Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

The authority conferred by the charter became nugatory as to any contract of subscription made by municipal corporations after the 24th of April, 1868, and also as to contracts not completed at that date.

*Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 479, 32 L. ed. 774, 9 Sup. Ct. Rep. 322; *Aspinwall v. Davies County Comrs.* 22 How. 364, 16 L. ed. 296; *Buffalo & J. R. Co. v. Falconer*, 103 U. S. 821, 26 L. ed. 471, 69 N. Y. 491; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469, 26 L. ed. 775; *Wadsworth v. Eau Claire County Supers.* 102 U. S. 534, 26 L. ed. 221.

The purchasers of these bonds had notice, when they took them, that neither the amendment of February 20, 1879, nor the amendment of March 2, 1881, nor the act of August 11, 1868, were passed in accordance with the requirements of § 14, art. 2, of the Constitution.

*Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. ed. 1204; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 157.

Federal courts must accept the declaration of the supreme court of North Carolina in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966, that it had been already decided in *State v. Patterson*, 98 N. C. 660, 4 S. E. 350, that all of the

sections of article 2 of the Constitution of North Carolina, defining the duties of the legislature, whether containing commands or prohibitions, were mandatory.

Mr. John F. Dillon argued the cause, and, with Messrs. Harry Hubbard and John M. Dillon, filed a brief for appellee:

The ordinance enacted by the constitutional convention of the state of North Carolina, March 9, 1868, entitled "An Ordinance to incorporate the Northwestern North Carolina Railroad Company," gave *per se* clear and complete authority to the county of Wilkes to issue the bonds in question, and this proposition was twice expressly decided by the supreme court of North Carolina before the said bonds were issued.

*Hill v. Forsythe County Comrs.* 67 N. C. 367; *Belo v. Forsythe County Comrs.* 76 N. C. 489.

If there was in fact legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

*Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Dill. Mun. Corp.* 4th ed. § 523, note; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Cairo v. Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803.

The provision of art. 2, § 14, of the Constitution of North Carolina, does not either expressly or impliedly repeal or annul any existing laws of the state.

*Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219. See also *Callaway County v. Foster*, 93 U. S. 567, 23 L. ed. 911; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Louisiana v. Taylor*, 105 U. S. 454, 26 L. ed. 1133; *Macon County v. Shores*, 97 U. S. 272, 24 L. ed. 889; *Howard County v. Paddock*, 110 U. S. 384, 28 L. ed. 171, 4 Sup. Ct. Rep. 24; *Dill. Mun. Corp.* 4th ed. § 542, note; *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 479, 32 L. ed. 774, 9 Sup. Ct. Rep. 322.

The recital in the bonds that the issue was authorized by vote of a majority of the qualified electors of Wilkes county, by an election regularly held, and by an order of the board of commissioners of that county, creates an estoppel as to the vote, even though the ordinance be not recited in the bond.

*Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433.

That it is competent to refer to the journals of a constitutional convention to see how an enactment of such convention is built up, see—

*Re Woolsey*, 95 N. Y. 135. See also *Blake v. National City Bank*, 23 Wall. 307, 23 L. ed. 119; *Edger v. Randolph County Comrs.* 70 Ind. 338.

Under the decisions of the supreme court of the state of North Carolina, as those decisions stood at the time when these bonds were issued, an enrolled statute passed by the legislative assembly was conclusive; and a person consulting the laws of the state was not bound to examine the journals of the legislature, and ascertain at his peril

whether such acts had been passed in the manner prescribed by the Constitution.

*Brodnax v. Groom*, 64 N. C. 244; *State ex rel. Scarborough v. Robinson*, 81 N. C. 409.

Furthermore, that this understanding of these decisions of the supreme court of North Carolina, above quoted, is correct, appears, we submit, in the case of *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 737, 22 S. E. 16.

If, for the sake of the argument, we assume that the precise point involved in the present case had not been decided by the supreme court of North Carolina at the time when the bonds in suit were issued, then it is open to the Federal courts to consider as a new and original proposition the following, namely, that "at the time these bonds were issued, by any sound principle of construction an enrolled statute passed by the legislative assembly of North Carolina was conclusive, and it was not competent to ascertain from the journals whether such statute had been passed in the manner prescribed by the Constitution."

*Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Folsom v. Township Ninety Six*, 159 U. S. 625, 40 L. ed. 283, 16 Sup. Ct. Rep. 174.

Assuming, then, that the question is open for consideration in this court as an original question, we maintain that, on sound principles of construction of the North Carolina Constitution, an enrolled statute passed by the legislative assembly, ratified by it, and duly signed by the presiding officer of each house, is conclusive, and cannot be impeached by what appears, or does not appear, upon the journals of the legislature.

*Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

The decision of the supreme court of North Carolina in the case of *Gatlin v. Tarboro*, 78 N. C. 119 (rendered before these bonds were issued), that it would not take judicial notice of the journals of the legislature, is utterly inconsistent with any proposition that an enrolled act can be impeached by such journals.

The supreme court of the state of North Carolina, down to the present time, still holds that it will not take judicial notice of the legislative journals.

*Union Bank v. Oxford Comrs.* 116 N. C. 339, 21 S. E. 410, 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966.

Mr. Charles Price also argued the cause and filed a brief for appellee:

The circuit court of the United States was not bound, in passing upon this case, by the decisions of the supreme court of North Carolina in the cases named in the first certified question or proposition. •

*Turner v. Wilkes County Comrs.* 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Folsom v. Township Ninety Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

If the contract when made was valid by the laws of the state as then expounded by all the departments of its government and



administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decisions of its courts, altering the construction of the law.

*Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 432, 14 L. ed. 997; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

If this court can find there existed in North Carolina, at the time of the issue and sale of the bonds, a course of decision of the highest court, upholding their validity, it will adopt that course of decision and follow the same.

*Folsom v. Township Ninety-Six*, 159 U. S. 627, 40 L. ed. 283, 16 Sup. Ct. Rep. 174.

Under the North Carolina decisions as they stood in 1889, when the bonds in suit were issued, an enrolled, duly signed, and published act could not be impeached by legislative journals.

*Brodnax v. Groom*, 64 N. C. 244; *State ex rel. Scarborough v. Robinson*, 81 N. C. 409; *Pacific R. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec. 673; *State ex rel. Pangborn v. Young*, 32 N. J. L. 29; *State ex rel. George v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966; *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 737, 22 S. E. 16; *Stanly County Comrs. v. Snuggs*, 121 N. C. 407, 39 L. R. A. 439, 28 S. E. 539; *Union Bank v. Oxford Comrs.* 116 N. C. 368, 21 S. E. 410.

The courts will not allow technical advantages which involve a breach of faith in the obligation of municipal bonds.

*Street v. Craven County Comrs.* 70 N. C. 644; *Belo v. Forsythe County Comrs.* 76 N. C. 489; *Hill v. Forsythe County Comrs.* 67 N. C. 369; *Johnston v. Cleveland County Comrs.* 67 N. C. 101.

Questions of commercial law, and those involving the validity of corporate securities, taxation, unrestricted legislative powers, corporate purposes, and public uses, are among those in the decisions of which the Federal courts have repeatedly refused to follow and be controlled by state decisions in similar cases.

*Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Oates v. First Nat. Bank*, 100 U. S. 246, 25 L. ed. 583; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Butz v. Muscatine*, 8 Wall. 584, 19 L. ed. 494; *Venice v. Murdock*, 92 U. S. 501, 23 L. ed. 585; *Alcott v. Fond du Lac County Supers.* 16 Wall. 689, 21 L. ed. 386; *New York C. R. Co. v. Lockwood*, 17 Wall. 368, 21 L. ed. 636; *Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Myrick v. Michigan C. R. Co.* 107 U. S. 109, 27 L. ed. 327, 1 Sup. Ct. Rep. 425; *Pana v. Bowler*, 107 U. S. 541, 27 L. ed. 429, 2 Sup. Ct. Rep. 802; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 372, 37 L. ed. 775, 13 Sup. Ct. Rep. 914.

The Federal courts will not follow the decisions of state courts construing their own constitutions and statutes, made after the rights sought to be enforced accrued and vested, when they are in conflict with the  
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construction placed upon the same in the state before and at the time of the vesting of the rights.

*Gelpcke v. Dubuque*, 1 Wall. 206, 17 L. ed. 525; *Taylor v. Ypsilanti*, 105 U. S. 69, 26 L. ed. 1011; *Olcott v. Fond du Lac County Supers.* 83 U. S. 690, 21 L. ed. 386; *Pine Grove Twp. v. Talcott*, 86 U. S. 677, 22 L. ed. 233; *Comanche County v. Lewis*, 133 U. S. 198, 33 L. ed. 604, 10 Sup. Ct. Rep. 286; *Havemeyer v. Iowa County Supers.* 3 Wall. 303, 18 L. ed. 41; *United States v. Moore*, 95 U. S. 763, 24 L. ed. 589; *United States v. Pugh*, 99 U. S. 269, 25 L. ed. 323; *Pease v. Peck*, 18 How. 596, 15 L. ed. 518; *Cooley*, Const. Lim. 6th ed. p. 82; *Livingston County v. Darlington*, 101 U. S. 412, 25 L. ed. 1017; *Douglass v. Pike County*, 101 U. S. 680, 25 L. ed. 969.

It is only well-settled and consistent decisions of the state courts that the Federal courts will follow; and, to be authoritative and controlling in any case, the construction placed upon the state Constitution or statute by the courts of the state must be settled and fixed, so as to be incorporated itself with the statute and become a rule of property.

*Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Thompson v. Perrine*, 103 U. S. 817, 26 L. ed. 617; *Pana v. Bowler*, 107 U. S. 540, 27 L. ed. 428, 2 Sup. Ct. Rep. 802; *Butz v. Muscatine*, 8 Wall. 583, 19 L. ed. 493; *Pease v. Peck*, 18 How. 598, 15 L. ed. 520.

*Mcrrs. R. O. Burton and James E. Shepherd* filed briefs respectively for the Commissioners of Oxford county and the Commissioners of Stanly county.

\*Mr Justice Harlan, after stating the facts as above reported, delivered the opinion of the court:

This being the case disclosed by the record, we proceed in our examination of such matters involved in the certified questions as are presented with sufficient distinctness to require notice at our hands.

The county insists that the bonds in question were issued in violation of the 14th section of article 2 of the Constitution of the state, which is in these words: "No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

In support of the above proposition, reliance is placed upon the cases named in the first of the certified questions.

We are asked whether the circuit court was bound to follow those decisions when considered in connection with prior decisions



of the supreme court of North Carolina and with the above and other provisions of the state Constitution, by one of which it is declared that "each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the general assembly." Art. 2, § 16.

[513] \*Premising that the journals of the two houses were put in evidence, and that it did not appear therefrom that the yeas and nays, on the second and third readings of the acts of 1868, 1879, and 1881, respectively, were entered on the legislative journals, let us inquire as to the scope of the decisions in the above cases.

In *Union Bank v. Oxford Comrs.* (1896) 119 N. C. 214, 220, 34 L. R. A. 487, 488, 25 S. E. 966, 967, which involved the validity under the 14th section of the state Constitution of an act passed in 1891 authorizing a municipal subscription to the stock of a railroad company and the issuing of bonds in payment thereof, it was said: "This section of the Constitution is imperative and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. . . . The point is one of transcending importance, and is simply whether the people, in their organic law, can safeguard the taxpayers against the creation of state, county, and town indebtedness by formalities not required for ordinary legislation, and must the courts and the legislature respect those provisions? This safeguard is § 14 of article 2 of the Constitution. . . . The journals offered in evidence showed affirmatively that 'the yeas and nays on the second and third reading of the bill' were not 'entered on the journal.' And the Constitution, the supreme law, says that, unless so entered, no law authorizing state, counties, cities, or towns to pledge the faith of the state or to impose any tax upon the people, etc., shall be valid. . . . The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the state and its counties, cities, and towns than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are 'no laws,' *i. e., are void unless the bill for the purpose shall have been read three several times in* [514] *each house \*of the general assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal.* This is a clear declaration of the nullity of such legislation

unless this is done, and every holder of a state or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dill. Mun. Corp. 545, and cases cited. It is certainly in the power of the sovereign people in framing their Constitution to require as a prerequisite for the validity of this class of legislation these precautions and the additional evidence in the journals that they have been complied with, over and above the mere certificate of the speakers which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the journals is plain beyond power of controversy. . . . The certificate of the speakers is not good for more than it certified, *i. e.,* that the bill has been read three times in each house and ratified. And ordinarily that makes the bill a law. But for this class of legislation the Constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the journals on the second and third reading in each house. The Constitution makes the entry on the journals essential to the validity of the act."

These principles were again announced in *Stanly County Comrs. v. Snuggs* (1897) 121 N. C. 394, 398, 39 L. R. A. 439, 440, 28 S. E. 539, 540, which also involved the validity of county bonds issued in payment of a subscription to the capital stock of a railroad corporation. It appeared that the act relied on as authority for issuing them passed its third reading in the house of representatives without any entry on the journal of the yeas and nays. The court said: "We are of the opinion that it was competent to introduce the house journal as proof that the acts referred to were not passed according to the requirements of the Constitution, and they established \*that fact. That provision [515] of the Constitution (§ 14 of article 2) is mandatory, as we have decided in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966. It is the protection which the people, in convention, have thrown around themselves for the benefit of the minority as well as of the majority. . . . The bill may, in point of fact, have been read three several times and on three different days, and the yeas and nays may have been actually called on the second and third readings and the presiding officers may have certified thereto, and yet, if the entry of the yeas and nays is not actually made on the journal, the Constitution speaking with absolute clearness says that the failure of such entry is *absolutely fatal* to the validity of the act. The entry, showing who voted on the bill and how they voted, must be made before the bill can ever become a law. The Constitution does not allow the certificate of the presiding officers or any other power to cure such an omission. The certificate



of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the Constitution are not a condition precedent to the validity of the act. But, in that class of legislation, the purpose of which is to legislate under § 14 of article 2 of the Constitution, a literal compliance with the language of that section is a condition precedent, and one which must be performed in its entirety before the bill can ever become a law."

These two decisions were followed in *Rodman v. Washington* (1898) 122 N. C. 39, 41, 30 S. E. 118, and *Buncombe County Comrs. v. Payne* (1898) 123 N. C. 432, 487, 31 S. E. 711.

[516] The same question arose in *Wilkes County Comrs. v. Call* (1898) 123 N. C. 308, 310, 44 L. R. A. 252, 31 S. E. 481. That case involved the validity of the identical issue of bonds that are here in suit. Referring to its former decisions, above cited, the court said: "Under the authority of those decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An act of the legislature passed in violation of the Constitution of the state, or in disregard to its mandatory provisions, is to the extent of such repugnance \*absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law. The act under which these bonds profess to have been issued [the above act of February 20, 1879] was never legally passed, and never became a law."

To the above cases we may add that of *State v. Patterson*, 98 N. C. 660, 662, 664, 4 S. E. 350-352, determined in 1887 before the bonds in question were issued. That was an indictment for selling spirituous liquors in a certain county wherein sales were prohibited by a supposed statute. Priv. Acts, N. C. 1887, chap. 113, § 8. The defendant, under the plea of not guilty, claimed that the statute cited was void, because it had no enacting clause, that is the words, "The general assembly of North Carolina do enact." The court, referring in its opinion to the constitutional provision that "the style of the acts shall be, 'The general assembly of North Carolina do enact,'" art. 2, § 21, and to the provision that "all bills and resolutions of a legislative nature shall be read three times in each house, before they pass into laws, and shall be signed by the presiding officers of both houses," art. 2, § 23, held that the statute under which the prosecution was inaugurated was not a law. The court, among other things, said: "It thus appears that its framers, and the people who ratified it, deemed such provisions wise and important, the purpose being to require every legislative act of the legislature to purport and import upon its face to have been enacted by the general assembly, and to be further authenticated by the signatures of the presiding officers of the two houses comprising that body. The purpose of thus

prescribing an enacting clause—"the style of the acts"—is to establish the act—to give it permanence, uniformity, and certainty—to identify the act of legislation as of the general assembly—to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake, and fraud. Such purpose is important of itself, and as it is of the Constitution, a due observance of it is essential. The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so."

\*After the decision in *State v. Patterson*, [517] rendered as above stated before the bonds in suit were issued, it might have been anticipated that the same court would hold as they did in the subsequent cases above cited that the entering of the yeas and nays vote on the second and third readings of an act of the class mentioned in § 14 of article 2 of the state Constitution was a condition precedent that could not be dispensed with under any circumstances.

The defendants, however, contend that by the decisions of the supreme court of North Carolina, as those decisions stood at the time the bonds were issued, a person consulting the laws of the state was not bound to examine the journals of the legislature and ascertain at his peril whether such acts had been passed in the particular manner prescribed by the Constitution; that everyone could properly assume that the act of February 20, 1879, signed by the proper officers, and enrolled and published as one of the statutes of the state, was passed in conformity with the constitutional provision as to the entry on the journal of the yeas and nays vote on the second and third readings of a bill.

The North Carolina cases cited by the defendants in support of this proposition are *Brodnax v. Groom* (1870) 64 N. C. 244; *Gatlin v. Tarboro* (1878) 78 N. C. 119, and *State ex rel. Scarborough v. Robinson* (1879) 81 N. C. 409. Let us see what was involved in those cases.

In *Brodnax v. Groom* it was held that the courts could not go behind an enrolled act, duly certified by the presiding officers of the two houses of assembly, to ascertain whether there had been a compliance with the 12th section of article 2 of the state Constitution providing that the "general assembly shall not pass any private law unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law."

In *Gatlin v. Tarboro* the question was as to the validity of a tax levied by a town, which was resisted on the ground that the act was private and had been passed without any notice of the application as required by the Constitution \* (art. 2, § 12), and was [518] therefore void,—the parties admitting that no such notice was given. The court said: "As to the second point: If it appeared from the act itself, or affirmatively ap-



peared by the journals of the legislature, which would have been competent evidence, that the notice of the intended application for the act, which the Constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the legislature had obeyed the Constitution, and that it appeared to it that the notice had been given. *Omnia præsumentur rite esse acta*. We cannot accept the agreement of the parties, that no notice was in fact given, as proof that it did not appear to the legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70. If any weight were allowed to admissions of this sort, the law might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one."

In *State ex rel. Scarborough v. Robinson* the issue presented was as to the power of the court to compel the presiding officers of the two houses to sign an act to the end that it might be authenticated—it being alleged that the bill had been duly ratified by the two houses as shown by their respective journals. That case arose under § 23 of article 2 of the state Constitution, providing that all bills and resolutions of a legislative nature should be read three times in each house before they pass into laws, "and shall be signed by the presiding officers of both houses." Preliminary to the decision of the question really involved in that case the court made some general observations upon the question whether the existence and validity of a statute should depend "upon the uncertain results of an inquiry made in each particular case, whether the provisions of the Constitution directing the mode of legislative proceedings have been followed in the action of the two houses in [519] passing a bill through \*its different stages of progress." But it was added that the determination of that question was not necessary to a decision of the application before the court. It was then decided, and nothing more was decided than, that "the signatures of the presiding officers of the two houses, under and by force of the words used in our Constitution, are an essential prerequisite to the existence of the statute,—the finishing and perfecting act of legislation,—and must be affixed during the session of the general assembly." Upon that ground only the application for a mandamus was denied.

It thus appears that no one of the cases cited by defendants involved a construction of § 14 of article 2 of the state Constitution. Those cases arose under other provisions of the Constitution. It is true that

in *State ex rel. Scarborough v. Robinson* there are general expressions touching questions adverted to but not decided, that lend apparent support to the contention that the North Carolina decisions rendered after the issuing of the bonds in suit were not, in all particulars, in harmony with what was said by the state court in prior cases. But such general expressions as to matters expressly excluded from decision are not authority, and reference must be had to the points in judgment.

In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the circuit court of the United States justified in holding the acts of 1868, 1879, and 1881 to be laws of the state? Observe that the issue is not as to the construction, meaning, or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose. May a Federal court disregard the decisions of the highest court of the state holding that such enactment, in the form of a statute, was never passed so as to become, under the state Constitution, a law?

These questions have been so distinctly answered by this court in cases heretofore decided that a discussion of them upon principle is unnecessary.

In *South Ottawa v. Perkins*, 94 U. S. 260, 267, 268, 24 L. ed. 154, 157, which was an action upon municipal bonds, the question was \*whether any such statute ever existed [520] as that under the authority of which the bonds there in suit purported to have been issued. It was contended that as the bonds were held by a bona fide purchaser for value, and as the town sued had paid the first instalment of interest, it was estopped from offering any evidence that the act under the authority of which the bonds purported to have been issued was not legally passed, the same having been duly published among the printed statutes as a law, and being therefore prima facie a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage. This court said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unsensible state of things, after the courts of Illinois have



determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise." "As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of the state is binding upon those of the United States. But the law under consideration has been passed upon by the supreme court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment, it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution \*of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."

These principles were reaffirmed in *Post v. Kendall County Supers.* 105 U. S. 667, *sub nom. Amoskeag Nat. Bank v. Ottawa*, 26 L. ed. 1204.

It is said, however, that the circuit court of the United States could not have followed the cases referred to in the certified questions without departing from the principles announced by this court in *Field v. Clark*, 143 U. S. 649, 671, 672, 36 L. ed. 294, 303, 12 Sup. Ct. Rep. 495, 497. This point deserves examination.

In the present case, the express mandate of the Constitution of North Carolina is that "no law shall be passed . . . to impose any tax upon the people of the state, or allow the counties, cities, or towns to do so, unless the bill for that purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." Whether the absence from the journal of entries showing the required number of readings of a bill, on three different days, will be notice to all that the legislature has not conformed to the requirements of the Constitution in respect of such readings, is a question that need not be decided in this case. As the state Constitution does not expressly require those facts to be entered on the journal of legislative proceedings, it may be that when an enrolled bill, certified and duly authenticated by the presiding officers of the two houses, is approved by the governor, it is to be conclusively presumed that

the Constitution was complied with as to the mere readings of the bill. Without, however, expressing any opinion on that question, we remark that no such conclusive presumption can arise to defeat the express constitutional inhibition \*upon the passage of an act authorizing a county, city, or town to impose taxes upon its people unless "the yeas and nays on the second and third readings of the bill shall have been entered on the journal." The object of that provision was to make such an entry on the journal a condition precedent to any legislation imposing taxes on the people. Everyone who took municipal bonds to be paid by means of taxation authorized by the legislature was bound to know, from the face of the Constitution, that there was a want of power to issue such bonds and to impose such taxation, if the yeas and nays on the second and third readings of the bill were not entered on the journal. The constitutional requirement in that matter could not be dispensed with by the act of the presiding officers of the two houses of the general assembly in certifying a bill as passed when the journal did not contain entries showing that to have been done which was necessary to be done before there was power to enact the bill into a law. These are the grounds upon which the supreme court of North Carolina have rested their decisions in the cases referred to in the first of the certified questions.

The case of *Field v. Clark*, 143 U. S. 649, 671, 672, 36 L. ed. 294, 303, 12 Sup. Ct. Rep. 495, 497, was altogether different. In that case it was contended that a certain enrolled act of Congress in the custody of the Secretary of State, and appearing upon its face to have become a law in the mode prescribed by the Constitution of the United States, was to be deemed a nullity in all its parts because it was shown by the congressional record of proceedings, reports of committees of each House, and other papers printed by authority of Congress, that a section of the bill as it finally passed was not in the bill authenticated by the signatures of the presiding officers of the respective Houses of Congress and approved by the President. The clause of the Constitution upon which that contention was based declares that "each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal." Art. 1, § 5. It was not claimed in that case that a yeas and nays vote was demanded by one fifth of the members of either House on the passage of the \*section alleged to have been omitted, or on the passage of the bill as approved by the two Houses of Congress. This court said: "In regard to certain matters, the Constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters



entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either House relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports, and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective Houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two Houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." It was then said: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has

[524] no authority \*to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

So that in *Field v. Clark* the question substantially as now presented—namely, as to the effect upon legislation of the failure to enter upon the journals that which is ex-

pressly required by the state Constitution to be entered on them before an act can become a law—was not decided, but was in terms reserved from decision. Nothing said in that case conflicts with the judgment of the supreme court of North Carolina in the cases cited.

To avoid misapprehension it may be well to add that, even if the decisions in North Carolina rested upon grounds inconsistent with the principles announced in *Field v. Clark* as applicable to the constitutional provisions relating to acts passed by Congress, it would be the duty of a Federal court to follow the rulings of the highest court of a state on the question whether a particular enactment found in the printed statutes had been passed in such a manner as to become, under its Constitution, a law of the state. Whether a different principle would apply in cases where rights had accrued under a statute previously adjudged by the state court to have been so passed as to become a law, we need not now inquire.

It is, however, earnestly contended that the county cannot escape liability even if the acts of 1868, 1879, and 1881 are disregarded as not having been passed so as to become laws; that the recital in each bond that it was issued under the authority \*of the act [525] of 1879 does not estop the holders of bonds from showing that there was in fact ample authority to issue them, although such authority was not recited in the bonds. This contention rests mainly upon *Anderson County Comrs. v. Beal* (1885) 113 U. S. 227, 236, 238, 28 L. ed. 966, 969, 970, 5 Sup. Ct. Rep. 433, 437, 438. In that case it was said: "It is not disputed that the recital in the bond that it was issued under the act of February 26th, 1866 (Sess. Laws of Kansas, 1866, chap. 24, p. 72), was an error. . . . It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds. . . . The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county." To the same effect is *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267.

The point here made is not specifically embraced in either of the certified questions, but it is so closely connected with the question whether the circuit court should have followed the decisions of the supreme court



of North Carolina in *Union Bank v. Oxford Comrs.*, *Stanly County Comrs. v. Snuggs*, *Rodman v. Washington*, *Wilkes County Comrs. v. Call*, and *Buncombe County Comrs. v. Payne*, above cited, that it ought to be examined.

Of course, if there was an absolute want of power to issue the bonds in question, every purchaser of them would be charged with notice of that fact, and could not look to the county in whose name they were issued. So that the inquiry must be whether the county had power to issue the bonds without the aid of any act passed after the Constitution of 1868 went into operation.

[526] \*The plaintiffs insist that requisite authority was given by the convention ordinance of March 9th, 1868, and that it had been in effect so decided by the supreme court of the state before the bonds were issued in *Hill v. Forsythe County Comrs.* (1870) 67 N. C. 367, and *Belo v. Forsythe County Comrs.* (1877) 76 N. C. 489.

In *Hill v. Forsythe County Comrs.* the relief sought was an injunction to restrain the commissioners of Forsyth county—from imposing and collecting taxes to be applied in paying instalments due upon a subscription made by that county to the stock of the North Western North Carolina Railroad Company. The general question presented in that case, and the only one decided, was whether the legislature could constitutionally authorize a county to take stock in a railroad company under the sanction of a popular vote, and impose a tax to pay for such subscription. The supreme court of the state adjudged that such legislation would be legal. No reference was made to the ordinance of 1868 or to the ratifying act of August 11, 1868. Nor does it appear from the report of that case that any question was raised as to the validity of that act under the 14th section of article 2 of the Constitution of the state, nor that evidence was offered to show whether the journals of the legislature contained any entry of the ye and nay vote on the second and third readings of the bill. Still, it must be taken that the ordinance of 1868 was assumed by the court in that case to be in force so far as Forsyth county, named in it, was concerned. The decision cannot, however, be regarded as authoritative upon the question whether Wilkes county had power, under that ordinance alone, to issue the bonds here involved.

In *Belo v. Forsythe County Comrs.* the relief sought was a judgment compelling the commissioners of Forsyth county to provide for the payment of the bonds issued by them in payment of its subscription of stock to the North Western North Carolina Railroad Company. The supreme court of the state said: "The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by § 12 of the charter, the same power to subscribe to the capital stock of the company

[527] and subject to the like regulations \*and re-  
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strictions is given to counties and towns as was conferred by an act incorporating the Atlantic & North Carolina Railroad Company, passed by the legislature of 1852. By § 34 of the latter act the justices of the county through or near which the road was located, 'a majority concurring,' are authorized to fix upon a subscription sum and submit it to the voters of the county. If the majority favored subscription, the justices were to choose an agent to subscribe the stock voted and to prepare and issue county bonds, as the justices should direct. The minutes of the special term of the county court of Forsyth county, which ordered the proposition to be submitted to the popular vote, recite that a majority of the justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding court, held in June, 1868. The minutes of that term recite that thirty-five justices were present, which number is admitted to be a majority of the whole number. At this latter term of the court the justices ordered the subscription to be made to the capital stock of the company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his banking house in Salem, on the 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the court of pleas and quarter sessions of Forsyth county at June term, 1868, and re-enacted and ratified and confirmed by an act of the general assembly, ratified the 11th of August, 1868.' At the same term at which the subscription was made the justices assessed a special tax upon the county to meet the semi-annual interest on the bonds. This special railroad tax was annually assessed, levied, and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the railroad company to the county, which it yet holds; an agent was annually chosen to represent, and did represent the county stock in all the meetings of the company. Under the new state Constitution of 1868 a board of county commissioners succeeded to all the powers and \*duties of the justices, and up to 1872 this [528] board unanimously caused the levy and collection of the railroad tax and its application to the discharge of the coupons due upon the bonds. But the board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the county was illegal and void."

Again: "For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the power to make the subscription of stock and issue



the bonds was conferred upon the county of Forsyth by the ordinance of the convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the justices of the county, a majority concurring, was the court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a bona fide holder of the bonds against the municipality."

After considering the rights of the parties under the convention ordinance of 1868, the court proceeded: "So far, as to the rights of the parties under the original act of the railroad corporation, granted by the convention of 1868. But the plaintiff further relies upon a subsequent act of the legislature, ratified the 11th of August, 1868, which confirms the original charter [ordinance] of March, 1868. This act in express terms 'ratifies all acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'board of commissioners of the county full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the county in borrowing money to pay such stock subscription.' The competency of the legislature to enact retrospective statutes to 'validate an irregular or defective execution of power by a county corporation is well settled.'" The court then declared that the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds, if any defects existed therein.

What was said in the *Belo Case* about the validity of the act of August 11, 1868, as a curative statute, within the power of the legislature to pass, cannot be deemed as an adjudication upon the question whether that act was void upon the ground that the yeas and nays on the second and third readings of the bill were not entered on the journal. It does not appear that any such question was presented or considered, or that the journals of the legislature were in evidence or proved so that the question could have been decided.

But the *Belo Case* involved other considerations. Forsyth county—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court however held that such authority was conferred by the convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid under that ordinance, which was recognized as part of the law of the state and as conferring authority on the county of Forsyth to do what it did.

It results that when the bonds here in

question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the Constitution of 1868, but was in force and therefore gave power to counties embraced by its provisions to take stock in that company and pay for it in county bonds just as Forsyth county had done.

Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county is a question not now decided.

In this connection we must allude to what was said in *Wilkes County Comrs. v. Call* (1898) 123 N. C. 308, 317, 44 L. R. A. 252, 255, 31 S. E. 481, 484. \*That was a suit brought by the commissioners of Wilkes county against the county treasurer to test the validity of the bonds issued in the name of that county to pay its subscription to the stock of the North Western North Carolina Railroad Company. No holder of bonds was made party to the original suit. In the progress of the case, however, two persons who became owners of one bond after the institution of the action were permitted to intervene. The supreme court of the state said: "We have not overlooked the fact that in *Belo v. Forsyth County Comrs.* 76 N. C. 489, this court strongly intimates that § 12 of the charter did confer the authority given in § 33 of the act of 1852 [incorporating the Atlantic & North Carolina Railroad Company]; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that 'as the case is presented to us, that question does not arise and we do not decide it.'" There is some ground for holding that the question which the court said was neither presented nor decided was whether the "justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the railroad company." Whether this be a correct interpretation of the opinion in the *Belo Case* or not is immaterial; for that the ordinance of 1868 gave power to Forsyth county to make the subscription and issue bonds in payment of it was expressly affirmed in that case—indeed, it was not there disputed. So far from the *Belo Case* turning, in part, upon the ratifying act of 1868, the court distinctly adjudged that the bonds were valid in the hands of bona fide holders under the ordinance of 1868 without the aid of the act of August 11th, 1868.

A further reference must be made to the *Call Case*. It was there said (p. 321, L. R.



[531] A. p. 256, S. E. p. 485) that "the ratification of the Constitution on \*the 24th day of April 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements." This view was again expressed in *Buncombe County Comrs. v. Payne*, 123 N. C. 432, 486-7, 31 S. E. 711. By article 7, § 7, of the state Constitution it was provided that "no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, *unless by a vote of the majority of the qualified voters therein.*" If the state court intended to adjudge in the *Oall* and *Payne Cases* that no municipal subscription to the stock of a railroad company could be made after the Constitution of 1868 took effect, except in conformity to § 7 of article 7, we perceive no reason to doubt the correctness of such interpretation of that instrument; for it could not be that any unexecuted provision of the ordinance of 1868 inconsistent with the state Constitution could be executed. *Aspinwall v. Daviess County Comrs.* 22 How. 364, 16 L. ed. 296; *Wadsworth v. Eau Claire County Supers.* 102 U. S. 534, 537, 26 L. ed. 221, 222; *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 479, 490, 32 L. ed. 774, 778, 9 Sup. Ct. Rep. 322. But if it was intended to say that the state Constitution abrogated all authority previously given to make such municipal subscriptions, and that no such subscriptions could be made except pursuant to a new statute passed in conformity with the requirements of § 14 of article 2, we are constrained to say that such a rule could not be applied in this case so as to violate any rights which the plaintiff had under the law of North Carolina as declared by the highest court of the state before the bonds here involved were issued. It is the settled doctrine of this court "that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation." *Loeb v. Columbia Twp.* 179 U. S. 472, 492, ante, 280, 21 Sup. Ct. Rep. 174, 182, and authorities there cited.

[532] \*We have referred fully to the *Hill* and *Belo Cases* because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes county to issue such bonds. This view suggests various questions as to the scope and 180 U. S.

effect of that ordinance. Assuming, as we must, that the *Belo* and *Hill Cases* held that the ordinance of 1868 remained in force after the adoption of the Constitution, did the general power given by that ordinance to the North Western Railroad Company to construct a railroad from its eastern terminus, "running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, *to be hereafter determined,*" invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the state to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the state? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell?

These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this \*court should, under the [533] questions certified, consider and determine the entire merits of the case.

We answer the certified questions to this extent:

1. That the circuit court of the United States should have regarded the decisions of the supreme court of North Carolina in *Union Bank v. Oxford Comrs.*, *Stanly County Comrs. v. Snuggs*; *Rodman v. Washington*; *Wilkes County Comrs. v. Oall*, and *Buncombe County Comrs. v. Payne*, above cited, as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881 were passed in such manner as to become, under the Constitution, laws of the state.

2. That the rights of the parties in this case are determinable by the law of the state as it was declared by the state court to be at the time the bonds here involved were made in the name of the county and put upon the market.

*These answers will be certified to the Circuit Court of Appeals.*

**MOUNTAIN VIEW MINING & MILLING  
COMPANY, Appt.,  
v.**

**W. D. McFADDEN, David O'Neil, Charles  
W. Vedder, and W. E. Harris.**

(See S. C. Reporter's ed. 533-536.)

*Courts—Federal—judicial notice to aid jurisdiction—removal of cause.*

1. Jurisdiction of a circuit court of the United States on removal depends on plaintiff's statement of his own claim.
2. Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a Federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge.

[No. 162.]

*Submitted March 5, 1901. Decided March 25, 1901.*

**A** PPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decision reversing a judgment of the Circuit Court rendered for defendants after denying their motion to remand the cause to the state court. *Reversed.*

See same case below, 38 C. C. A. 354, 97 Fed. Rep. 670.

The facts are stated in the opinion.

**Messrs. W. B. Heyburn and L. A. Doherty** submitted the cause for appellant.

**Messrs. A. B. Browne, Alexander Britton, and W. T. Stoll** submitted the cause for appellees.

[534] \*Mr. Chief Justice Fuller delivered the opinion of the court:

The Mountain View Mining & Milling Company had made application for a patent on a certain lode-mining claim in the land office at Spokane, Washington, against which McFadden and others duly filed their protest and adverse claim, and thereupon brought this action "in aid of their said adverse claim, and to determine the right of possession," in the superior court of Stevens county, Washington, which was removed on the mining company's petition into the circuit court of the United States for the district of Washington, but not on the ground of diverse citizenship. Plaintiffs moved to remand the cause, and the motion was denied.

The petition for removal set up "that the controversy herein is a suit of a civil nature arising under the Constitution and laws of the United States, brought in pursuance of the provisions of § 2326 of the Revised Statutes of the United States, providing for the

filing of adverse claims against the application for patent for mining claims, and the bringing of suits in support of said adverse claims."

The petition also set forth that the construction of two acts of Congress was involved, namely, an act approved July 1, 1892 (27 Stat. at L. 62, chap. 140), entitled "An Act to Provide for the Opening of a Part of the Colville Reservation, in the State of Washington, and for Other Purposes," and an act of February 20, 1896 (29 Stat. at L. 9, chap. 24), entitled "An Act to Extend the Mineral Land Laws of the United States to Lands Embraced in the North Half of the Colville Indian Reservation." But the jurisdiction of the circuit court on removal depended on plaintiffs' statement of their own claim, and that only disclosed an action brought in support of an adverse mining claim.

In *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, and *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726, we held that a suit brought in support of an adverse claim under the Revised Statutes, §§ 2325, 2326, was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal court regardless of the citizenship of the parties.

\*It is conceded by counsel on both sides [535] that those decisions are controlling, unless the circuit court was entitled to maintain jurisdiction by taking judicial notice of the fact "that the Mountain View lode claim was located upon what had been or was an Indian reservation," and "of the act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain;" notwithstanding no claim based on these facts was stated in the complaint. But the circuit court could not make plaintiff's case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge. Thayer, *Treatise on Evidence*, ch. VII; *Oregon S. L. & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869.

In *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728, plaintiff alleged in his complaint that he was in possession, as a pre-emptor, of a tract of land, and entitled to a patent for the same from the United States; that the defendant company, being a corporation of the territory of Washington, had seized a strip of this land and appropriated it for railroad purposes without his consent and without having compensated him therefor; but that the entry on and seizure of the land was under and pursuant to the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks. As we had judicial knowledge that the authority of the territory to legislate in respect of the right of a

NOTE.—As to jurisdiction of cases involving Federal question—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308.

On judicial notice—see note to *Olive v. State* (Ala.) 4 L. R. A. 33.



territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress of March 3, 1875, we held that the plaintiff's complaint disclosed the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress. The case before us affords no such basis for sustaining the jurisdiction.

[536] In *Powell v. Brunswick County Supers.* 150 U. S. 433, 440, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166, 168, we said: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment \*without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered." And see *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 41, ante, 415, 21 Sup. Ct. Rep. 256.

The result is that *the judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court must be also reversed*, and the cause be remanded to that court with a direction to remand it to the state court, the costs of this court and of the other courts to be paid by the Mountain View Mining & Milling Company.

So ordered.

# *In re* ALEXANDER McKENZIE, Petitioner.

(See S. C. Reporter's ed. 536-551.)

## *Appeal—supersedeas—jurisdiction to issue—contempt by disobeying.*

1. A writ of supersedeas issued by the circuit court of appeals to a district court after an appeal has been allowed, citation signed, and supersedeas bond approved by a judge, cannot be deemed void for lack of jurisdiction merely because the appeal papers are not filed with the clerk of the district court until a subsequent day, when it is attacked by writ of habeas corpus in favor of a person committed for contempt because of disobeying such writ.
2. Appeals from interlocutory orders appointing receivers are authorized to be taken from the district court of Alaska under the act of Congress of June 6, 1900 (31 Stat. at L. 321, chap. 786), regulating appeals from that court, when read in connection with the judiciary act of March 3, 1891, § 7, as amended June 6, 1900 (31 Stat. at L. 660, chap. 803), by providing for appeals from orders appointing receivers.
3. A writ of supersedeas issued by the clerk of a circuit court of appeals is not void because its issue was directed by a judge of the court, and not by the court as a court.
4. The inherent power of the appellate court to stay or supersede proceedings on appeal 180 U. S.

from an order appointing a receiver is not interfered with by the provision of the Alaska Code, § 507, to the effect that on appeal to the circuit court of appeals from interlocutory orders granting or refusing an injunction, or an order to dissolve an injunction, "the proceedings in other respects in the district court" "shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."

[No. —, Original.]

*Submitted February 26, 1901. Decided March 25, 1901.*

ORIGINAL application for habeas corpus to relieve from a commitment for contempt by the Circuit Court of Appeals for the Ninth Circuit.

Statement by Mr. Chief Justice Fuller:

\*This is an application by Alexander McKenzie for leave to file a petition for habeas corpus to relieve him from an alleged unlawful restraint under certain orders of the circuit court of appeals for the ninth circuit committing him for contempt. [536]

The petition stated that on July 23, 1900, McKenzie was, by the judge of the second division of the district court of Alaska, appointed receiver of the property involved in an action then pending in said court, entitled *L. F. Melsing et al. v. John I. Tornanses*, and was directed by the order appointing him as receiver to take possession of and operate a certain placer mining claim situated on Anvil creek near Nome, in the district of Alaska; a copy of the order was attached. That he duly qualified as such receiver and took possession of and operated said mine and was engaged in operating the same continuously from the time of his appointment down to and including the 14th day of September, 1900. That on the 29th of August, 1900, an appeal from said order, so appointing him receiver, was allowed by the Hon. W. W. Morrow, judge of the circuit court of the United States for the northern district of California; that a citation on said appeal was on that day signed by the said circuit judge, and a supersedeas bond approved. That none of these papers were filed with the clerk of the district court of Alaska, 2d division, until the 14th day of September, 1900. That on the same 29th day of August, 1900, the clerk of the United States circuit court of appeals for the ninth circuit issued a writ of supersedeas, a copy of which was attached and made a part of the petition:

"That thereafter and on the 14th day of September, 1900, a copy of such writ of supersedeas was served on your petitioner at Nome, Alaska; that your petitioner immediately ceased operations on said properties so taken possession of by him as such receiver under and in obedience to the order of the district court of Alaska, 2d division, but that your petitioner then and there refused to deliver to the defendants in said action the gold and gold dust then in his possession as receiver, and which had come to his possession from operating said properties. [538]

"That thereafter, on the 1st day of October, 1900, the United States circuit court of appeals for the ninth circuit made and entered an order directing the United States marshal of the northern district of California to attach the person of the said Alexander McKenzie, and produce him before the United States circuit court of appeals for the ninth circuit, at the city and county of San Francisco, state of California, to answer to his refusal to obey the said writ of supersedeas hereinbefore referred to; that this matter came on regularly to be heard, and on the 11th day of February, 1901, the said United States circuit court of appeals, ninth circuit, ordered and adjudged your petitioner guilty of contempt of said court, and adjudged that he be imprisoned in the county jail of Alameda county, California, for the period of six months, and that by virtue of said judgment and in obedience to it he is now confined in the county jail of Alameda county, California, by Oscar L. Rogers, sheriff of Alameda county, California.

"Your petitioner further states and alleges, as he is advised, that the said United States circuit court of appeals for the ninth circuit had no jurisdiction or lawful authority to cause the arrest of your petitioner, or to proceed against him in the manner and form aforesaid, and that the said pretended process, arrest, order, trial, and judgment and warrant whereby your petitioner was committed to the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and whereby he is held in the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and imprisoned and restrained of his liberty, were and are, each and all of them, wholly without authority of law, in violation of law and of the just rights of your petitioner.

"That on the 29th day of August, 1900, the said circuit court of appeals for the ninth circuit was without authority of law to issue said writ of supersedeas, so called, or order the said writ to issue, for that it [539] did not then have jurisdiction of \*the action entitled *L. F. Melsing et al. v. John I. Tornanses*, as at that time no appeal had been taken to the said court in the said case of *L. F. Melsing v. John I. Tornanses*, or from any order made or entered in said cause by the district court of Alaska, 2d division, because:

"(a) On said 29th day of August, 1900, no appeal had been taken in said cause from the district court of Alaska, 2d division, to the circuit court of appeals for the ninth circuit, for on said date neither the order allowing the appeal nor the assignment of errors, nor the undertaking on appeal, nor citation, had been filed with the clerk of the district court for the district of Alaska, 2d division, and no appeal had been allowed by said court or the judge thereof.

"(b) That on the 1st day of October, 1900, when the warrant for the arrest of your petitioner was issued, the circuit court of appeals for the ninth circuit was entirely without jurisdiction in the above-entitled cause, for on said date neither the order allowing [540]

the appeal nor any assignment of errors or undertaking on appeal had been filed with the clerk of the district court of Alaska, 2d division; and, further, that on said date the above-entitled cause had not been docketed in the circuit court of appeals for the ninth circuit, nor the record in said cause filed therein, and the return day of the appeal, as designated in the order allowing the appeal herein, and citation signed by the Honorable W. W. Morrow, the judge allowing said appeal, had passed, and there had been no extension of the time to file such record.

"That the said circuit court of appeals for the ninth circuit has been at all times without jurisdiction in the action of *L. F. Melsing et al. v. John I. Tornanses*, or of any order made therein, for that no appeal to said honorable court from the district court of Alaska had ever been taken in the above-entitled action or from any order made therein by said district court of Alaska, and that neither the order allowing an appeal signed by the Honorable W. W. Morrow on the 29th day of August, 1900, or any assignment of errors in said matter, nor any undertaking upon appeal has at any time been lodged or filed with the clerk of the said district court of the district of Alaska.

"\*That the paper entitled a writ of supersedeas annexed hereto was issued by the clerk of the circuit court of appeals, ninth circuit, on the order of the Honorable W. W. Morrow, circuit judge for the ninth circuit, and as such judge and not otherwise; that the said Honorable W. W. Morrow, circuit judge as aforesaid, was without authority of law to order the issuance of said writ, for that the same should only be issued, if at all, by the United States circuit court of appeals for the ninth circuit, acting as a court, and power to issue the same was not vested in the individual judges thereof; therefore said order of said Honorable W. W. Morrow, circuit judge as aforesaid and the said writ issued in obedience to his order, was and is void.

"Defendant alleges that on the dates when it is alleged in the affidavits on which the warrant for the arrest of this defendant was issued this defendant failed to obey said writ of supersedeas said writ of supersedeas was inoperative and void, for that no appeal had been taken to said court in the action entitled *L. F. Melsing et al. v. John I. Tornanses*.

"That the United States circuit court of appeals for the ninth circuit and the judges thereof were without authority to issue or direct the issuance of the writ of supersedeas individually in this case, inasmuch as said writ went beyond the proper scope of such writ and nullified the order of the lower court instead of directing a mere stay of proceedings.

"A judge of the circuit court of appeals for the ninth circuit had no power to grant the supersedeas staying the proceedings in the court below herein, for the reason that such power was vested exclusively in the district court of Alaska; that the said court of appeals for the ninth district was and is



without jurisdiction in the premises, because:

"(a) There is no provision of law authorizing an appeal from an interlocutory order from the district court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and said appeal was not taken or attempted to be taken within the time limited by law.

[541]"(b) Because the order in question made by the district court of Alaska is an interlocutory order appointing a receiver, and not an interlocutory order granting an injunction or refusing to dissolve an injunction.

"That the United States circuit court of appeals for the ninth circuit did not authorize or direct the issuance of the paper entitled a writ of supersedeas, which it is claimed this defendant disobeyed, and which was issued by the clerk of the circuit court of appeals, ninth circuit, on the 29th day of August, 1900, and that the same was issued by said clerk without authority of law, and was and is void.

"Your petitioner hereto attaches a copy of the record on appeal in said cause, and a copy of the record in the matter of his alleged contempt and a copy of the testimony submitted in the trial of said alleged contempt, marked Exhibits A, B, C, and D."

Petitioner prayed for the writs of habeas corpus and certiorari and for his discharge.

#### *Copy of Order Appointing Receiver.*

Now, on this 23d day of July, A. D. 1900, come the complainants, L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, above set forth, and upon the complaint filed in said action on behalf of the complainants comes on for hearing the application of said complainants for the appointment of a receiver, and the same having been considered by the court and the court having been fully advised in the premises, it is now hereby—

Ordered, adjudged, and decreed that Alexander McKenzie of Nome, Alaska, be, and he is hereby, appointed receiver to take charge of and manage and control the placer mining claim mentioned and described in said complaint, and the said receiver is hereby authorized and directed to take immediate possession of said placer mining claim and to manage, mine, and work the same, and perform such other acts and things in and about said premises as are authorized by law, and to preserve the gold and gold dust and proceeds resulting from the working and mining of said claim, and to dispose of the same, subject to the further orders of this court.

[542]It is further ordered that the said receiver file with the clerk of this court a proper bond with sureties to be approved by the judge of this court, in the penal sum of five thousand dollars, conditional for the faithful discharge of his duties as such receiver, and accounting for all the funds coming into his hands as such, according to the order of this court.

It is further ordered that the said defendants, and each and all of them, turn over and

deliver to said receiver the immediate possession, control, and management of said placer mining claim, and that the said defendants, and each of them, are hereby restrained and enjoined until the further order of this court from interfering with the control or management of said receiver in the mining and working of said placer mining claim, or any part thereof, or from interfering in any manner whatever with the possession or management of any part of the said property over which said receiver is hereby appointed; or in interfering in any manner to prevent the discharge of his duties or of the operation of said property under the order of this court, until the further order of this court.

#### *Copy of Writ of Supersedeas, entitled in the Circuit Court of Appeals for the Ninth Circuit.*

United States of America, ss:

The President of the United States of America to the Honorable Arthur H. Noyes, Judge of the District Court for the District of Alaska, second division, and to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

Whereas, in the above-entitled cause appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment, and decree given and rendered herein on the 23d day of July, 1900, by the district court for the district of Alaska, second division, granting unto complainants herein an injunction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned called No. 10 Above Discovery, on Anvil creek, situated within said district of Alaska, and also ordering and directing said defendant to turn the possession of said mine into the said Alexander McKenzie, as receiver thereof, and also ordering and directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment, and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said circuit court of appeals allowed and said petition for a writ of supersedeas granted upon the appellant's filing a bond in the sum of \$20,000 to be approved by this court, and said bond in the sum of \$20,000 with approved sureties having been filed and approved by this court:

Now, therefore, you the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie, and Arthur H. Noyes, judge of said district court for the district of Alaska, second division, and each of you are hereby commanded that from every and all proceedings on any exe-



cution of the aforesaid order, or in anywise molesting said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas together with your acts and doings thereon to said district court for the district of Alaska, second division, as you will answer the contrary at your peril, and you, the judge of said district court for the district of Alaska, second division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

[544] Witness the Honorable Melville W. Fuller, Chief Justice of \*the United States this 29th day of August, in the year of our Lord one thousand nine hundred.

[seal] F. D. Monckton,

Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit.

From the records and exhibits attached to the petition it appeared that on July 24, in the case of *Melsing v. Tornanses*, the parties claiming under Tornanses moved the district court to vacate the order of July 23, supporting the motion by Tornanses' notice of location of his claim, by his deed of conveyance, and by numerous affidavits in respect of action thereunder. The district judge on August 10 entered an order denying the motion made to vacate the order granting the injunction and appointing the receiver; and on August 14 defendants applied to the district judge for an order allowing an appeal from the order granting the injunction and appointing the receiver, the proper bond on appeal being at the same time presented to the judge, together with an assignment of errors and a proposed bill of exceptions for settlement and allowance, in response to which the district judge, on August 15, made an order "that said proposed bill of exceptions is in each and every part thereof disallowed as a bill of exceptions herein, and the settlement thereof, or of any proposed bill of exceptions herein, is hereby refused; that said petition for an order allowing said appeal is hereby denied, and said judge declines to accept or fix the amount of any bond for costs thereof or allow a supersedeas bond to be given, or fix the amount thereof."

On the same day, to wit, August 15, 1900, the judge made and entered the following order:

"It is further ordered that in addition to the powers and authorities already granted the receiver appointed, the said receiver is hereby ordered to take possession of the placer claim mentioned in the complaint herein,

and all sluice boxes, dams, excavations, machinery, pipe, boarding houses, tents, buildings, safes, scales, and all other personal property fixed or movable on the said placer claim; also all gold, gold dust, precious metals, money, books of account, and each and all personal property \*upon the said claim [545] connected therewith, and in any way appertaining thereto, in possession of and under the control of the defendant, his lessees, grantees, assigns, employees; and all and every person in possession of the said claim or claiming any right, title, or interest in and to the said placer claim, or any gold dust therein or any personal property thereon of any nature whatsoever, are hereby ordered to deliver the same to the said receiver, and are hereby restrained from interfering with the said receiver in quiet and peaceable possession of the same, or any agent that the said receiver may designate to take possession thereof.

"It is further ordered that this order shall revoke all and any order in conflict herewith, and does hereby revoke the same; and

"It is further ordered that this order shall remain in full force and effect until further order of this court.

"It is further ordered that a copy of this order shall be served upon any person in possession of or claiming possession of the property described."

The allowance of an appeal, the taking of a supersedeas bond, the issue and approval of a writ of supersedeas, in this and another case, followed. Certified copies of the order allowing the appeal in each case, together with certified copies of the assignments of error and of the bond, were with the original writ of supersedeas and the original citation in each case filed in the lower court on the 14th of September, 1900, and copies thereof served at once upon the receiver McKenzie and a demand made upon him for restitution of the property in accordance with the writs.

The circuit court of appeals from the evidence taken on the hearing of the proceedings in contempt found the fact to be "that the respondent McKenzie thereupon refused and continued to refuse to restore, in accordance with the requirements of the writs of supersedeas, the gold, gold dust, and other personal property received by him under the orders of the trial court, and that fact being made to appear to this court by affidavits on the 1st day of October, 1900, and it further being made to appear to this court that the last steamer for the season \*would leave the [546] city of Seattle for Nome within a few days, and that no further communication could be had with that section of the country until the spring or early summer of 1901, this court thereupon made an order directing its marshal to proceed to Nome, enforce its writs of supersedeas, arrest the offending receiver, and produce him at the bar of this court. The evidence taken upon the hearing of these proceedings is also to the effect, and we so find the fact to be, that the receiver McKenzie at all times had it within his pow-



er to comply with the requirements of the writs of supersedeas issued out of this court; that he contumaciously refused to restore the gold, gold dust, and other personal property to the defendants, as required by those writs, and has continued such refusal ever since."

**Measrs. J. M. Wilson, Thomas J. Geary, C. A. Severance, and F. B. Kellogg** submitted the cause for petitioner:

An appeal is taken only when the allowance is filed in the office of the clerk of the court in which the judgment or order complained of was made; the lodging of the petition, and the order allowing the appeal, and the appeal bond, with its approval, in the office of the clerk of the court of appeals, is ineffectual.

*Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Musina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Brandies v. Cochran*, 105 U. S. 262, 26 L. ed. 989; *Farrar v. Churchill*, 135 U. S. 612, 34 L. ed. 248, 10 Sup. Ct. Rep. 771; *Scarborough v. Pargoud*, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 696, 5 Sup. Ct. Rep. 8, 97; *Fowler v. Hamill*, 139 U. S. 550, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.* 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Harkrader v. Wadley*, 172 U. S. 163, 43 L. ed. 404, 19 Sup. Ct. Rep. 119; *Waxahachie v. Coler*, 34 C. C. A. 340, 92 Fed. 284; *United States v. Baxter*, 2 C. C. A. 410, 10 U. S. App. 241, 51 Fed. 624; *Threadgill v. Platt*, 71 Fed. 1; *Stevens v. Clark*, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 324; *Re Goodman*, 42 C. C. A. 85, 101 Fed. 920.

Under the terms of the Alaska Code no appeal is permitted from an interlocutory order made by the district court of Alaska appointing a receiver, or from an order refusing to discharge a receiver.

*Highland Ave. & B. R. Co. v. Columbian Equipment Co.* 168 U. S. 627, 42 L. ed. 605, 18 Sup. Ct. Rep. 240. See also *Florida Constr. Co. v. Young*, 8 C. C. A. 231, 11 U. S. App. 683, 59 Fed. 721; *Jaek v. State ex rel. Cunningham*, 42 C. C. A. 267, 102 Fed. 210.

No appeal was ever taken in these causes, for the reason that neither the petition for an appeal, nor the order allowing the same, nor the bond upon appeal, nor the approval thereof, was at any time deposited or filed with the clerk of the district court for the district of Alaska.

*Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 696, 5 Sup. Ct. Rep. 8, 97; *Ex parte Ralston*, 119 U. S. 613, 30 L. ed. 506, 7 Sup. Ct. Rep. 317.

Even conceding that Judge Morrow had the right to allow an appeal from the order appointing a receiver, made by the district court of Alaska, to approve a bond, and direct that said order should be superseded, 180 U. S. U. S. Book 45.

still, the writ issued by the clerk under his authority, in so far as it directed return of the proceeds of the property, was in excess of his authority, as he could only direct a stay of proceedings under the order appointing a receiver, and not the return of the property, which in effect operated to reverse the order of the district court of Alaska.

*Goddard v. Ordway*, 94 U. S. 672, 24 L. ed. 237; *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; *Slaughter-House Cases*, 10 Wall. 273, 19 L. ed. 915; *Staffords v. King*, 32 C. C. A. 536, 61 U. S. App. 487, 90 Fed. 136; *Schenk v. Peay*, 1 Dill. 267, Fed. Cas. No. 12,451; *Beach, Receivers*, § 235; *Knox County v. Harshman*, 132 U. S. 16, 33 L. ed. 250, 10 Sup. Ct. Rep. 8; *Hogan v. Ross*, 11 How. 294, 13 L. ed. 702; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; *Sage v. Central R. Co.* 93 U. S. 412, 23 L. ed. 933; *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 118, 30 L. ed. 910, 7 Sup. Ct. Rep. 849; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532.

The writ of supersedeas is not to be used as a weapon in the hand of a litigant, but is to be employed by the court only when necessary to shield the jurisdiction which it has already assumed and acquired.

*Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 118, 30 L. ed. 910, 7 Sup. Ct. Rep. 849; *Goddard v. Ordway*, 94 U. S. 672, 24 L. ed. 237; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532.

If an order made by a court is simply erroneous, while the court making it has jurisdiction, then the party is not justified in disobeying the order, but should apply to have the order set aside; but if the order is void for want of jurisdiction, disobedience to it is not a contempt.

*Haines v. Haines*, 35 Mich. 138; *Perry v. Mitchell*, 5 Denio, 537; *People v. O'Neil*, 47 Cal. 109; *Brown v. Moore*, 61 Cal. 432; *Re Morton*, 10 Mich. 208; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; *State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864; *Rapalje*, Contempt, §§ 16-33.

\*Mr. Chief Justice **Fuller** delivered the [540] opinion of the court:

The writ of habeas corpus cannot be availed of as a writ of error, and unless the writ or orders, for a violation of which petitioner is being punished, in the case referred to in the petition, were absolutely void, this application must be denied. Accordingly it is contended that there was no legal authority for the issue of the writ of supersedeas; and that the circuit court of appeals had not, at the time the writ was issued, nor at any other time, jurisdiction of the appeal in question.

It is said the appeal was not "taken" until the allowance thereof was filed in the office of the district court for the district of Alaska.

In *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107, a final decree had been entered in the circuit.



court for the eastern district of Arkansas dismissing a bill for want of equity on the 22d of January, 1883, and on the 22d of January, 1885, a petition for an appeal was [547] presented to Mr. \*Justice Miller in Washington and allowed, citation signed, and bond approved. These papers were filed with the clerk of the circuit court, January 27, 1885, being five days after the expiration of two years from the date of the final decree. It was ruled that an appeal could not be said to be "taken" until it was in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court.

In *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989, it was decided that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office.

In *Brown v. McConnell*, 124 U. S. 489, 31 L. ed. 495, 8 Sup. Ct. Rep. 559, it was held that the signing of a citation returnable to the proper term of this court, though without the acceptance of security, nevertheless constituted an allowance of appeal which would enable this court to take jurisdiction and to afford the appellants an opportunity to furnish the requisite security here.

In these cases the original citation and the original writ of supersedeas, together with certified copies of the assignment of errors and of the supersedeas bond and of the orders allowing the appeals, were filed in the district court, September 14, 1900. This was held by the circuit court of appeals sufficient to give effect to the appeals, and we concur in that conclusion if treated as open to re-examination here.

It is also contended that an appeal did not lie from the orders of July 23 and August 10, inasmuch as they were interlocutory orders in respect of the appointment of a receiver. June 6, 1900, an act was passed "making further provision for the civil government in Alaska and for other purposes" (31 Stat. at L. 321, chap. 786), § 504 of which provided: "Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: . . . and that in all oth-

[548]er cases \*where the amount involved or the value of the subject-matter exceeds five hundred dollars, the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

Section 507 read as follows: "An appeal may be taken to the circuit court of appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the district court within sixty days after the entry of such interlocutory order. The proceedings

in other respects in the district court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."

Section 508 provided that "all provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States circuit court of appeals for the ninth circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts, respectively, from the district court for the district of Alaska."

Section 7 of the judiciary act of March 3, 1891, as amended by the act of February 18, 1895 (28 Stat. at L. 666, chap. 96), provided that where, upon a hearing in equity in a district court or a circuit court, an injunction should be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction should be refused, an appeal might be taken from such interlocutory order or decree to the circuit court of appeals within thirty days from the entry of such order or decree; "and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal. On June 6, 1900, the section was further amended so as to allow such appeals from orders appointing a receiver. 31 Stat. at L. 660, chap. 803. Reading these acts *in pari materia*, as we should, it may well be concluded that appeals were thereby authorized from the district court of Alaska from interlocutory orders appointing \*receivers, and that such [549] appeals might be prosecuted from that court within sixty days from the entry of such orders. Moreover, the order of July 23 granted an injunction in connection with the appointment of the receiver. In the case of the *Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177, decided before the statute was amended, it was held that an appeal would lie from such an order, and would bring up the entire order, including the appointment.

In *Highland Ave. & Belt R. Co. v. Columbian Equipment Co.* 168 U. S. 627, 42 L. ed. 605, 18 Sup. Ct. Rep. 240, the order was confined to the appointment of the receiver, and contained no injunction.

The circuit court of appeals, however, held that these orders were final decrees, and appealable as such. As we are of opinion that an appeal was allowable on other grounds we need not discuss the correctness of this view.

Granting all this, it is further insisted that the writ of supersedeas was void because not directed to be issued by the court of appeals as a court. By § 4 of the act of March 3, 1891 [26 Stat. at L. 826, chap. 517], it is provided that "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts, shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act



regulating the same;" and by § 11 that "any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." That this court as a court has power to issue a writ of supersedeas under § 716 of the Revised Statutes is clear, for that section concedes its power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeably to the usages and principles of law. This is equally true of the circuit courts of appeals under § 12 of the act of March 3, 1891.

Although the issue of the writ is not ordinarily required there are instances in which it has been done, under special circumstances, \*and in furtherance of justice. *Stockton v. Bishop*, 2 How. 74, 11 L. ed. 184; *Hardeman v. Anderson*, 4 How. 640, 11 L. ed. 1138; *Ex parte Milwaukee & M. R. Co.* 5 Wall. 188, 18 L. ed. 676.

In *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 941, we held, referring to §§ 1000 and 1007 of the Revised Statutes, that a justice of this court had authority, not only to allow the writ of error, but also to grant the supersedeas. After the decision in that case Rule 36 was adopted providing that any justice of this court, or any circuit judge within his circuit, or any district judge within his district, might allow an appeal or writ of error, take proper security, and sign the citation, and that he might "also grant a supersedeas and stay of execution, or of proceedings, pending such writ of error or appeal."

The court below had refused to grant an appeal and as an appeal lay, the judge of the circuit court of appeals had the power to award it and to grant a supersedeas, and if in his judgment a writ of supersedeas was required, under the particular circumstances, the order for it to issue was not in itself void, nor was the process void, issued under such order. Obedience to an order granting a supersedeas is as much required as to an order for a writ of supersedeas and to the writ thereupon issued. The essential point is that the order or decree below is superseded, and the parties affected must govern themselves accordingly.

Nor do we think that the language used in § 507 of the Alaska Code operated as a limitation on the power of the court of appeals to grant a supersedeas. It is true that the section provided that "the proceedings in other respects in the district court in the cause in which such interlocutory order was entered, shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court." And similar language was used in § 7 of the judiciary act of March 3, 1891.

In *Re Haberman Mfg. Co.* 147 U. S. 525, 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527, it was held that in view of the terms of the act the lower court had a discretion to grant or

refuse a supersedeas, and that thereupon this court would not issue a mandamus to command the judge of that court to approve a supersedeas bond, to supersede \*an injunction, and to enter an order vacating the injunction. Even if the language used be given this scope beyond proceeding with the main cause, it nevertheless does not interfere with the inherent power of the appellate court to stay or supersede proceedings on appeal from such orders as those here. Tested by the principles and rules which relate to chancery proceedings, the power of the appellate court to render its jurisdiction efficacious, the court below refusing to do so, is unquestionable.

The frame of the writs in these two cases, one of which is attacked on this application, was approved by a specific order of the circuit judge; but it is objected that so much thereof as directed the receiver to restore the property taken by him was void. The authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done. It is at all events evident that an order that he should do so is not void in itself. We cannot on this application review the judgment of the circuit court of appeals sustaining such an order and approving of the writs as issued.

The opinion of the circuit court of appeals presents a comprehensive review of the facts and circumstances surrounding the granting of the orders appealed from, but it has not been necessary to recapitulate these matters at length on this inquiry. The question before us is whether petitioner is unlawfully restrained of his liberty by way of punishment for violation of orders absolutely void.

The distinction between a total want of power and a defective exercise of it is obvious, and want of power cannot be predicated of mere errors, if such were committed here, which we do not intimate.

We hold that the circuit court of appeals had jurisdiction in the premises, and was clothed with the power to pass on all questions in respect of the means taken to enforce and maintain it. We are not called on to revise its conclusions on this application. It is enough that, in our judgment, it has not exceeded its powers.

*Leave denied.*

\*JOSEPHINE H. THROCKMORTON and [552]  
Luke Devlin, *Plffs. in Err.*,

*v.*

WASHINGTON HOLT *et al.*

(See S. C. Reporter's ed. 552-581.)

*Wills—evidence of forgery—rebuttal—declarations of testator—revocation—presumptions.*

1. Testimony of a witness that certain pecu-

NOTE.—On expert and opinion testimony as to handwriting—see note to *Dresler v. Hard* (N. Y.) 12 L. R. A. 456.



ilarities in a signature to a will are frequently found in the signatures of the signer of the will is admissible in rebuttal of testimony by another witness that such peculiarities are not often found in the genuine signatures of such person,—especially where there is a sharp conflict in the evidence as to the genuineness of the signature.

2. Notice by the court to the proponents of a will that they must offer all the evidence they propose to give before resting the case does not justify a refusal to admit evidence of the proponents in rebuttal of testimony of the contestants which could not have been anticipated.
3. An attempted withdrawal from the jury, by an instruction, of all opinions of witnesses as to the genuineness of the testator's signature, in so far as they are based, in whole or in part, upon the composition of the paper, the expressions contained in it, the legal or literary attainments of the testator, or anything else but the handwriting, but stating that all other evidence admitted bearing upon his legal attainments and literary style may be considered with other evidence, is too uncertain to cure the erroneous admission of opinions of witnesses upon those matters, where in a long trial some witnesses to handwriting have given opinions based upon that matter only, while others have based their opinions, not only upon the handwriting, but upon their familiarity with the legal attainments of the testator and his characteristics of style and composition.
4. An opinion of a witness as to the genuineness of handwriting cannot be based in part upon knowledge of and familiarity with the legal attainments, the style, and composition of the alleged writer of the instrument in question.
5. Declarations and letters of one whose alleged will is attacked as a forgery, when not part of the *res gestæ*, are not admissible, whether made before or after the date of the will, to show the improbability of his making such a disposition of his property as that which is in question.
6. No presumption of the revocation of a will by the testator, or under his direction, arises in the case of a will received by the register of wills through the mail, with a local postmark, more than a year after the death of the testator and more than twenty-two years after its execution, where the will, when received, is mutilated, torn, and burned around the edges, with no seal upon it, while there is no evidence of its whereabouts from the time of its execution until that time, and nothing to show by whom it was mailed, but there is evidence that no such paper was found among his papers in his house after his death.
7. Declarations of a testator are not admissible for the purpose of showing his state of mind, in order to raise an inference that acts of mutilation shown by the will were performed by him or under his direction, and that they were made with the purpose of revocation, where such declarations are not part of the *res gestæ*.

[No. 21.]

Argued December 7, 10, 1900. Decided March 25, 1901.

THE ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment of the Supreme

Court of the District refusing probate of an alleged will. *Reversed.*

See same case below, 12 App. D. C. 552.

Statement by Mr. Justice Peckham:

\*This was a proceeding in the supreme court of the District of Columbia for the purpose of proving an alleged will of the late Joseph Holt, a distinguished lawyer and for many years Judge Advocate General of the United States Army, who died at the age of eighty-seven, in Washington on August 1, 1894, after a residence of many years in that city. The proceeding resulted in the rejection of the paper on the ground that it was not the will of Judge Holt but was a forged document, and judgment refusing probate was entered upon the verdict of the jury. The proponents of the will appealed to the court of appeals of the District, but before the appeal was brought on for argument Miss Hynes, one of the legatees named in the will, withdrew her appeal. The judgment of the supreme court upon the appeal of the other proponents was subsequently affirmed by the court of appeals, and the proponents of the paper, excepting Miss Hynes, have brought the case here by writ of error.

The record shows that Judge Holt died leaving no relatives nearer than nieces and nephews, residents of the states of Indiana, Mississippi, and Kentucky, and of the city of Washington, D. C., all being respondents in this appeal. He had been twice married and both wives had died long prior to his own demise. He had no children by either wife. Immediately upon his death his nephews, Washington D. Holt and William G. Sterrett, came to his late residence in Washington, and the keys being delivered to them by one of the servants, a strict search was made for a will but none was found. While the nephews were in possession of the house and the search was going on for the will, papers were burned and destroyed, all of which the nephews testified were wholly unimportant, and consisted of letters from relatives of Judge Holt to him, and that no papers destroyed were of a testamentary character. No will having been found, the nephews above named, and another, named John W. Holt, filed a petition in the supreme court of the District of Columbia, holding a special term for orphans' court business, in which the fact of intestacy was stated and the appointment of an administrator was asked. Pursuant to the petition and on September 28, 1894, the National Safe Deposit, Savings & Trust Company of the District was appointed administrator of the estate, and has continued so to act since that time.

Up to August 26, 1895, nothing out of the ordinary occurred in the administration of the estate, but on the last-mentioned date a sealed envelope, addressed to the register of wills in Washington, was received by that officer, which envelope was postmarked "Washington, D. C., August 24, 6 P. M. 1895, L." The envelope was opened by the regis-



ter who found therein a paper purporting to be a will signed by "J. Holt," dated February 7, 1873, and on the paper appeared what purported to be the signatures of Ellen B. E. Sherman, U. S. Grant, and W. T. Sherman as witnesses. By this paper Judge Holt gave one half of his estate to Lizzie Hynes, her real name being Elizabeth Hynes, and the other half to Josephine Holt Throckmorton.

Lizzie Hynes had been left an orphan in infancy and had been committed to the care of her uncle, Dr. Harrison, and his daughter, the first Mrs. Holt, and she had taken special charge of the child up to the time of her own marriage to Judge Holt, who had promised his wife at the time of their marriage to care for the child, and Mrs. Holt upon her deathbed asked and received a promise from Judge Holt that he would always take care of Lizzie, and treat her as if she were his own daughter. From that time until his death Judge Holt fully and in all things kept his promise and always supported her, she living most of the time in Kentucky, though frequently visiting and traveling with him.

[555] The other beneficiary, Miss Throckmorton, was Judge Holt's goddaughter, her mother being the cousin of his second wife, and \*while her father was a young man Judge Holt treated him with great kindness, and always so treated Miss Throckmorton.

The following is the text in full of the alleged will, with punctuation as in the original:

In the name of God Amen

J, Holt, of the city of Washington D. C. being of sound mind declare this to be my last will & Testament

I do hereby give devise & bequeath all of my property—both personal & real to Lizzie Hynes—cousin of my first wife & to Josephine, Holt, Throckmorton—who is my God-child & to their heirs & assigns forever—I do hereby direct that at my death all of my property be divided equally between them.—

Lizzie Hynes is to inherit hers at my death Josephine at the age of 21, her Father Maj. Charles B. Throckmorton will hold her share in trust—

I appoint Mr. Luke Devlin of the City of Washington D. C. whose character I believe to be of the highest standard & who will I am certain carry out my wishes my executor

Signed & sealed by me in the presence of these witnesses in the City of Washington, D. C. J. Holt

Feby 7th 1873—

Ellen B. E. Sherman  
U. S. Grant  
W. T. Sherman

There was nothing in the envelope addressed to the register of wills other than this paper. The postmarks on the package indicated that it had been deposited in one of the many local mail boxes to be found in the northwest quarter of the city of Washington, which is quite a large district, running from North Capitol street on the east to Georgetown on the west, and bounded on the south by the Mall and north by the boundaries of the city. When the paper was taken from the envelope it bore evident signs of mutilation by burning and tearing, and although the paper recited that it was signed and sealed, there was no seal on it, and if it ever had been affixed it had been torn away. At the time the paper bears date, February 7, 1873, Ellen B. E. Sherman was the wife of W. T. Sherman, who \*was then the general commanding the army of the United States, and U. S. Grant was then President. The paper was torn nearly in two across the page between the signatures of the testator and that of the first witness. Some of the evidence tended to show that the tearing was complete, but, as stated by the court below, the weight of the evidence was that it was not entirely separated at one end. The burning appeared on the edges of the paper and at the top, but the body of the instrument was so far intact as to be plainly legible.

Upon the receipt of this paper by the register of wills he communicated with Mr. Luke Devlin, the person named therein as executor, and after the latter had seen it he communicated with the parties interested, and on September 20, 1895, filed his petition in the supreme court of the District of Columbia, held for orphans' court business, for the probate of the paper as the last will and testament of Joseph Holt, deceased.

The contestants, as next of kin, filed their caveat October 18, 1895, opposing the probate of the paper, to which answer was made and filed December 2, 1895, by Luke Devlin, the executor, and by the Misses Hynes and Throckmorton, the two legatees named in the paper.

Issues were duly made up in the orphans' court and transferred to the circuit court for trial by jury. They are as follows:

"1. Was the paper writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?

"2. Was the execution of said paper writing procured by fraud exercised and practised upon said Joseph Holt by any person or persons?

"3. Was the execution of said paper writing procured by the undue influence of any person or persons?

"4. If the said paper writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by said testator?

Upon the trial of these issues the proponents of the paper proved the death of the subscribing witnesses, and gave evidence \*in regard to the genuineness of their signatures as well as of Judge Holt's. Senator John Sherman testified to the genuineness of the signature of his brother, General Sherman; Colonel Frederick D. Grant to that of his father, President Grant, and P. Tecumseh Sherman to that of his mother,

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Mrs. Ellen B. E. Sherman. Mr. Henry B. Burnett testified that in his opinion the body of the will and the signature of the testator were written by Judge Holt; that he became acquainted with him in 1893; had frequently seen him write and had had considerable correspondence with him which continued up to 1889, and that he was familiar with his handwriting. After this evidence was given counsel for proponents offered the paper in evidence, which was objected to by counsel for the contestants on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated, and had been sent to the register of wills anonymously, and that it was incumbent upon proponents to explain these circumstances before the will could be read to the jury. The objection was overruled and the paper read in evidence.

Elizabeth Hynes, one of the legatees and proponents, was called and testified that the paper writing was never in her possession, and she never saw it until it was shown her on the witness stand at the trial.

Miss Throckmorton also testified that she had never had the paper in her custody and had never seen it until it was shown her by the register of wills in the latter part of October, 1895, and that the first she knew of its existence was through a telegram from Mr. Devlin, which she received in New York city, August 26, 1895; that she had known Luke Devlin when she was a child but had not seen him since until after the paper was filed.

Mr. Devlin, the person named as executor in the paper writing, also testified that it was never in his possession, and that he first saw it in the office of the register of wills on the day it had been received there. On cross-examination Devlin testified that he knew Joseph Holt well since 1862, having been a [558] copyist \*and messenger at that time in the office of the Judge Advocate General when Judge Holt succeeded to that office; that he continued to be employed in that office until 1876, when Judge Holt retired therefrom; that he had little communication with him in relation to office matters; that he visited Judge Holt once or twice at his house; that he was in the habit of meeting him socially at the residence of Mrs. Throckmorton, Sr., the grandmother of Miss Josephine H. Throckmorton, from 1865 to 1878; that he had not seen Mrs. Throckmorton, Sr., more than four or five times during a period of ten years preceding the receipt of the will at the register's office, and on learning of the existence of the will he had to consult the city directory to ascertain where she then lived; that on the day the will reached the register of wills he received a telephone message from the register, went to his office, and saw the will for the first time. He called on Mrs. Throckmorton, Sr., and on the same day telegraphed Miss Josephine H. Throckmorton of the finding of the will, having first learned her address from her

father upon inquiry at the War Department; that he called on several occasions in later years at Judge Holt's house, and was informed by the colored servant that he was out or that he was engaged, and asked witness to call again, the last of these visits being about April 9, 1894, shortly before his death; that he had met Judge Holt outside on several occasions, the last of which was about two years before his death, and conversed with him.

At this point the proponents announced their prima facie case closed, but opposing counsel objected that it was incumbent upon proponents to put in all their testimony essential to the establishment of the alleged will before contestants were called upon to offer any; whereupon the court ruled that because of the fact that there was no attesting clause to the will, it was proper and necessary for the proponents to offer all the evidence they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the will, and counsel for the proponents accepted the ruling as being a matter within the discretion of the court.

Testimony was then given by Elizabeth Hynes, who stated that she had corresponded with Judge Holt for forty years,\* and that in [559] her opinion both the body of the will and the signature were in his handwriting. Mr. Devlin testified that he had had daily opportunity for thirteen years of becoming familiar with Judge Holt's handwriting, and that the signature to the instrument was undoubtedly in testator's handwriting.

Miss Throckmorton testified that she had corresponded with him, and was familiar with his handwriting and knew his signature, and that both the will and the signature were in the handwriting of Joseph Holt.

Other witnesses were called, who testified that they were acquainted with the handwriting of Judge Holt, and that in their opinion the body of the paper and the signature were in his handwriting; after which the proponents rested.

Counsel for the contestants then offered in evidence the deposition of John Judson Barclay, in which the deponent testified that he knew the testator intimately from 1857 to 1866, and at intervals thereafter until the time of his death, and that he had last seen him in November, 1893, when he was in impaired health and in a darkened room, at which last stated time he had a conversation with Judge Holt in regard to the disposition by him of his property and estate. Evidence in regard to this conversation was duly and fully objected to, and the objection overruled and an exception taken by the proponents. The witness then stated the conversation as follows:

"In our conversation he referred most touchingly to my deceased sister, Mrs. Sarah Barclay Johnson, and made many kind inquiries in regard to my aged mother, who had also been his warm personal friend for many years. In this connection he remarked, 'I have made my will and have made provision for her to receive some pic-



tures,' etc., which my sister had painted for him, as well as an ambrotype or photograph of herself, which he highly prized and wished my mother to possess."

[560] Another witness, Mrs. Briggs, testified under proper objection and exception that she had had a conversation with Judge Holt relating to wills some time between 1888 and 1891, in which he told the witness that if she were going to make a disposition of any piece of her property to do it before she \*passed away; then she would be sure that it would be done and be permanent; but, he continued, "in my own case my nephew, my brother's son, will attend to my affairs, and I know it will be done all right." Before the conversation ended Judge Holt had stated that it was his nephew, Washington Holt, and that he would attend to his affairs, and he knew it would be all right.

The objection to this testimony was on the ground that, if it tended to prove anything, it could only mean that there was a will existing in which Washington Holt was named as executor, and that if offered for the purpose of proving the contents of such will its execution could not be proved by mere declarations of the testator, and also that the legal presumption was that as the will was not produced or found that it had been revoked. If not revoked it must be produced, and that parol declarations of this character are inadmissible as a basis for proving revocation. Counsel for the contestants admitted that their claim was that there was a will existing in which Washington Holt was executor, but at the same time counsel stated that they wished it understood that the evidence was also offered both on the question of forgery and on the question of revocation of the alleged will of 1873. The objections were overruled and the testimony admitted and exceptions duly taken.

Subject to the same objections and exceptions, counsel for the contestants further gave evidence to the jury tending to prove that between the years 1884 and 1893 Judge Holt, on several occasions, told Washington D. Holt that he had made him (Washington Holt) his executor, and on several occasions Judge Holt informed Mary Holt and her mother Vanda Holt that they would be much better off after his death; that they would then go to Europe, and Mary must become proficient in French so that while in Europe she could act as their interpreter. Evidence was also given that during the same period Judge Holt told the servants of his house on two occasions that Washington D. Holt would have charge of his affairs after his death.

[561] It was also proved that Judge Holt was born in or about the year 1807, in the state of Kentucky, and that until 1856 he lived there, excepting a few years when he practised law in \*Mississippi; that he died in the city of Washington in August, 1894, leaving an estate of about \$180,000, about \$40,000 of which consisted of real estate in the city of Washington; his mother died in 1871, pre-  
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vious to the date of the alleged will, February 7, 1873.

During the war it would appear that there was some bitterness of feeling engendered in Judge Holt's mind by the part taken by his relatives, most of whom favored the South, and some of whom entered its military service. Evidence was also given on the part of contestants tending to prove that Judge Holt, prior to February 7, 1873, had on several occasions received visits at his house in Washington from some of his nieces and nephews, and had kindly received them and spoken kindly of them to others after they had gone.

Letters of his were received in evidence, without objection, dated prior to February 7, 1873, directed to different relatives in Kentucky, and tending to show pleasant relations between them, while letters of a similar nature from him to those relatives, dated subsequently to February 7, 1873, and up to within a few years prior to his death in 1894, were admitted, but under an objection and exception as to their competency. Evidence was also given, subject to similar objections and exceptions, of declarations of an unfriendly character on the part of Judge Holt towards the father of Miss Throckmorton, and also towards her grandmother, the evidence tending to show that he had said some time after the date of February, 1873, that the Throckmortons were his enemies, and that at a reception given by President Arthur, Judge Holt had refused to shake hands with Major Throckmorton, the father of Miss Josephine; also declarations of his to his servants that he would not see the Throckmortons, these declarations having been made many years subsequently to February, 1873.

All of this class of evidence was offered by the contestants in support of their allegation that the paper was a forgery as well as upon the issue of revocation.

There was also evidence given on the part of the proponents tending to show that Miss Throckmorton was a great favorite of Judge Holt's, and that his feelings of affection for her had \*never changed, notwithstanding he (562) may have felt differently towards her father and grandmother. She was his goddaughter, and she testified (after the evidence above referred to on the part of contestants) that she frequently visited and stayed at Judge Holt's house, and in 1892 he told her that he was an old man, on the brink of his grave, but that he had provided for her, and that she would be perfectly independent, and that was the last time she ever saw him; that he never spoke to her at any time otherwise than kindly and with affection.

Letters indicative of interest and affection for the mother of Miss Throckmorton were put in evidence by proponents, after evidence of that character had been given by contestants, in relation to the relatives of Judge Holt.

Other evidence was given upon the trial not necessary now to be referred to.

To the question whether the paper filed in court on August 26, 1895, was executed by  
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Joseph Holt as his last will and testament, the jury answered "No."

To the fourth question, whether, if the paper had been executed by Joseph Holt as his last will and testament, the same had been revoked by him, the jury answered "No; because it was not executed."

No evidence having been given in relation to matters referred to in the second and third questions, the jury by direction of the court returned a negative answer.

**Messrs. William G. Johnson and Calderon Carlisle** argued the cause, and, with **Messrs. J. J. Darlington and George C. Fraser**, filed a brief for plaintiffs in error:

When the intention to be proved is important only as qualifying an act, its connection with that act must be shown in order to warrant the admission of declarations of the intention.

*Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909.

Until some evidence, affirmative or presumptive, has been given that the burning, tearing, canceling, or obliterating of a will was done by the testator, or by some other person by his direction, it is not material to inquire as to the intent of the testator.

*Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251; *Andrew v. Motley*, 12 C. B. N. S. 514; *Hise v. Fincher*, 32 N. C. (10 Ired. L.) 139, 51 Am. Dec. 383; *Gains v. Gains*, 2 A. K. Marsh, 190, 12 Am. Dec. 375; *Sewell v. Slingluff*, 57 Md. 537; *Wittman v. Goodhand*, 26 Md. 95; *Allen v. Huff*, 1 Yerg. 404; *Ludd's Will*, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734; *Perjue v. Perjue*, 4 Iowa, 520; *Crocker v. Chase*, 57 Vt. 413.

The presumption is that the mutilation was neither done nor authorized by Judge Holt.

*The Pizarro*, 2 Wheat. 227, 4 L. ed. 226; *Armory v. Delamiric*, 1 Strange, 504; 1 Smith Lead. Cas. 8th Am. ed. pp. 688-690; *Podmore v. Whotton*, 3 Swabey & T. 449; *Finch v. Finch*, L. R. 1 Prob. Div. 371; *Halyburton v. Kershaw*, 3 Desauss. Eq. 105; *Hitchings v. Wood*, 2 Moore, P. C. C. 353; *Wood v. Goodlake*, 2 Curt. Eccl. Rep. 82; *Swinburne, Testaments & Last Wills*, 6th ed. p. 538.

The declarations of a testator are inadmissible as evidence of the facts therein declared, and are only admissible as evidence of the state of feeling of the testator at the time, and then only in cases where that is material.

*Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Mooney v. Olsen*, 22 Kan. 69; *Shailer v. Bumstead*, 99 Mass. 112; *Marx v. McGlynn*, 88 N. Y. 357; *Griffith v. Dufferderffer*, 50 Md. 466; *Gibson v. Gibson*, 24 Mo. 227; *Cawthorn v. Haynes*, 24 Mo. 236; *Thompson v. Updegraff*, 3 W. Va. 629; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; Redf. Wills, \*557. To the same effect, see *Schouler, Wills*, § 241; *Cassody, Wills* (1893) § 310; *Gillett, Indirect & Collateral Ev.* (1897) § 281.

This evidence has been uniformly excluded

by the courts, upon an issue of forgery, in all considered cases of authority.

*Boylan v. Mecker*, 28 N. J. L. 274; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Johnson v. Hicks*, 1 Lans. 150; *Hayes v. West*, 37 Ind. 21; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Kennedy v. Upshaw*, 64 Tex. 411; *Wallon v. Kendrick*, 122 Mo. 504, 25 L. R. A. 701, 27 S. W. 872; *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *Swope v. Donnelly*, 190 Pa. 417, 42 Atl. 882.

Decisions in cases in equity, in admiralty, in the ecclesiastical courts, and in common-law courts where a jury is waived, and in all other courts where the judge tries both law and fact, are not authority on questions of the admission or exclusion of evidence in jury trials at common law.

1 Greenl. Ev. 15th ed. p. 75; *Field v. United States*, 9 Pet. 182, 9 L. ed. 94; *United States v. King*, 7 How. 833, 12 L. ed. 934; *Arthurs v. Hart*, 17 How. 6, 15 L. ed. 30; *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.* 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Brick v. Brick*, 66 N. Y. 144; *Clapp v. Fullerton*, 34 N. Y. 190; *Re Crawford*, 113 N. Y. 560, 5 L. R. A. 71, 21 N. E. 692.

Evidence tending to show mere probability is inadmissible.

*Thompson v. Bowie*, 4 Wall. 463, 18 L. ed. 423; *First Nat. Bank v. Stewart*, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845.

This same principle has been applied to cases involving validity of wills, where the probability or improbability of the provisions was urged in support of or against genuineness.

*Rutherford v. Maule*, 4 Hagg. Eccl. Rep. 213; *Wood v. Goodlake*, 2 Curt. Eccl. Rep. 82.

Where the authorship of a document is in issue, an opinion based upon the style of the composition is inadmissible.

*Lee v. Bennett*, How. App. Cas. 187. See also *Lawson, Expert & Opinion Ev.* ed. 1883, p. 167.

The peculiar official relations of the testator with the witnesses to the paper propounded as his will do not justify the introduction of opinion testimony as to what might have been the proprieties, or whether or not the testator was one who would have observed a particular standard of propriety.

*Spence v. Spence*, 4 Watts. 165; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

Error in admitting evidence is not cured by a subsequent instruction to disregard, where such an impression has been made upon the minds of the jury that its subsequent withdrawal will not remove the effect caused by its admission.

*Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296; *Waldron v. Waldron*, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383; *Hopt v. Utah*, 120 U. S. 438, 30 L. ed. 711, 7 Sup. Ct. Rep. 614; *Erben v. Lorillard*, 19 N. Y. 299; *O'Sullivan v. Roberts*, 7 Jones & S. 360; *Furst v. Second Ave. R. Co.* 72 N. Y. 542.



It was proper to show in rebuttal that the peculiarity in a letter in a signature to the will, which another witness thought indicated forgery and declared did not exist in the genuine signature, was by no means an unusual feature, and is frequently, if not habitually, found in the signature.

*Com. v. Leach*, 156 Mass. 99, 30 N. E. 163; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584; *Gillett, Indirect & Collateral Ev.* § 61; *Wentworth v. Eastern R. Co.* 143 Mass. 248, 9 N. E. 563.

The verdict in this case, being the answer of the jury separately given to four separate and distinct issues, is not, as in ordinary actions at law, where a general verdict is rendered, an entire thing, but is severable, and in reality consists of four separate verdicts, and should be so treated.

*Lisbon v. Lyman*, 49 N. H. 553; *Robbins v. Townsend*, 20 Pick. 345; *Amherst Bank v. Root*, 2 Met. 522; *Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517.

**Messrs. A. S. Worthington and J. M. Wilson** argued the cause and filed a brief for defendants in error:

The omission of the trial judge properly to instruct the jury on any question of law arising in a civil case is not ground of error, when the court has not been requested to give such instruction.

*Armstrong v. Toler*, 11 Wheat. 276, 6 L. ed. 473; *Castle v. Bullard*, 23 How. 172, 16 L. ed. 424; *United States Exp. Co. v. Kountze Bros.* 8 Wall. 353, 19 L. ed. 461; *Butler v. Maples*, 9 Wall. 766, 19 L. ed. 822; *Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123; *Mutual L. Ins. Co. v. Snyder*, 93 U. S. 393, 23 L. ed. 887; *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 450, 36 L. ed. 500, 12 Sup. Ct. Rep. 671; *Pennock v. Dialogue*, 2 Pet. 15, 7 L. ed. 332; *Potter v. Baldwin*, 133 Mass. 427.

Something must be left to the discretion of a judge presiding at a jury trial when the issue joined must be determined by purely circumstantial evidence.

*Moore v. United States*, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26.

The extent to which the declarations of a person may be offered in evidence as tending to show what is going on in his mind at the time is well illustrated by the following decisions:

*Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 295, 36 L. ed. 710, 12 Sup. Ct. Rep. 909; *Com. v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235, 31 N. E. 961. See also *Brown v. Sutton*, 129 U. S. 242, 32 L. ed. 666, 9 Sup. Ct. Rep. 273.

The declarations of the testator, made after the date of his alleged will, are admissible in evidence for the purpose of showing his feelings and intentions at the time they were made.

*Adams v. Norris*, 23 How. 353, 16 L. ed. 530; *Mooney v. Olsen*, 22 Kan. 77; *Collagan v. Burns*, 57 Me. 449; *Hoppe v. Byers*, 60 Md. 391; *Scott v. Hawke*, 105 Iowa, 470, 75 N. W. 368; *Turner v. Hand*, 3 Wall. Jr. 88, 180 U. S.

Fed. Cas. No. 14,257; *Johnson v. Brown*, 51 Tex. 65; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154; *Could v. Lakes*, L. R. 6 Prob. Div. 1; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194; *Re Sullivan*, 114 Mich. 189, 72 N. W. 135; *Re Cottrell*, 95 N. Y. 329; *Burge v. Hamilton*, 72 Ga. 568; *Milner v. Phillips*, 9 R. I. 141.

After the death of testator, circumstantial evidence, including his declarations, is admissible to show that any burning or mutilation of his will was done by him.

*Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Patterson v. Hickey*, 32 Ga. 156; *Harring v. Allen*, 25 Mich. 505; *Re Valentine*, 93 Wis. 45, 67 N. W. 12; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110; *Tucker v. Whitehead*, 59 Miss. 594; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Collagan v. Burns*, 57 Me. 449; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194.

Where evidence has been improperly admitted against objection, the error is cured by subsequently striking it out or instructing the jury to disregard it.

*Pennsylvania Co. v. Roy*, 102 U. S. 458, 26 L. ed. 144; *Hopt v. Utah*, 120 U. S. 438, 30 L. ed. 711, 7 Sup. Ct. Rep. 614; *New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524, 31 L. ed. 258, 8 Sup. Ct. Rep. 246; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; *Providence Life Ins. & Invest. Co. v. Martin*, 32 Md. 310; *Sittig v. Birkestack*, 38 Md. 160; *Herrick v. Swomley*, 56 Md. 464; *Detroit Water Comrs. v. Burr*, 56 N. Y. 665; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Coughlin v. Poulson*, 2 MacArth. 308.

The evidence of P. Tecumseh Sherman was not competent in rebuttal, and the court properly excluded it.

*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422.

Questions relating to the admissibility of evidence in rebuttal must be in some degree within the discretion of the trial court.

*Dugan v. Anderson*, 36 Md. 588, 11 Am. Rep. 509.

The law presumes innocence rather than guilt, and will therefore rather impute the burning and mutilation of this paper to Judge Holt than to another, for it would have been right for him to do it, but a gross fraud for anybody else to do it without his authority.

1 Greenl. Ev. §§ 34, 35, note a, 38a, note 2, 41, 80; Best, Ev. § 302, note V; *Lawson*, Presumptive Ev. 93, chap. 5; *Bennett v. Sherrod*, 25 N. C. (3 Ired. L.) 305, 40 Am. Dec. 410; *Knapp v. Knapp*, 10 N. Y. 279; *Bauskett v. Keitt*, 22 S. C. 193; *Scoggins v. Turner*, 98 N. C. 137, 3 S. E. 719. See *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

Where there is any dispute about the handwriting, and there is no other evidence, a court of probate should not receive the document as a will.

*Machin v. Grindon*, 2 Lee Eccl. Rep. 406.



[562] \*Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:-

Before proceeding to a discussion of the more important questions involved in this case we will refer to two decisions of the

[563] \*trial court upon questions of evidence, in which we think there was error.

The witness, P. Tecumseh Sherman, had been called by the proponents of the will for the purpose of proving the signature of his mother, Mrs. Ellen B. E. Sherman, and had stated that in his opinion the signature on the paper was genuine. He did not testify as to the genuineness of the signature of his father, as Senator John Sherman, the brother of the General, had testified that in his opinion the signature was genuine. Subsequently, when the case was with them, the contestants called as a witness John B. Randolph, who, after testifying that he had been employed for more than thirty years in the office of the Secretary of War, and that he was so employed while General Sherman had acted as Secretary and also when he had been General of the Army, testified that he was familiar with the signature of General Sherman, and had recently re-examined the signature on the paper in question, and that in his opinion the signature was not that of General Sherman. Upon cross-examination he was asked his reason for that opinion, and among others stated that in the genuine signature of General Sherman in the long quirl on the capital T the upper and lower lines meet; that he never saw one in which they did not meet, and he had seen thousands of them. In response to a further question on cross-examination he said that the upper and lower lines met at least in four out of five signatures. He also stated that another reason for his belief that the signature was not that of the General was that the S in Sherman differed from the genuine S in the little stroke at the lower part of that letter where the upward stroke crosses the staff; that it should not make so much of a loop or so pronounced a loop as in the paper.

The proponents in rebuttal called as a witness P. Tecumseh Sherman, who had already been sworn in relation to the handwriting of his mother, and by him they offered to prove that this failure of the lines to meet in the letter T was by no means an unusual feature in the signature of his father, General Sherman, and that it was frequently, if not habitually, found therein, and also that the loops at the bottom of the S, as large as that

\*in the signature to the paper, were also usually found. The court excluded this evidence on the objection of contestants that it was not competent as rebuttal.

We think this evidence was competent in that character, and should have been received. The case in regard to the genuineness of the paper was very closely contested, and was one of the vital points in the trial. Evidence had been given on both sides, and witnesses of the highest character and respectability had differed in regard to the genuineness of the signatures. Although the court, when the case was first with the

proponents, had notified counsel that they must offer all the evidence they proposed to offer upon the subject before they first rested their case, and in accordance with such decision they had proceeded to give further evidence, we are not able to see how that fact is material at this point. Counsel for the proponents could not anticipate what evidence would be given by their opponents, nor what reasons might be offered by a witness as the ground for an opinion against the genuineness of any signature on the paper. When Mr. Randolph therefore was examined, and stated his opinion that the signature on the paper was not that of General Sherman, he was naturally asked on cross-examination if there were any particular reason why he had come to that conclusion, and in giving that reason he stated the failure of the lines to meet in the letter T, and the peculiarity of the loop in the letter S. The proponents could surely not be expected to anticipate that the letter T or the letter S would be the particular subject of criticism by any witness on the other side, nor what the character of the criticism might be. There was nothing to call their attention to the question, and in the nature of things it is plain the alleged peculiarities suggested by Mr. Randolph could not have been anticipated before they were spoken of by the witness. Under these circumstances it seems to us it was proper evidence in rebuttal, and that it was most important and material to show by a perfectly competent and absolutely disinterested witness, the son of General Sherman himself, that the peculiarities testified to by Mr. Randolph were in fact no peculiarities, and were frequently if not habitually present in the genuine signature. The fact that, after the \*witness Randolph had testified that he never saw one signature of General Sherman's in which the lines in the capital T did not meet, he subsequently stated that they met certainly as often as four out of five times, did not render the proposed evidence of Mr. Sherman immaterial when it was offered to be shown by him that these lines met not only frequently, but habitually, met. It is possible to imagine that the signatures of General Sherman which Mr. Randolph had examined in the War Department would bear out his statement that the meeting of these lines occurred at least as often as in four out of five of the signatures, while in those examined by the son of the General, and with which he was familiar, a failure to meet might be frequent, if not habitual, and thus there might be no contradiction between the two witnesses; but such a case would be highly improbable, to say the least, and we

[565] think that if Mr. Sherman had been permitted to testify upon the subject, and had in fact testified in accordance with the offer, such testimony would have been most material as affecting the reasons given by Mr. Randolph for his belief that the signature was not that of General Sherman. This might be true without impeaching in any degree the integrity of Mr. Randolph or his intention to testify what he believed to be the truth. As neither witness saw the signature



made, it was a matter of opinion with each, and while either might have been mistaken, such mistake would not necessarily affect the character of the witness. It was not a case where the discretion of the judge was appealed to. It was a case of strict right, and we are of opinion that the court below erred in refusing to admit the evidence. In such a case as this, where there was no evidence by an eyewitness as to the signatures of the parties, it became of the greatest importance that no admissible evidence should be excluded when offered upon the question of their genuineness. For this error we think a new trial will have to be granted.

Again, in the course of the trial the contestants called a Mrs. Briggs as a witness, and proved by her that she was a journalist by profession and had made literature her business in life, and that she had received instruction from Judge Holt in the line of composition in the English language; that [566] she had gone to him \*and asked his advice about a series of articles written by her, because she had been informed that he was a master of the English language; that he was her master and teacher in such matters. She was also somewhat familiar with his handwriting, and stated that in her opinion the signature "J. Holt" to the paper in question was not the signature of Judge Holt. She was then asked: "Have you formed that opinion in any respect upon any matter except the mere handwriting?" This was objected to and admitted under an exception. The witness answered that she had, that it was from the composition: "More the composition, as well as the writing."

Other witnesses were called who were permitted to prove that they formed their opinions in regard to the paper from its composition and style, and their knowledge of Judge Holt's legal and literary attainments, as well as from their familiarity with his handwriting. One witness was asked this question: "Let me call your attention to the use of the word 'inherit' in that paper, in the middle paragraph. From your knowledge of General Holt's characteristics and his way of expressing himself, what do you think as to that being his expression?" This question was duly objected to and the grounds fully stated, but the court overruled the objection and permitted the witness to answer, which he did by saying that he did not think the testator would use that expression.

The counsel for the contestants say that these rulings were right, but that if there were any error, it was cured by the subsequent charge of the court to the jury, given upon the request of counsel for the contestants, in which the jury were instructed "to disregard any opinion as to whether Joseph Holt wrote the paper in controversy that may have been expressed by any of the witnesses for the caveators in this case so far as such opinion was based upon anything but the handwriting of the paper. In so far as any such opinion may have been based in whole or in part upon the composition of the paper or the expressions contained in it, or the legal or literary attainments of said Jo-

seph Holt, they are withdrawn from the consideration of the jury. But all other evidence which has been admitted in this case bearing upon the legal attainments and literary style of said \*Joseph Holt remains as [567] competent evidence for the consideration of the jury, along with the other evidence in the case bearing upon the question of the genuineness of said paper."

The general rule is that if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. *Pennsylvania Co. v. Roy*, 102 U. S. 452, 26 L. ed. 142; *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. ed. 708, 711, 7 Sup. Ct. Rep. 614. But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614. And see *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. ed. 453, 459, 15 Sup. Ct. Rep. 383.

There may also be a defect in the language of the attempted withdrawal, whether it was sufficiently definite to clearly identify the portion to be withdrawn. This evidence was regarded upon the trial as of considerable importance. The question of its admissibility was raised in the early stages of the trial, and the evidence was excluded. It was again raised while the case was with the contestants and the evidence admitted at their instance, and several witnesses sworn in regard to it. After that an effort was made on the part of the proponents to give testimony in their favor on this question, and it was refused as not rebutting in its character. It is not a case therefore of the introduction of merely irrelevant evidence, such as was stated in *Pennsylvania Co. v. Roy*, 102 U. S. 452, 26 L. ed. 142; nor like the case of *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614, where the testimony of a single witness, a physician, as to the direction from which the blow was delivered, had been admitted, and where it was held that if it had been erroneously admitted, its subsequent withdrawal from the case with the accompanying instructions cured the error. That was a plain question of evidence on a single point, and on the part of one witness only.

Here was a case where several witnesses gave opinions in regard to the handwriting in the disputed paper, based upon \*their [568] knowledge of the handwriting of Judge Holt, and also based upon their familiarity with his legal attainments and with his characteristics of style and composition, while others based their opinions upon handwriting only. Which were the witnesses that based their opinions partly upon both foundations, the jury could not be expected to accurately



recall after a long trial lasting several weeks. Nevertheless it was called upon to separate and cast aside that portion of the evidence which had been based upon such facts, and, after excluding that evidence, determine as to the value of the remaining opinions based upon knowledge of handwriting only. It is at least questionable whether the case does not come within the exception to the rule by reason of the possible impression produced upon the jury during the long trial, in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility.

The witnesses who testified upon both knowledge of handwriting and familiarity with the style and legal attainments of Judge Holt may have made the deeper impression upon the jury, and they may have failed to realize that it was those particular witnesses whose evidence on the subject was to be withdrawn. And while the opinions of these witnesses as to the handwriting of the deceased were withdrawn, yet their evidence as to the legal attainments and composition and style of Judge Holt was to remain as competent evidence in the case. All this was called for by the directions, and without naming a single witness or recalling to the jury the fact that it was his particular opinion regarding the handwriting which was withdrawn. This was a somewhat difficult task for any mind, and there was no certainty under such general directions that it was properly understood, or that with the best intentions it was fully performed. In such a case as this and under the particular facts herein we think the names of the witnesses should have been given and the specific evidence which was given by them and which was to be withdrawn should have been pointed out.

[569] The court, be it remembered, was not responsible for the character of the directions. It simply gave them as asked for by \*the contestants and in the language prepared by their counsel, and whatever they lacked in the way of precision and certainty is not the fault of the court.

It would appear that the counsel felt the doubt as to the admissibility of the evidence, and after striving so hard to get it in, when they desired it to be withdrawn they were under an obligation to have it done plainly and certainly. Upon the particular facts of this case, while not impairing the force of the general rule, we are of opinion that the withdrawal was far too uncertain to be of any avail.

We are thus brought to a consideration of the merits of the question decided by the court below. Is the opinion of a witness as to the genuineness of the handwriting found in the paper, based in part upon the knowledge of the witness, of the character and style of composition and the legal and literary attainments of the individual whose handwriting it purports to be, competent to go to the jury upon that question? If he is able to give an opinion without such evidence, and from his fa-

miliarity alone with the handwriting, can the attempt be permitted to corroborate or strengthen such an opinion by this kind of evidence? We think not. An expert in regard to handwriting is one who has become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter, and does not in itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye. But the process of his mind and the language or style in which in the opinion of a witness the person habitually clothes his thoughts, are not matter of expert evidence, proper to be presented to a jury, for the purpose of determining whether the paper presented is or is not in the handwriting of the particular individual, in regard to whom the inquiry is made. The fact may of course be proved that the person was a man of intelligence, education, high legal attainments, refinement, and not addicted to coarseness in speech or writing, and the inference may be sought to be drawn from the facts that the paper in question is or is not his composition and is or is not his handwriting; but where it is material the \*infer- [570] ence is for the jury, and taking the opinion of the witness in that regard is to take his opinion upon the very subject to be decided by the jury, and is not at all a proper case for opinion evidence.

We think the court, therefore, erred in permitting witnesses to give an opinion as to the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style and composition of the individual whose handwriting was in controversy, and as corroborative of their opinion from knowledge of handwriting alone.

The two points above indicated in which we think the trial court fell into error require the reversal of this judgment and the granting of a new trial, but there are other questions in the case which are fully presented by the record, and which have been most ably and exhaustively argued by counsel on both sides. These questions will necessarily arise at the very threshold of the case when it comes on for trial again, and we think it is our duty to express our views in relation to them. They relate to certain evidence upon the issues of forgery and revocation.

And first, as to forgery. The paper in question was propounded as the will of Joseph Holt.

The facts set forth in the statement prefixed to this opinion show the case to be one of an extraordinary nature. There being no proof in regard to the history or whereabouts of the paper before it was received by the register of wills, and the evidence pro and con as to its genuineness having been received upon the trial, the question arises as to the admissibility of the various declarations of the deceased, and also of his letters to different relatives living in Ken-



tucky and other states, which it is claimed tend to show the improbability of the deceased making such a disposition of his property as is made in the paper in controversy. (They are referred to in the statement of facts above given.) The question is, in other words, Can the contestants prove by unsworn oral declarations and by letters of the deceased facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a [571] forgery? \*The decisions of the state courts as to the admissibility of this kind of evidence are not in accord. Many of them are cited in the margin.† Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. The principle of exclusion was favored by Chancellor Kent, and also by Justices Washington, Story, Livingston, and Thompson, all of whom once occupied seats upon the bench of this court.

The cases cited in the two classes do not all, or even a majority of them, deal with the question of forgery, but many of them treat the subject of declarations of a deceased person upon a principle which would admit or exclude them in a case where forgery was the issue. It is not possible to comment upon each of the cases cited in these lists, without unduly extending this opinion. We can only refer to the two classes generally, and state what we think are the questions decided by them.

[572] \*In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestæ*, are not admissible as evidence in favor of or against the validity of the will. The exception to the rule as admitted by these cases is that where the issue involves the testamentary capacity of the testator, and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the time of, the execution of the will as to

permit of the inference that the same state of mind existed when the will was made, are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity, of the testator at the time when the instrument in question was executed.

The cases contained in class B favor generally the admission of declarations of the deceased made under similar conditions in which declarations are excluded by the cases in class A.

If declarations of the character now under consideration are admissible when made prior to the execution of the alleged will, although not after it, then a large part of the evidence in this case as to the oral and written declarations of the deceased was properly admitted upon the issue of forgery, because such declarations may have all been made before the forgery was executed, the date of the paper not furnishing any evidence of the time when it was in fact prepared. The forger could not be permitted, by giving a date to the instrument, to fix the time subsequent to which the declarations should be excluded.

But we see no good ground for the distinction. The reasons for excluding them after the date of the will are just as potent when they were made prior thereto. When made prior to the will, it is said they indicate an intention as to a testamentary disposition of property thereafter to be made, and that such \*declarations may be corroborative of the [573] other testimony as to what is contained in the will, as is said by Mellish, L. J. in *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154, 251 (a case of a lost will), or else they indicate the feeling of the deceased towards his relatives, from which an inference is sought that a testamentary provision not in accordance with such declarations would be

†Class A. *Boylan v. Meeker*, 28 N. J. L. 274; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Gordon's Case*, 50 N. J. Eq. 397, 424, 26 Atl. 268; *Hayes v. West*, 37 Ind. 21; *Kennedy v. Upshaw*, 64 Tex. 411; *Mooney v. Olson*, 22 Kan. 60; *Thompson v. Updegraff*, 3 W. Va. 629; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Dinges v. Branson*, 14 W. Va. 100; *Gibson v. Gibson*, 24 Mo. 227; *Cawthorn v. Haynes*, 24 Mo. 236; *Walton v. Kendrick*, 122 Mo. 504, 25 L. R. A. 701, 27 S. W. 872; *Comstock v. Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 263, 20 Am. Dec. 100; *Shailer v. Bumstead*, 99 Mass. 112; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828; *Robinson v. Hutchinson*, 27 Vt. 38, 60 Am. Dec. 298; where the evidence was received, but the inquiry was as to mental capacity, the testatrix being greatly broken and enfeebled in mind and capacity and of advanced age; *Jackson ex dem. Coe v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390; *Jackson ex dem. Brown v. Betts*, 6 Cow. 377; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, citing many cases; *Johnson v. Ifloks*, 1 Lans. 150; *Morr v. McGlynn*, 88 N. 180 U. S.

Y. 357; *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *Den ex dem. Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Provis v. Reed*, 5 Bing. 435; 1 Redf. Wills, 4th ed. pp. 556, 557; Gillett, Ev. § 281; Schouler, Wills, 3d ed. § 317a.

Class B. *Turner v. Hand*, 3 Wall, Jr. 88, 92, 107, Fed. Cas. No. 14,257; *Johnson v. Brown*, 51 Tex. 65; *Swope v. Donnelly*, 190 Pa. 417, 42 Atl. 882; *Taylor Will Case*, decided by surrogate of New York county, 10 Abb. Pr. N. S. 300, 306. This case was reversed sub nom. *Howland v. Taylor*, in the court of appeals on a question of fact, but no opinion is reported; 53 N. Y. 627; *Davis v. Elliott*, 55 N. J. Eq. 473, 36 Atl. 1092; claimed by respondents to be adverse to *Boylan v. Meeker*, which is not referred to, neither is the question itself discussed, although evidence of this nature seems to have been received, without objection; *Hoppe v. Byers*, 60 Md. 381; *Burge v. Hamilton*, 72 Ga. 568, 624; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154; *Collagan v. Burns*, 57 Me. 449, by an equally divided court; 1 Phillim., Eccl. Rep. 447-460.



forged. The declarations are, however, unsworn in either case, and if they are inadmissible on that ground when made subsequent to the execution of the will, they would be also inadmissible when made prior to its execution. In *Den ex dem. Stevens v. Vancleve*, 4 Wash. C. C. 262, 265, Fed. Cas. No. 13,412, Mr. Justice Washington said that declarations of the deceased, prior or subsequent to the execution of the will, were nothing more than hearsay, and there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity. Judge Pennington concurred in those views.

After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not a part of the *res gestæ*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible [574] on the ground \*that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the same individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere

fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

Thus it is said in *Shailer v. Bumstead*, 99 Mass. 112, which is one of the cases cited in the margin in class A: "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language. \*Statements and [575] declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. *The truth or falsity of the statement is of no consequence.*" The testatrix in the above case died in 1865, at the age of ninety-one, having executed a will in 1851, another in 1853, and a codicil thereto in 1857; and among other issues raised was one of testamentary capacity. The declarations that were held admissible were only for the purpose of showing "what manner of person she was" who uttered them. They were used to throw light upon an alleged state of mind which was involuntary and the result of disease and old age. If used for any other purpose they were not admissible, said the court, because they were mere hearsay and could never be explained or contradicted by the person who uttered them.

And so in *Gibson v. Gibson*, 24 Mo. 227, the court said such declarations were admitted when it was proposed to show the condition of the testator's mind or to show the state of his affections, but never as a mere narrative of facts. The latter remark is explained in the next case in the same volume (p. 236), the opinion in which was delivered by the same judge, by which it is seen that such evidence was admissible only on the issue of insanity. See pages 238 and 239, where the point is plainly made that there must be a foundation of that kind in order to let in the proof of declarations as to his affections, which could only be admitted on such an issue.

And it was also said in *Waterman v. Whitney*, 11 N. Y. 157, that to receive declarations when no such issue was involved would be attended "with all the dangers which



could grow out of changes of purpose, or of external motives operating upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator." To the same effect is *Boylan v. Meeker*, 28 N. J. L. 274, cited in class A. It is therefore clear that as their truth in such an issue is not of importance, and their materiality lies only in the fact that they were made, the principle of rejecting unsworn declarations has no application. But when it is sought to prove them as coming from one about whose perfect mental capacity there is no dispute, all-  
**[576]** though \*they relate to the alleged state of his affections when made, the only possible importance of such declarations rests in the claim that they are true, and an inference is sought to be drawn which is founded wholly upon the assumption of their truth. Now if their only value rest upon that assumption, then the fact that they are unsworn declarations brings them at once within the bar of the general rule of evidence that unsworn declarations are not admissible. As indicative of mental capacity they are original evidence sworn to by the witness, but as evidence of the truth of the statement declared they are simply unsworn declarations, and should be excluded accordingly.

The cases mentioned in class B proceed upon a totally different theory, viz., that the declarations may be true and are made by a person who knows all about the subject, and they are therefore proper to be submitted to the jury for what that body may regard their worth, although it is admitted that it is a very dangerous kind of evidence. We are familiar with the case of *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154. Cockburn, Chief Justice, in that case, favored the admission of declarations of the testator as secondary evidence of the contents of the lost will, on the ground that such declarations were usually honestly made, and that the evidence might be put on the same footing with declarations of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case. pp. 224, 225. It seems to us that the admission of the evidence substantially enlarged the exception to the rule as to hearsay. Jessel, M. R. (at p. 240), undertook to give the exceptions to the general rule as to hearsay (which exceptions do not include this case), but he thought, upon the principles upon which some of the exceptions were founded, the declarations had been properly admitted, the case being one of a lost will, known to have existed but which at the death of the testator was not forthcoming. Mellish, L. J., thought the declarations of testator made after the will were inadmissible, while James, L. J., and Baggallay, J. A., concurred with the Chief Justice.

The remarks of the master of the rolls  
**[577]** were adverted to in \*the subsequent case of *Woodward v. Goulstone*, in the House of 180 U. S.

Lords, L. R. 11 App. Cas. 469, by Herschell, L. C., and by Lords Blackburn and Fitzgerald, all of whom stated (pp. 478, 484, 486) that they did not wish in deciding the case to be regarded as approving the views in the *Sugden Case* upon the admissibility of the declarations of the deceased testator made subsequently to the execution of the will, even in the case of a lost will; that the question was not necessary to the decision of the case then before them, and that they wished to reserve their opinion until it was necessary to decide it. Considerable doubt is thus thrown by the highest legal tribunal in England upon the correctness of the decision of the lower court. In New York and probably in most of the other states the character and sufficiency of the evidence to establish a lost will are provided for by statute. *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88.

The decision in the *Sugden Case* also overrules that of *Quick v. Quick*, 3 Swabey & T. 442, where Lord Penzance refused probate of the alleged will, there being no other evidence of its contents than the declarations of the testator made after its execution, and it also runs counter to the opinion of Lord Campbell in *Doe ex dem. Shallcross v. Palmer*, 16 Q. B. 747.

The law cannot, therefore, be regarded as settled in England that, even in the case of a lost will, declarations of the testator made after its execution are to be admitted as evidence of its contents. It is also proper to call attention to the fact that all the judges participating in the decision of *Sugden's Case* were entirely satisfied with the proof of the contents of the lost will, wholly aside from evidence of these declarations.

While the case is not like the one before us, inasmuch as the inquiry here is not in regard to the contents of a lost will, yet it might perhaps be urged with some force that if declarations of that kind were admissible, the evidence now before us is competent, and was properly admitted.

We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evidence. \*Where the issue is not one in re-  
**[578]** gard to the mental capacity of the alleged testator to make a will, his declarations upon the subject cannot be said to be declarations made against interest, such as declarations made by an individual while in possession of property, in disparagement of his absolute ownership. Such evidence has been admitted as declarations against interest or as characterizing possession, but the same declarations made after a conveyance of the land would be inadmissible, as mere hearsay and in no degree as declarations against interest. Declarations made by an alleged testator before or after the date of the paper are not declarations against interest, because they can have no effect upon his interest. The will would not take effect un-



til after his death, and before that time he could revoke it or make another, and it would still be immaterial evidence even if he did neither.

There is another reason why no exception should be made in favor of such evidence upon which to build a presumption or inference of forgery, and that is the inherent weakness and danger of the evidence itself. No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator's mind towards relatives or others, as evidenced by his declarations. It is every-day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and that, too, in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will. Although admitting the evidence, yet Sir John Nicholl, in *Johnston v. Johnston*, 1 Phillim. Eccl. Rep. 447, 460, said: "Parol declarations are always to be received with very great caution; in general, they are the lowest species of evidence. . . . They may on the part of the testator be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended and misrepresented. But these confidential communications with his wife upon her serious representations to him respecting so important a subject are deserving of rather more weight as evidence of the deceased's mind and intentions."

The common-law rules of evidence do not obtain in the ecclesiastical courts of England in regard to the proof of wills relating to personalty. "On the contrary, the evidence bearing on those points is generally mixed up with declarations of the party, and frequently consist of such declarations alone." (Per Tindal, Ch. J., in exchequer chamber, 1838, in *Marston v. Roe ex dem. Fox*, 8 Ad. & El. 14, 56.) The unreliable character of the evidence is acknowledged, but it is taken in connection with almost any other evidence, for what it is worth. In our judgment its value is entirely too problematical at its best to cause us to make an exception to the well-considered rule of evidence prohibiting hearsay.

The motives underlying and causing the particular provisions of a will may be so various and so hidden from observation that it is in the highest degree unsafe to draw an inference of forgery based upon declarations as to testamentary intentions which are so subject to change and which declarations may or may not represent the true feelings of the testator or even his actual testamentary intention at the time when spoken. The result is very apt to be a breaking down

of the safeguards provided by statute for the proof of the due execution of a will, and to provide in place of that proof evidence which is in itself of the most unsatisfactory nature, and from such evidence permit a jury to draw a still more uncertain inference of forgery.

We are not aware of any well-founded rule permitting such evidence on the mere ground that it is probable the declarations were true, and therefore, though unsworn, should be received. On this ground it might equally be maintained that evidence of the declarations of a person, since deceased, in a matter regarding which he had been familiar, who had been a man of undoubted character and probity, and who had had no interest in the subject, ought to be received though not sworn to. But in such case the probability of their truth has not been regarded as sufficient to admit the declarations.

\*In matters of pedigree, declarations by [580] members of the family are admitted, because the question in such cases is generally one concerning the parentage or descent of the individual, and in order to ascertain that fact it is material to know how he was acknowledged and treated by those who were interested in him or sustained towards him any relations of blood or affinity. 1 Greenl. Ev. §§ 103, 104. Evidence showing how he was acknowledged and treated is frequently only to be shown by declarations made at the time, and though unsworn are received as the best that the nature of the case permits. The analogy between such evidence and evidence of the nature under discussion is somewhat formal and far-fetched.

Undoubtedly cases may arise from the enforcement of this rule where injustice may be the result. It is possible that a forged instrument may in a particular case be declared a true one, where if evidence of this nature had been admitted the decision might have been the other way. An extreme case may be assumed, such as was put by Mr. Justice Grier in *Turner v. Hand*, 3 Wall. Jr. 88, 107, Fed. Cas. No. 14,257, by way of illustration in charging the jury, and although he held in the case he was trying that the evidence was admissible, he at the same time said it must be regarded with very great caution as a dangerous kind of evidence. *Turner v. Hand* was one of the many phases in which the controversy over the alleged will of Meeker was conducted in the courts of New Jersey and in the Federal court, while *Boylan v. Meeker*, 28 N. J. L. 274 above cited, was another.

The difficulty in regard to a rule of evidence is that it cannot be the subject of enforcement or nonenforcement according to the exigencies of the particular case. The rule must be general in its application. It cannot depend upon the opinion of the judge in each case whether the declarations are or are not to be relied upon. The rule must either permit or refuse to permit the evidence. We think that more injustice is possible as a result of admitting the evidence



than from its exclusion. The statutes of all the states have very careful and stringent provisions in relation to the making of wills and the due proof of their execution.

[581] The wills must be in writing (with the exception of certain nuncupative wills) signed by the testator and witnessed by others; and to permit evidence of the nature given in this case tends, as we think, most strongly to break down the efficiency of the statutory provisions, and to render proof of the execution of wills much less certain than was contemplated by the statutes. If declarations of the deceased were admissible to attack, they would then of course be admissible to sustain the will, and there would be apt to arise a contest in regard to the number and character of conflicting declarations of the deceased which he could neither deny nor explain, and in the course of which contest great opportunities for fraud and perjury would exist. The statutes as to wills were passed, as we believe, for the very purpose of shutting out all contests of such a character.

If not admissible generally, it is as we think inadmissible even as merely corroborative of the evidence denying the genuine character of the handwriting. It is open to the same objection in either case as merely unsworn declarations or hearsay.

We are therefore of opinion that the court below erred in admitting this evidence upon the issue of forgery, and that the error was of a most important and material nature.

The last question is whether this evidence, even though not admissible on the issue of forgery, was admissible upon that of revocation, as it was offered on both, and if admissible upon either the general objection to its admission would be unavailing, and there was no request to charge the jury to confine it to the issue of revocation alone. This question remains, therefore, although the jury found there was no revocation because the will was never executed.

It is manifest that upon the issue of revocation the fact of the execution of the will is to be assumed, for in the nature of things one cannot revoke a will which he never made. It is conceded on the part of proponents that the will appeared, when it came to the hands of the register of wills, to have been mutilated, torn, and burned around its edges, and counsel concede that its appearance is such that if it had been found among the papers or repositories of the deceased, a

[582] presumption would have arisen in favor of its revocation. The question is whether any presumption of cancellation or revocation by the deceased, or under his direction, is created in this case by the condition in which the paper was when received by the register of wills through the mail on August 26, 1895. If not, then these declarations subsequent to 1873 are not admissible on the theory that they are in aid or corroborative of a presumption that does not exist.

After proof that a will had been duly executed and was in the possession of the testator, the failure to find it after his death would be presumptive evidence that the testator had destroyed with an intention to re-

voke it. The presumption could, of course, be overcome by proper evidence leading to a contrary conclusion. This is conceded.

But here the will is found, not among the papers of the deceased at his former residence, but it comes through the mail to the register of wills more than a year after the decease of Judge Holt. The presumption of revocation cannot therefore attach from the failure to find a will once shown to have existed, for here the will is found and produced. We are left absolutely without evidence as to its whereabouts from the time of its execution in 1873 down to the time when the register of wills received the envelope inclosing it in August, 1895.

It is in evidence that immediately after the death of Judge Holt two of his nephews came to the house, and during the next few days papers were burned under their direction by one of the servants in the house. The evidence of these nephews given on the trial was absolute and distinct to the point that no paper of any consequence or in the nature of a testamentary disposition of property was found or destroyed, and there is no one to contradict or dispute such evidence; but the fact exists that there was a burning of papers.

Some evidence was given upon the subject of a similarity of form between the half-printed and half-written characters on the envelope directed to the register of wills and those found upon a sign put upon the stable of the deceased by the servant who had destroyed papers under the direction of the nephews, but we think such evidence was of no importance, and it must therefore be admitted that there is no evidence that the address on the envelope was in the handwriting of any particular person.

We think no presumption of revocation by the testator, or under his direction, arises from the appearance of this will when first received by the register of wills.

In *Hitchings v. Wood*, decided by the Judicial Committee of the Privy Council in 1841, 2 Moore, P. C. C. 355, 447, Lord Lyndhurst, Langdale, M. R., Shadwell, V. C., Baron Parke, and Mr. Justice Littledale being in the court, the holograph instrument purporting to be a codicil to the will of James Wood, sent anonymously by the post to one of the legatees named therein, though partly burned and torn, was (reversing the court below) admitted to probate, the handwriting being satisfactorily proved; and it was held that under the circumstances of the case the onus of proving that the cancellation was the act of the testator, and with what intention it was done, lay on the parties opposing the proof. In the course of his opinion, Lord Lyndhurst said:

"Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the onus to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom, and under what circumstances, does not appear. There is nothing whatever to show that it was done



by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practised, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death, we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be approved."

[584] \*This case establishes the point that no presumption of revocation arose upon the facts herein by reason of the appearance of the paper, and after execution is proved by evidence of the handwriting the *onus* rests upon the individual claiming that the paper was revoked by the testator, to prove the fact. There must be some evidence of an act by the deceased, or under his direction, which would be sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated and torn or otherwise defaced, and under such circumstances that the fact of revocation might be presumed. It was observed in *Johnston v. Johnston*, 1 Phillim. Eccl. Rep. 447, 497, that a will once regularly made, the presumption of law is strong in its favor; the intention to revoke must be plain and without doubt.

There being no presumption of revocation from the appearance of the paper, and the *onus* being on those who assert its revocation, can the written or oral declarations of the testator, made subsequently to the execution of the will, and tending to show the existence of another will, not otherwise proved, or tending to show the state of his affections for his relatives and an alleged change in his feelings towards the relatives of one of the legatees, though not toward the legatee herself, be admitted for the purpose of asking the jury to infer either that the testator himself mutilated and burned with the intention to revoke the will, or directed the acts of mutilation and burning, in order to accomplish such revocation? Can such evidence take the place of proof of an act on the part of the deceased (or directed by him) sufficient to revoke a will, and from which an intention to revoke might be presumed? Here is simply a case of an inference sought to be drawn that the testator did the act and with the intent to revoke the will, because of his making certain declarations as to a will, and also because he had expressed friendly feelings towards some of his relatives, and feelings the reverse of friendly towards the father of one of the legatees.

The will having been executed by the tes-

tator, it is said that it must be assumed to have been in his possession or under his control up to the time of his decease; and it is urged that proof \*of the state of mind of the testator during more than twenty years subsequent to the execution of the will is proper to be considered by the jury, in order that it may from that proof infer that the acts of mutilation were performed by the testator or under his direction, and also that they were performed or directed with the purpose of revocation. A double inference is thus based upon a most insecure and dangerous foundation. The evidence is of the same nature that we have just said was inadmissible upon the issue of forgery; only here the inference sought is a revocation instead of the forgery of the will. We think the declarations are no more admissible for the purpose of inferring a revocation than for the purpose of inferring the forgery of the will.

There is in the first place no evidence that the testator either himself performed or that he authorized the acts of mutilation, and we think no presumption that he did can arise from the fact that the will was not found among his papers. And the appearance of the will when received by the register furnished no such presumption.

Counsel for the contestants have cited a number of cases which they claim show the admissibility of this class of evidence, in addition to those cited in the foregoing discussion, upon the issue of forgery. They are placed in the margin.†

The evidence is claimed to be admissible for the purpose of authorizing an inference therefrom that the testator himself mutilated or directed the mutilation of the will for the purpose of thereby revoking it. Declarations made by a testator at the time of mutilation or cancellation, going to show the intent with which the act is done, are of course admissible, being part of the *res gestæ*. But as the production of the will under the circumstances proved in this case created no presumption of revocation, it was necessary to prove that the act of mutilation \*was performed by the testator or by his direction, and with an intention to revoke; and we think that his declarations, not being part of the *res gestæ*, cannot be permitted for the purpose of asking the jury to infer therefrom that the testator, not only performed or directed the act of mutilation, but did so with the intent to revoke the instrument. This kind of evidence is of a most dangerous character. It is hearsay, and nothing more.

Some of the cases cited above admitted proof of declarations in aid of the presumption of revocation arising from the finding of

†*Lawyer v. Smith*, 8 Mich. 411, 423, 77 Am. Dec. 460; *Patterson v. Hickey*, 32 Ga. 156, 164; *Harring v. Allen*, 25 Mich. 505; *Burge v. Hamilton*, 72 Ga. 568, 625; *Oollagan v. Burns*, 57 Me. 449; *Collyer v. Collyer*, 110 N. Y. 481, 484, 18 N. E. 110; *McDonald v. McDonald*, 142 Ind. 55, 81, 41 N. E. 336; *Müller v. Phillips*, 9 R. I. 141, 144; *Re Valentine*, 93 Wis. 45, 55, 67 N. W. 12; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Gould v. Lakes*, L. R. 6 Prob. Div. 1, 5.



the mutilated will among the effects of the deceased. *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Patterson v. Hickey*, 32 Ga. 156. Another case, *Burge v. Hamilton*, 72 Ga. 568, admitted declarations of a testator made to his attorney at the time of the execution of a codicil to his will, in relation to the number of pages to his will then present and exhibited to the attorney, the question arising from some mistake in the numbering of the pages, and the testator declaring to his attorney that the will which was then read over to him was all right and the numbering of the pages a mistake. The court held the paper presented an ambiguity, and a question of the identity of the paper produced with the will as executed. The declarations were in reality part of the *res gestæ*.

In another case the evidence went to prove that two sheets stitched together and found in an envelope were parts of the will. *Gould v. Lakes*, L. R. 6 Prob. Div. 1. In some of the other cases declarations were admitted on the same theory as stated above in the discussion as to forgery.

There must be an act and an intention in order to revoke. Neither can be inferred from evidence of declarations of a testator apart from the act and with no proof that the testator ever performed an act of a revocatory nature. Unless a part of the *res gestæ*, we see no reason for the admission of these declarations any more than upon the issue of forgery.

As is stated by James, Lord Justice, in *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251, in speaking of the evidence of revocation:

"It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As [587] it was put \*by Dr. Deane in the court below, 'All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

We cannot overcome the feeling that to admit evidence of this nature is in the highest degree dangerous, and that its admission would tend very strongly to impair the efficacy of the statutes relating to the proof and revocation of wills.

*The judgment of the Court of Appeals of the District of Columbia is reversed, and the cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District and to remand the cause to that court with instructions to grant a new trial.*

Mr. Justice **Harlan**, Mr. Justice **White**, and Mr. Justice **McKenna** agreed with the opinion only upon the first and second grounds discussed, and dissented from the others.

Mr. Justice **Brown** concurred in the result.

180 U. S.

FREEPORT WATER COMPANY, *Plff. in Err.*,  
v.

CITY OF FREEPORT.

(See S. C. Reporter's ed. 587-618.)

*Franchise of water company—power of city to bind itself by contract—authority to contract as to rates for a term of years—subsequent reduction of rates by ordinance.*

1. Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate water rates.
2. The power to prescribe such regulations and provisions for corporations as the legislature may deem advisable, which is reserved by the Illinois general incorporation act, § 9 (Starr & C. Stat. p. 1006), is not limited to the external business of corporations to the exclusion of interference with their internal management.
3. The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers it is not enough that the power is convenient to other powers; it must be indispensable to them.
4. A contract giving a water company the right to charge certain rates for thirty years without interference by new ordinances changing rates is not authorized by Ill. act April 9, 1872, empowering cities and villages to contract with such companies for a supply of water for public use for a period not exceeding thirty years, and Ill. act April 10, 1872, empowering such municipalities to authorize persons or private corporations to construct and maintain waterworks "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," since, under the rule requiring strict construction of such grants, the clause "for a period not exceeding thirty years" qualifies the words "construct and maintain," but does not qualify the words "at such rates as may be fixed by ordinance."
5. The power of a city to fix water rates, conferred by the Illinois statutes of 1872, became a condition of privileges thereafter granted to water companies.
6. The question what functions the circuit courts of a state may have is a matter of state law, on which the decisions of the state courts will be followed by a Federal court.

[No. 348.]

*Submitted October 31, 1900. Decided March 25, 1901.*

IN ERROR to the Supreme Court of Illinois to review a decision affirming a judgment overruling a demurrer to defendant's pleas in an action by a water com-

NOTE.—On reserved power to alter, amend, or repeal charters—see note to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961.

As to when United States Supreme Court follows decisions of state courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

pany against a city for the price of water. *Affirmed.*

See same case below, 186 Ill. 179, 57 N. E. 862.

Statement by Mr. Justice McKenna:

[588] \*This is an action of assumpsit brought by the plaintiff in error against the defendant in error in the circuit court of Stephenson county, state of Illinois, for the price of water delivered by plaintiff in error to defendant in error between January 1, 1896, and July 1, 1896.

The cause of action was based upon a contract arising from an ordinance passed by defendant empowering the plaintiff to construct certain waterworks in the city of Freeport, and the renting from the plaintiff by the city of certain fire hydrants.

To the defenses of a subsequent ordinance reducing the rental of such hydrants, it was replied that the latter ordinance impaired the obligation of the first ordinance as a contract, and therefore violated the Constitution of the United States.

The case was presented upon a demurrer to the pleas of the defendant. The demurrer was overruled by the circuit court, and the plaintiff electing to stand by its demurrer, judgment was entered for the defendant for costs. On appeal to the supreme court the judgment was affirmed (186 Ill. 179, 57 N. E. 862), and to that action this writ of error is directed.

The facts presented by the pleadings are as follows:

The plaintiff is a corporation organized and existing under the general laws of the state, and the defendant is a municipal corporation organized under the general act of the state entitled "An Act to Provide for the Incorporation of Cities and Villages," approved April 10, 1872, and in force July 1, 1872, and the acts amendatory thereof.

[589] That on the 6th of June, 1882, defendant enacted an ordinance giving and granting to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the 1st of July, 1882, to supply the city of Freeport and its citizens with water suitable for domestic and manufacturing purposes. The city reserved the right of purchasing the works at the end of thirty years. If such right should not be exercised, the rights and privileges of the plaintiff were to be extended for a further period of twenty-five years. There were the usual provisions for the use of the streets, the character of the works and appliances, the quality of the water, and provision was made for the extension of the system as the growth of the city and its needs might require.

Section 7 of the ordinance was as follows:

"The said Nathan Shelton or his assigns shall erect double-nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his as-

signs as an annual rental for the first 100 of said hydrants the sum of \$100 each, for all said hydrants over 100 and up to 150 an annual rental of \$80 each, and for all of said hydrants over 150 an annual rental of \$50 each, which said rentals shall be payable semiannually on the 15th days of January and July in each year; and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, and shall continue during the full term specified in this ordinance, unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease. The pay of any hydrant shall cease whenever any hydrant is out of repair, or unfit for use, or incapable of throwing a stream as provided for in this ordinance."

The city was given the right to use water free of charge from the hydrants on streets curbed and guttered, for flushing and washing the gutters, and from any hydrant, upon giving notice, for flushing any and all sewers; also water free of charge for the use of the fire department and for the city hall, public offices, public schools, churches, and [590] for four public drinking fountains if the city should erect the same.

Maximum rates to consumers were fixed for purposes which were especially enumerated, and it was provided that "rents for other purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following rates." The rates were specified.

Section 13 was as follows:

"This ordinance shall become binding as a contract between the city of Freeport, Illinois, and Nathan Shelton or his assigns, upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordinance; and this ordinance when so accepted shall not be altered, amended, or changed in any way without the concurrence and consent of both parties thereto and interested therein, or their successors or assigns."

On June 27, 1882, Shelton filed a written acceptance of the terms and conditions of the ordinance. On August 8, 1882, he assigned all his rights to plaintiff, of which defendant had notice. Plaintiff has complied with all things required of Shelton or of it, has constructed 121 hydrants as required by § 7 and as ordered by defendant, which were in operation on January 1, 1896, and defendant paid all rentals which became due January 1, 1896, and that there was due for rentals subsequent to that date, and up to the 15th of July, 1896, the sum of \$5,840.

The pleas of the defendant in substance alleged that it was a municipal corporation organized under the general laws of the state for the incorporation of cities and villages, and that, in pursuance of the statutes of the state relating to waterworks, it passed the ordinance of June 6, 1882.



It was alleged in plea No. 1 that the water rates fixed by such ordinance "were then unjust, unreasonable, and oppressive to the citizens and taxpayers of said city, and so remained and continued to be unjust, unreasonable, and oppressive from said enactment thereof up and until the subsequent action of the council of said city had in relation [591] thereto. . . ." This charge was substantially repeated in the other pleas, and it was alleged that the new rates were just and reasonable. The ordinance of February 11, 1896, was set out in full. The following is all that is necessary to be quoted:

"Sec. 1. That the Freeport Water Company, a corporation, now furnishing to the city of Freeport and its inhabitants water for fire protection, domestic uses, and manufacturing purposes, and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed, and no more.

*"Fire Protection and Public Uses.*

"Sec. 2. Said corporation shall be entitled to charge and receive from the city of Freeport for all water furnished for fire protection and other public uses and purposes as hereinafter defined and enumerated an annual rental or rate of fifty dollars (\$50) for each double-nozzle fire hydrant now in use in the said city of Freeport, or any that may be ordered hereafter by the city council of the city of Freeport, such rental to be payable in semiannual instalments on the fifteenth (15th) day of January and July, provided that it shall be shown by a certificate signed by the committee on water, city engineer, and chief of fire department that test of the works of said corporation has been made within six (6) months, and that such works have been in such condition as to furnish at all times and for any length of time a fire pressure sufficient to throw six (6) fire streams from six (6) hydrants chosen by the committee on water, each through fifty (50) feet of 2½ inch hose and 1-inch nozzle from each hydrant so chosen to a height of one hundred (100) feet, or maintain its equivalent in pressure at the nozzles of the hydrants. Where the works of said corporation are not shown to be maintained in condition to furnish such fire pressure the rental shall be one half the amount hereinbefore fixed. The above rate and rental shall be in full payment for all water furnished as follows: For fire protection, including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice, for all water used by the committee on water \*for cleaning, washing, flushing gutters and sewers, in said city, and for all water used for the city hall, fire and police stations, and other city offices, for drinking fountain in park, when desired, and for all public schools and churches in the city."

The ordinance further established in detail maximum rates for water to be furnished for domestic and manufacturing uses and other uses when furnished without meter; also rates when furnished or measured by meter.

There was a penalty provided for charging greater rates than those established.

The ordinance was to take effect from the date of its passage, and the right of further regulation was reserved.

The rates established by the ordinance of February 11, 1896, were considerably less than those established by the ordinance of June, 1882.

The assignment of error presented the contentions in various ways that the ordinance of February 11, 1896, and the statutes in pursuance of which it was claimed to have been passed, violated the Constitution of the United States in that the ordinance and statutes impaired the obligation of the contract made by the ordinances of June, 1882, with plaintiff, and deprived it of its property without due process of law.

The statutes of the states which are urged as applicable to the contentions of the parties are cited in the margin.†

Messrs. George C. Fry and James W. Hyde submitted the cause and filed a brief for plaintiff in error:

This court will ascertain from the record and determine for itself whether or not the contract has been impaired within the meaning of the Federal Constitution, or whether the party has been deprived of his property without due process of law.

*Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 433, 14 L. ed. 1004; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Jefferson Branch Bank v. Skelly*, 1 Black. 436, 17 L. ed. 173; *Butz v. Muscatine*, 8 Wall. 575, sub nom. *United States ex rel. Butz v. Muscatine*, 19 L. ed. 490; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Edwards v. Elliott*, 21 Wall. 549, 22 L. ed. 489; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Wright v. Nagle*, 101 U. S. 791, 25

†An Act to Enable Cities and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect the Tax to Pay for Water so Supplied. Approved April 9, 1872, in force July 1, 1872.

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years. (Public Laws of Illinois of 1871, p. 271.)

An Act to Provide for the Incorporation of Cities and Villages. (Approved April 10, 1872; in force July 1, 1872.)

Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the



L. ed. 921; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 667, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Hoadley v. San Francisco*, 124 U. S. 639, *sub nom. Clark v. San Francisco*, 31 L. ed. 553, 8 Sup. Ct. Rep. 659; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *McCullough v. Virginia*, 172 U. S. 110, 43 L. ed. 385, 19 Sup. Ct. Rep. 134; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 487, 43 L. ed. 525, 19 Sup. Ct. Rep. 247; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

It was the duty of defendant in error under its implied powers to provide its inhabitants with a supply of water.

Dill. Mun. Corp. § 146; *Hardy v. Waltham*, 3 Met. 163.

Defendant in error was acting under the provisions of the city and village act, of which fact the courts take judicial notice.

*Potwin v. Johnson*, 108 Ill. 74; *Harmon v. Chicago*, 110 Ill. 411, 51 Am. Rep. 698; *Rock Island v. Cuinely*, 126 Ill. 415, 18 N. E. 753.

The legislature of Illinois has repeatedly recognized by course of legislation this implied power to contract for waterworks. Such legislative construction is entitled to great weight.

*People ex rel. Mooney v. Hutchinson*, 172 Ill. 486, 40 L. R. A. 770, 50 N. E. 599; *People ex rel. Stuckart v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Bank for Savings v. The Collector*, 3 Wall. 495, *sub nom. Bank for Savings v. Field*, 18 L. ed. 207; *Ex parte Crow Dog*, 109 U. S. 556, *sub nom. Ex parte Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962.

Municipal corporations are invested with all powers necessary to carry out the provisions of the statute.

1 Dill. Mun. Corp. §§ 89, 90, 443; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Montgomery County v. Barber*, 45 Ala. 237; *Douglass v. Virginia City*, 5 Nev. 147.

unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs, or waterworks. (Public Laws of Illinois of 1871, p. 259; 1 Starr & C. Stat. p. 785, § 175.)

An Act to Enable Cities, Towns, and Villages Incorporated under any General or Special Law of this State to Fix the Rates and Charges for the Supply of Water Furnished by Any Individual, Company, or Corporation to Any Such City, Town or Village and the Inhabitants Thereof. (Approved June 6, 1891; in force July 1, 1891.)

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That the corporate authorities of any city, town, or village now or hereafter incorporated under any general or special law of this

It is also settled that the legislature can delegate its power to a municipality.

Cooley, Const. Lim. 204; Dill. Mun. Corp. § 96; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77.

Where authorized to make a contract, a municipal corporation may make a binding contract and insert proper covenants, the same as an individual under like circumstances.

15 Am. & Eng. Enc. Law, p. 1080; *Quincy v. Bull*, 106 Ill. 351.

Words and phrases are to be used in their ordinary meaning, and to be construed according to the rules of grammar.

Endlich, Interpretation of Statutes, § 2; Potter's Dwarrr. Stat. 237; Bishop, Written Laws, §§ 92, 93; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Robertson v. French*, 4 East, 137.

The court should construe the statutes, when capable of such construction, so as to carry out the intention of the parties.

*Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *Vincennes v. Citizens' Gas-light Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

The legislature knew that parties would not contract to invest their money in expensive works for a long period of time without a fixed rate for the entire period, and the contract was entered into under such circumstances.

*Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L. R. A. 294, 45 Atl. 830; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137.

The establishment of waterworks pertains to a municipality as an individual, as distinguished from the state at large.

state, in which any individual, company, or corporation has been or hereafter may be authorized by such city, town, or village to supply water to such city, town, or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town, or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town, or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town, or village may be. (Public Laws of Illinois of 1891, p. 85; 1 Starr & C. Stat. p. 868, § 458.)



Dill. Mun. Corp. § 58; *People v. Hurlbut*, 24 Mich. 105, 9 Am. Rep. 103.

The city was acting, in making the contract, simply in its private capacity as an individual, and not as a sovereign.

1 Dill. Mun. Corp. § 27; 15 Am. & Eng. Enc. Law, p. 985; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Gale v. Kalamazoo*, 23 Mich. 354, 9 Am. Rep. 80; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185, 72 Am. Dec. 730; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Newport v. Newport Light Co.* 84 Ky. 168; *Greenville v. Greenville Waterworks Co.* (Ala.) 27 So. 764; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 730; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

The great weight of authority is that, when an express power is given to a municipality to contract or provide for waterworks, such municipality has the power to contract for a fixed rate and for a definite term.

*Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24; *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Cartersville Improv. Gas & Water Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25; *Grant v. Davenport*, 36 Iowa, 396; *Saleno v. Neosho*, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190; *State ex rel. Kaiser v. Phillipsburg*, 23 Mont. 16, 57 Pac. 405; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; *Greenville v. Greenville Waterworks Co.* (Ala.) 27 So. 764; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Connersville v. Connersville Hydraulic Co.* 86 Ind. 184; *Valparaiso v. Gardner*, 97 Ind. 2; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Newport v. Newport Light Co.* 84 Ky. 168; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *Memphis v. Memphis Water Co.* 5 Heisk. 529; *Blood v. Manchester Electric Light Co.* 68 N. H. 340, 39 Atl. 335; *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 8, 61 Fed. 782; *Kimball v. Cedar Rapids*, 100 Fed. 802; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 591; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Westerly Waterworks v. Westerly*, 75 Fed. 181; *Defiance Water Co. v. Defiance*, 90 Fed. 753; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 378, 25 U. S. App. 166, 66 Fed. 140; *State ex rel. St. Louis v. Laeclde Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; *Living-*  
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*ston v. Pippin*, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50; *Hale v. Houghton*, 8 Mich. 458; *Re Pryor*, 55 Kan. 724, 29 L. R. A. 398, 41 Pac. 958; *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

The statutes passed at the session of the legislature of 1871 should be construed *in pari materia*.

Potter's Dwar. Stat. 272; Sedgw. Stat. & Const. L. 423; 1 Kent, Com. 463; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *South Park Comrs. v. First Nat. Bank*, 177 Ill. 234, 52 N. E. 365.

Having power to make such contract, the mode and manner are entirely within the discretion of the municipality, so long as the rates are fixed by ordinance and the contract does not extend beyond thirty years.

*Grant v. Davenport*, 36 Iowa, 396; *Portland v. Portland Water Co.* 67 Me. 135; *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L. R. A. 294, 45 Atl. 830; *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432; *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Utica Water Co. v. Utica*, 31 Hun, 431; *Livingston v. Pippin*, 31 Ala. 542; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

Shelton could rely upon the statutes as they then existed.

*Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090.

The statute of 1891 is to be construed prospectively.

Potter's Dwar. Stat. ed. 1871, p. 162; Cooley, Const. Lim. 2d ed. 370; Morawetz, Priv. Corp. § 1110; *Gage v. Stewart*, 127 Ill. 207, 19 N. E. 702; *Bauer Grocery Co. v. Zelle*, 172 Ill. 414, 50 N. E. 238; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210.

The legislature having authorized the making of the contract of June 7, 1882, such contract must stand unless attacked for fraud.

Tiedeman, Mun. Corp. § 175; Cooley, Const. Lim. 186, 187; 15 Am. & Eng. Enc. Law, p. 1046; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 481, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Little Falls Electric Light Co. v. Little Falls*, 102 Fed. 663; *Sherlock v. Winnetka*, 59 Ill. 389; *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74; *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883; *Newport v. Newport Light Co.* 84 Ky. 166; *Memphis v. Memphis Water Co.* 5 Heisk. 529; *Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 114, 23 Am. Rep. 713; *State, Van Reipen, Prosecutor, v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

Where an ordinance is repealed, such re-

peal cannot operate retrospectively to impair private rights vested under it.

Dill. Mun. Corp. § 314; *Thomp. Corp.* § 5413; *Tiedeman, Pol. Power*, § 188; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Pearsall v. Great Northern R. Co.* 161 U. S. 673, 40 L. ed. 847, 16 Sup. Ct. Rep. 705; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Close v. Greenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Com. v. Essex Co.* 13 Gray, 239.

A contract between a state and an individual is as obligatory as any other contract.

*Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Von Hoffman v. Quincy*, 4 Wall. 535, *sub nom. United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403.

The reserved right to repeal cannot affect contracts already entered into.

*Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Outts*, 24 L. ed. 94; *Sinking Fund Cases*, 99 U. S. 710, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 567, 38 L. ed. 270, 14 Sup. Ct. Rep. 437; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Citizens' Water Co. v. Bridgeport Hydraulic Co.* 55 Conn. 1, 10 Atl. 170; *Inland Fisheries Comrs. v. Holyoke Water-Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Sage v. Dilard*, 15 B. Mon. 341.

The ordinance of 1896 was not passed under the police power of the state.

1 Dill. Mun. Corp. § 142; *Cooley, Const. Lim. p. 577*; *Maine C. R. Co. v. Maine*, 96 U. S. 511, 24 L. ed. 836; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Pearsall v. Great Northern R. Co.* 161 U. S. 675, 40 L. ed. 848, 16 Sup. Ct. Rep. 705; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 689, 43 L. ed. 861, 19 Sup. Ct. Rep. 565.

The establishing of rates is a legislative, and not a judicial, act.

2 Redf. Railways, § 246; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 344, 36 L. ed. 179, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S.

499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

Under the provisions of the Constitution of Illinois dividing the governmental powers into the legislative, executive, and judicial departments, and prohibiting either of the departments from exercising any power properly belonging to the others, the judiciary has no power to infringe upon what are legislative acts.

*Field v. People ex rel. McClenand*, 3 Ill. 79; *Galesburg v. Hawkinson*, 75 Ill. 152; *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111.

The maxim, *Nemo debet esse judex in propria causa*, applies to all matters and situations where one is appointed to decide between conflicting rights in which he is interested, and applies equally to the legislative, executive, or judicial department of the government.

*Washington Ins. Co. v. Priece*, Hopk. Ch. 1; *Sanborn v. Fellows*, 22 N. H. 473; *Dimes v. Grand Junction Canal Co.* 3 H. L. Cas. 759; *State, Winans, Prosecutor, v. Cranc*, 36 N. J. L. 394; *Ames v. Port Huron Log Driving & Booming Co.* 11 Mich. 139, 83 Am. Dec. 731; *Stoddard v. Moulthrop*, 9 Conn. 502; *Earle v. Stocker*, 2 Vern. 251; *Reg. v. Cambridge*, 8 El. & Bl. 637; *Wolcott v. Ely*, 2 Allen, 338; *McGough v. Wellington*, 6 Allen, 505.

The 14th Amendment to the Constitution of the United States is prohibitive against all forbidden acts of the state, whether through its legislative, executive, or judicial authorities.

*Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Virginia v. Rives*, 100 U. S. 313, *sub nom. Ex parte Virginia*, 25 L. ed. 667; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Fick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Scott v. McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Gibson v. Mississippi*, 162 U. S. 579, 40 L. ed. 1078, 16 Sup. Ct. Rep. 904; *Blake v. McClung*, 172 U. S. 260, 43 L. ed. 440, 19 Sup. Ct. Rep. 165.

The rights of plaintiff in error under the contract were property rights.

2 Kent, Com. 251; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Rigney v. Chicago*, 102 Ill. 77; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 385, 56 Am. Rep. 173, 4 N. E. 246.

Such property rights can be destroyed or interfered with only by due process of law; that is, according to the "law of the land,"—"according to those rules and forms which have been established for the protection of private rights."

*Lake View v. Rosehill Cemetery Co.* 70 Ill. 198, 22 Am. Rep. 71; *State Bd. of Edu. v. Bakewell*, 122 Ill. 348, 10 N. E. 378; *Railroad Commission Cases*, 116 U. S. 331, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 644, 6 Sup. Ct. Rep. 334, 388, 1191; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Monongahela Nav. Co. v. United States*, 148 U. S. 324, 37 L. ed. 467, 13 Sup. Ct. Rep. 622.

The property rights of plaintiff in error



having been taken from it by the action of the state under the act of 1891, without any compensation paid therefor, it was deprived of its property without due process of law.

*Henderson v. Central Pass. R. Co.* 21 Fed. 358; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. 395; *Baker v. Norwood*, 74 Fed. 997; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Kentucky Railroad Tax Cases*, 115 U. S. 331, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 416, 6 Sup. Ct. Rep. 57; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; 2 Story, Const. 5th ed. pp. 676, 702, 703, § 1956; 1 Hare, Am. Const. Law, 347, 348; *Mount Hope Cemetery Proprs. v. Boston*, 158 Mass. 509, 33 N. E. 695; *Harness v. Chcsapeake & O. Canal Co.* 1 Md. Ch. 249; *Ex parte Martin*, 13 Ark. 199, 58 Am. Dec. 321.

Mr. A. J. Hopkins submitted the cause for defendant in error:

The fixing of water rates for the period of thirty years by the ordinance of June 6, 1882, was not a contract with the city; nor was such ordinance binding upon it, as the corporate authorities had no lawful right to so bind the city for fixed water rates for the entire period.

*Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363; *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *East St. Louis Gaslight & Coke Co. use of Griswold v. East St. Louis*, 47 Ill. App. 411.

The several statutes of the state of Illinois herein considered should be construed together, and so reconciled, if in any way conflicting, as to deny municipalities the power to pass and enforce irrepealable ordinances which tend to create monopoly and impose unnecessary burdens on their inhabitants.

Cooley, Const. Lim. pp. 232, 233; Dill. Mun. Corp. §§ 91, 443; *Chicago v. Rumpff*, 45 Ill. 95, 92 Am. Dec. 196; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Greenhood*, Pub. Pol. 180, 643, 554.

It will not be presumed that the legislature in granting powers to municipal corporations intended to clothe them with power to create a monopoly, or to create exclusive or special privileges in favor of individuals or private corporations, or to pass ordinances to subject the inhabitants thereof to needless, excessive, and oppressive burdens.

*Lombard v. Stearns*, 4 Cush. 61; *Greenhood*, Pub. Pol. p. 317; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236.

Any ambiguity or doubt arising out of the terms used by the legislature in conferring power must be resolved in favor of the public. Every reasonable doubt of power is resolved

against the grantee, and the power denied. This is especially true as to grants and franchises of special privileges.

*Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; *Seeger v. Mueller*, 133 Ill. 94, 24 N. E. 513; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; Dill. Mun. Corp. § 89.

While, as a proposition of law, the legislature can delegate certain powers to a municipality, yet any power the state itself cannot exercise it cannot lawfully delegate to its agents.

Beach, Pub. Corp. § 554; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Zanone v. Mound City*, 103 Ill. 556; *Cooley*, Const. Lim. 340.

It is within the power of courts to declare that a thing which is within the letter of a statute is not governed by the statute, because not within its spirit, or the intention of its maker.

*Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Rockland Water Co. v. Camden & R. Water Co.* 80 Me. 544, 1 L. R. A. 388, 15 Atl. 785.

If it can be maintained that a municipality in making a contract for supplying water acts in a private capacity, as an individual, and not as a sovereign, and that there are some rights under such contract which are beyond destruction by the legislature, yet in the administration of such contracts, it is not beyond legislative authority and control.

*Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Ruggles v. People*, 91 Ill. 256; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

In contracting for a supply of water, a municipality acts both in its capacity as a public corporation and also in an individual capacity. When acting in the former capacity the corporation is in the exercise of its police power.

Dill. Mun. Corp. § 146; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. L. 333.

Corporations or individuals engaged in a business which affects the public owe a duty to the public. Any unreasonable restrictions upon the performance of such duties are prejudicial to the public interest and in contravention of public policy.

*Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

Supplying water to cities and villages is a business impressed with a public use. A business so impressed implies the right of legislative authority, not only to fix maximum rates, but also to adjust and reduce such rates and charges.



*Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363; *Illinois C. R. Co. v. People*, 95 Ill. 313; *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685.

There is much reported conflict in the numerous reported waterworks cases regarding the powers, and the extent of the powers, municipalities may exercise in establishing and fixing water rates. On principle, however, long-time and irrevocable contracts for fixed rates and charges are condemned.

*Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 357, 64 N. W. 269; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55.

In a number of cases the courts have held that contracts for the supply of water or gas to a municipal corporation, at a fixed price and for an unreasonable period of time, are invalid.

*Illinois Central Hospital v. Jacksonville*, 61 Ill. App. 199; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 20 L. ed. 173, 4 Sup. Ct. Rep. 48; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97, 47 Ill. App. 411.

The ordinance of February 10, 1896, is not in violation of the provisions of § 10, article 1, of the Constitution of the United States, as impairing the obligation of a contract.

*New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Coolley*, Const. Lim. pp. 437, 438; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

The said amendatory ordinance of the city of Freeport, which is based upon the provision of the act of the legislature of June 6, 1891, does not tend to deprive the plaintiff in error of its property without due process of law; nor is it unconstitutional.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Ruggles v. People*, 91 Ill. 256; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

The act itself provides a lawful tribunal for the protection of the property rights of the plaintiff in error, if unjustly assailed, or if attempted to be put in jeopardy.

Ill. Laws, act June 6, 1891, p. 85; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

All regulations of trade with a view to the public interest may more or less impair the value of property, but they do not come within the constitutional inhibition unless they virtually take away and destroy those rights in which property consists. This destruction must be, for any substantial purpose, total.

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*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Hawthorn v. People*, 109 Ill. 309, 50 Am. Rep. 610.

Ill. Const. 1870, art. § 14, prohibits the irrevocable grant of special privileges, and is a denial of the power to fix unalterable rates and charges for water to be furnished to municipalities and their inhabitants. So also does § 9, chapter 32, of the act entitled "Corporations."

*People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

The attempt by plaintiff in error to irrevocably establish a schedule of water rates and charges for the term of thirty years, in pursuance of the said ordinance, is unauthorized by § 1, art. 10, chap. 24, of the Revised Statutes relating to corporations.

*Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

The legislature may delegate powers to municipal corporations as a tribunal and agent of the law to fix reasonable rates and charges for a public service.

*San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 683; *English v. New Haven & N. Co.* 32 Conn. 240; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

\*Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court: [552]

\*The supreme court of the state based its decision on its opinions in the case of *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, and 180 Ill. 235, 54 N. E. 224. In that case the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance to that involved in the pending controversy. [593]

It is not clear from the opinion of the court whether it intended to decide that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in *Los Angeles v. Los Angeles City Water Co.* (1900) 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736. See also *Walla Walla v. Walla Walla Water Co.* 172 U. S. 7, 43 L. ed. 344, 19 Sup. Ct. Rep. 77, where the subject is more extensively discussed and the cases reviewed. See also *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

We do not mean to say that if it was the declared policy of the state that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not be controlled by such policy. In *Stevenson v. School Directors*, 87 Ill. 255, and in *Davis v. School Directors*, 180 U. S.



92 Ill. 293, it was held that a school board could not make a contract for the employment of teachers to extend beyond the current year, and this was put upon the ground of the inability of one board to control the exercise of the functions of its successor. In *East St. Louis v. East St. Louis Gas-light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97, decided in May, 1881, the doctrine of

[594] those cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One justice asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities. If there was anything more, we need not decide, as there are other grounds for judgment.

The supreme court did decide in the *Freeport Case* (1) that, the water company having been incorporated under the general incorporation act of the state, approved April 18, 1872, the provisions of the act entered into and formed a part of its charter, and that by § 9 of the act (inserted in the margin†) the right of the legislature to regulate and provide for the rates at which the company should supply water to the city was reserved; and (2) that the language of the act of April 9, 1872, and in force July 1, 1872 (inserted in the margin), did "not necessarily imply the power to make and fix rates." The court further said in 178 Ill. at page 309, 53 N. E. p. 122: "The authority 'to contract for a supply of water for public use for a period not exceeding thirty years' does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law. *Carlyle v. Carlyle Water, Light, & Power Co.* 52 Ill. App. 577."

[595] \*It is true that we do not necessarily have to follow this decision. When § 10, article 1. is invoked \*we decide for ourselves the fact of contract,—not only its formal execution, but its legal basis in law, and therefore construe for ourselves the statutes of the state upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to agreement with the state court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. After stating the peculiarity of the existence of two co-ordinate jurisdictions in the

same territory, and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the Federal courts of the right to exercise an independent judgment, the learned Justice said:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, \*it is the right [596] and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

Applying these principles to the case at bar, we solve its questions. The supreme court of the state in passing on the case, not only considered the acts of the 9th and 10th of April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated; and it was held that the act "must be regarded as entering into and forming part of the charter" of the plaintiff. The statute reserves to the general assembly the power to prescribe in the government of corporations "such regulations and provisions as it may deem advisable." The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The supreme court of the state has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations.

The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business management of the corpora-

†Section 9 of the general Incorporation act, cited in the opinion, is as follows:

"The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: And provided further, That this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation. (Section 9, Corporation Act; Starr & C. Stat. p. 1006.)



tion itself," but to regulate "those classes of acts which control the relation existing between stockholders as individuals and the corporation as \*an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation." We think the construction is too narrow. The statute made no distinction between the internal and the external business of corporations,—between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses.

In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, a provision was passed on, of an act defining the general powers and duties of manufacturing corporations, as affecting the beer company. The general statute was enacted in 1809, and the provision construed was as follows: "*Provided always*, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly repeal any act or part thereof, establishing any corporation, as shall be deemed expedient." The beer company was incorporated in 1828 "for the purpose of manufacturing malt liquors in all their varieties." It was held that the provisions of 1809 were adopted in the charter of the beer company, and were a part of the contract between the state and the company, rendering the latter subject to the exercise of that power; and the seizure and forfeiture of certain malt liquors, which were intended to be sold in violation of the prohibitory liquor law passed in 1869, were sustained.

But assuming that § 9 of the general incorporation act is correctly interpreted by plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The supreme court of the state, as we have seen, decided against the claim, and the principle of *Burgess v. Seligman* applies if the ruling of the court and the contention of the plaintiff is "balanced with doubt." There were no previous interpretations of the statutes by the state courts upon which the plaintiff had a right to rely. It acted upon the faith of the statute alone, and committed its rights to a judicial interpretation of the statute. \*The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.

In *Smith v. McDowell ex rel. Hall*, 148 Ill. 51, 23 L. R. A. 393, 35 N. E. 141, the supreme court of the state expressed the rule

as follows: "Their power [the power of municipal corporations] is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

The supreme court of the state applied these principles. It held that an irrevocable contract for specific rates was not indispensable to the other powers with which the cities of the state were invested. And a distinction was made between a contract which related to a governmental function, which the regulation of rates was said to be, and a contract which related to franchises which, though public in their nature, yet were not governmental, which the supply of water was said to be. This distinction, it was held, the statutes of 1872 observed, and gave the power to make one kind of contract, but not the other,—the power to contract for a supply of water, but not the power to contract "to pay a fixed and unalterable rate for thirty years." This was deduced from the silence of the statute of the 9th of April and the necessity of resolving all ambiguities in favor of the public. But ambiguity disappears, it was said, when the statute of the 9th was considered with the statute of the 10th, as it necessarily had to be, as the statutes were "*in pari materia*, and should be construed together." Section 1 of the act of the 10th of April "authorizes," the court said, "the city council to empower a private corporation to construct and maintain waterworks at such rates as may be fixed by ordinance. The meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, 'for a period not exceeding thirty years,' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.'"

The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, by Chief Justice Waite, of the power of the regulation of rates:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. ed. 939, 955, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipali-



ties of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise, and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company, or corporation to supply water, "be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation. . . ." There is no explicit provision for repetitions of the power,—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation, we might have to listen to them, but now, undisturbed by them, we yield without resistance to that meaning which the subject-matter demands in the absence of negating words.

[600] \*Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks "*at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*" The words, "*fixed by ordinance,*" may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

It is also urged by plaintiff that the ordinance of February 10, 1896, deprives the plaintiff of its property without due process of law. The grounds of this contention are that (1) by the statute of June 6, 1891, none of the circumstances which it is claimed, constitute a rate just and reasonable, are required to be considered by the authorities of cities, nor is previous notice required to be given to the parties furnishing water; (2) establishing rates is a legislative, not a judicial act, and that, therefore, the power to review and determine them, given by the statute to the circuit court, is void; (3) the cities, towns, and villages of the state are made judges in their own cases.

The first ground is answered by *San Diego Land & Town Co. v. National City*, 174 U. S. 50, 43 L. ed. 1158, 19 Sup. Ct. Rep. 804, and we may say there is no question of the reasonableness of the rates. It was alleged in the pleas of the defendant that the rates of the ordinance of June, 1882, were unreasonable when established. This was conceded by the demurrer. It was also alleged that the rates established by the ordinance of February 10, 1896, were just and reason-

able. This was also conceded. The allegations, therefore, must be accepted as true conclusions from investigation. And it was averred, besides, that "the plaintiff refused to treat" with a committee appointed by the city council, "and neglected to reduce or fix such rental and water rates so as to make them just, reasonable, and fair."

\*Of the second ground it is only necessary [601] to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition, therefore, of the privileges granted to plaintiff. The act of 1891 only repeated and emphasized the power.

The third ground urged why plaintiff is deprived of its property without due process of law is as abstract, as free from real grievance to plaintiff, as the other grounds. With what functions the circuit courts of the state may be invested may not be of Federal concern. It is also a matter of construction, in which we might be obliged to follow the state courts. The ground we are now reviewing seems not to have been presented to the supreme court of the state, either in the case at bar or the cases referred to by it and upon which it based its opinion.

In *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, and 180 Ill. 235, 54 N. E. 224, the provision of the statute was referred to, but not in such way that it can be confidently said that the power given to the circuit court was to only review the rates fixed by the city council, and to determine them to be reasonable or unreasonable, or whether the court could go farther and fix rates. The former seems a natural construction. But whether it is or not, the plaintiff has yet no reviewable grievance. No power has been attempted to be exercised by the circuit court against the plaintiff, and no judicial remedy has been denied it.

*Judgment affirmed.*

Mr. Justice **White**, with whom concurs Mr. Justice **Brewer**, Mr. Justice **Brown**, and Mr. Justice **Peckham**, dissenting:

The far-reaching consequences which must result from the principles upon which this case is decided, and the conflict between those principles and what I conceive to be previous well-settled rules of law, impel me to state the reasons for my dissent.

The legislature of Illinois, in 1872, passed a law entitled "An Act to Enable Cities and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect a Tax to Pay for Water Supplied." The act in full is as follows:

"Sec. 1. *Be it enacted by the People of the State of Illinois, \*represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years.*

"Sec. 2. Any such city or village, so contracting, may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

This act was approved on April 9, 1872. Public Laws of Illinois, 1871-1872, p. 271.

At the same session an elaborate law was passed entitled "An Act to Provide for the Incorporation of Cities and Villages." Article 10, under the heading "(Miscellaneous Provisions)—Water" in § 1, provided as follows:

"Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring or sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, *and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years*; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

This was followed, in subsections 2 and 3, by the granting of full power to municipal corporations, in the event they determined to construct their own waterworks, to acquire land, etc., to levy taxes, and to provide for the collection of water rates or assessments for the use of the water to be supplied to the inhabitants from the works to be constructed. This act was approved on April 10, 1872. Public Laws of Illinois, 1871-1872, p. 259.

At the same session an act was passed entitled "An Act Concerning Corporations." It was in effect a general law regulating the organization of private corporations in the state of Illinois. Section 9 thereof, in part, reads as follows:

[603] "Sec. 9. The general assembly shall at all times have power \*to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act. . . ."

This act was approved April 18, 1872. Public Laws of Illinois, 1871-1872, p. 299.

None of the foregoing acts contained an emergency clause; and hence, although approved on different dates, each act went into force on the same day, *viz.*, July 1, 1872. Constitution of 1870, Illinois, Art. 4, § 13; 1 Starr & C. Ann. Stat. 2d ed. p. 125.

The defendant in error, the city of Freeport, a municipal corporation, on June 6, 1882, enacted an ordinance giving Nathan Shelton or his assigns the right of constructing, maintaining, and operating waterworks for the term of thirty years from the 1st day of July, 1882, for the purpose of furnishing fire protection to, and for the supply of, said city of Freeport and the inhabitants thereof with water suitable for domestic and manufacturing purposes. The ordinance consisted of fourteen sections. It provided for a stand pipe, that the pumping machinery should possess a capacity of at least 3,000,000 gallons of water in twenty-four hours, to be increased as the growth of the city and its needs required, and that not

less than 8 miles of mains, of specified dimensions and quality, should be laid for the distribution of water. Ample provision was also made for the extension of these mains by the water company, at its cost, upon the direction of the city government. The obligation was further imposed upon Shelton or his assigns to erect double-nozzle fire hydrants at the rate of not less than ten to each mile of main pipe, whenever and wherever the city council should direct. Payment was to be made by the city for fire hydrants by an annual rental for the first 100 of \$100 each; for all said hydrants over 100 and up to 150, an annual rental of \$80 each; and for all said hydrants over 150, an annual rental of \$50 each. It was expressly provided, in § 8 of the ordinance, that the hydrant rentals "shall continue during the full term specified in this ordinance, \*unless [604] said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease." By § 6 the city reserved to itself the right to acquire the waterworks by purchase at the expiration of thirty years from July 1, 1882, the valuation of the property to be determined as provided in the section.

The ordinance contained provisions for the use of water "free of charge from the hydrants on streets curbed and guttered, for the purpose of washing and flushing the gutters, and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary for sanitary purposes, upon giving notice to the person in charge of said waterworks." It was also provided that "the city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches, and for four public fountains for drinking only, and one fountain in the public square or park should the city erect the same." Full specifications were contained in the ordinance as to the maximum charge to be made for water to be furnished individual consumers. In other words, the ordinance formulated a complete system, not only for the construction of the works, but for their operation during the time specified therein.

It was provided that the ordinance should become a binding contract upon its acceptance in writing by Shelton within a stated time, and when so accepted its provisions should not be changed, altered, or amended in any way without the consent of both parties thereto or their successors or assigns.

On June 27, 1872, within the time limited, Shelton filed his written acceptance of the contract. In the following August he assigned all his rights to the plaintiff in error, a corporation organized under the provisions of the general statute relating to private corporations, approved April 18, 1872, above referred to. The assignment was recognized by the municipality, and it is unquestioned that the works were constructed in accordance with the contract, and that all obligations which it imposed were discharged by



the company to the satisfaction of the municipality.

[605] \*Up to January 1, 1896, under the contract, 121 hydrants were placed in position, and up to that date the annual rental as provided in the contract was regularly paid by the municipality.

In 1891 an act was passed by the legislature of the state of Illinois entitled, "An Act to Enable Cities, Towns, and Villages Incorporated under any General or Special Law of This State to Fix the Rates and Charges for the Supply of Water Furnished by Any Individual, Company, or Corporation to any Such City, Town, or Village and the Inhabitants Thereof." Briefly stated, this act, as its title indicated, empowered municipal corporations to prescribe by ordinance "maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town, or village and the inhabitants thereof, such rates and charges to be just and reasonable." The act, moreover, provided that the reasonableness of the rates prescribed by the municipality might be tested by proceedings before a designated court.

Availing itself of the power conferred by this statute, the city of Freeport on February 11, 1896, passed an ordinance reducing the rates stipulated to be paid under the contract of 1882. It is necessary, however, only to consider, for the purposes of this case, the reduction made on the contract price for the public hydrants. At the reduction they were to be paid for annually at the uniform rate of \$50 each. Whilst thus seeking to reduce the sum which the city was to pay for the hydrants, the ordinance in effect retained all the contract obligations for the benefit of the city resting upon the water company, among them being the duty to lay additional mains as directed, and to furnish free water for schools, churches, and other purposes. The city refusing to pay any longer for the hydrants at the original contract price, an action was instituted to recover an amount asserted to be then due under the contract. Without stating the form of pleadings, it suffices to say that on the one hand the right of the water company to recover according to the rates fixed by the original contract was asserted, and on the other the obligation of the city to pay only at the reduced rates was alleged. It was ex-

[606] pressly charged in the pleadings on behalf of the water company that the enforcement of the ordinance reducing the rates would be an impairment of the obligations of the contract, and hence a violation of the contract clause of the Constitution of the United States.

The case was ultimately taken to the supreme court of Illinois, and, upon the authority of the analogous case of *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, judgment went in favor of the city and against the water company. 186 Ill. 179, 57 N. E. 862. The opinion of the court in the *Danville Case* was not unanimous, three of the seven judges dissenting. Without attempting to reproduce in its details the rea-

soning by which the court reached its conclusion, it seems to me that all the views expressed are embodied in the following propositions:

That the fixing of water rates was a public attribute, which from its nature was incapable of being alienated or restrained by the obligations of a contract, even although express authority to do so was conferred by the legislature on the municipality. That even if this was not the case, to contract for rates to be paid for a definite term required authority of the legislature, and that no such grant to the municipality had been conferred in this case, because, albeit the legislative acts gave power to contract for a definite time for a supply of water, this did not give the right to fix the rates to be paid for the water during the time for which the municipality was authorized to contract; the argument being that the power to contract for a definite time is one thing, and the fixing of the rates for the same time for the water contracted for is another and different thing. That even under the hypothesis that the power to contract for a definite time included the authority to fix the rates for such time, the reservation found in the general private incorporation law operated to confer upon the legislature the right to change the rates, because the contract although originally made by the city with an individual, had been assigned to the defendant, a private corporation organized under the general private incorporation law.

These propositions practically embrace all but one of the contentions urged in the argument at bar, and their consideration will therefore substantially dispose of the controversy, except in \*the particular above referred to, which we shall separately notice before concluding. Inverting the order in which they have been stated, I come to consider their correctness. In logical sequence the questions which arise are these: Was there power in the legislature to confer upon the municipality authority to contract for water for public use, and fix by contract the rates to be paid by the city for a stated period? If so, was such power conferred upon the municipality, and did it contract under it? If it did so, was the contract to that effect taken out of the protection of the contract clause of the Constitution of the United States by reason of the reservations contained in the general private incorporation law under which the water company was organized? [607]

It is not even intimated in the opinion below that there was any express limitation in the Constitution of the state of Illinois restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period, and to agree upon the rates to be paid therefor for such time. That in the absence of such restriction the legislature of a state may contract by statute, or may empower a municipality to contract, for water for public use for a stated period, and fix the rates to be paid during

such term for the same, and that such contract if made is protected from impairment by the Constitution of the United States,—is no longer an open question. *New Orleans Waterworks Co. v. Rivers* (1885) 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

In that case the exclusive right granted was to continue for fifty years, and the act which it was held constituted a contract stipulated for the furnishing of a supply of water for public use during the continuance of the contract, “in consideration whereof its franchises and property [of the company], used in accordance with its charter, were exempted from taxation, state, municipal, and parochial.” (p. 677, L. ed. p. 526, and Sup. Ct. Rep. p. 275.) After observing that the case before the court was controlled by the decision in *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, the court, speaking through Mr. Justice Harlan, said (p. 680, L. ed. p. 527, and Sup. Ct. Rep. p. 276):

[608] “The two are not to be distinguished upon principle; for if it was competent for the state, before the adoption of her present Constitution, as we have held it was, to provide for supplying \*the city of New Orleans and its people with illuminating gas by means of pipes, mains, and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city.”

In the *Gas Company Case*, beginning at page 660, L. ed. p. 520, and Sup. Ct. Rep. p. 257, the court considered and held untenable the contention “that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects.” After reviewing various decisions bearing upon this feature of the case, the court said (p. 664, L. ed. p. 521, and Sup. Ct. Rep. p. 260):

“Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 368, 26 L. ed. 1128, 1130; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *New Jersey v. Wilson*, 7 Cranch, 164, 166, 3 L. ed. 303; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 376, 14 L. ed. 977, 980; *Gordon v. Apical Tax Court*, 3 How. 133, 11 L. ed. 529; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 266, 20 L. ed. 568, 569; *Humphrey v.*

*Peques*, 16 Wall. 244, 248, 249, 21 L. ed. 326, 327; *Farrington v. Tennessee*, 95 U. S. 679, 689, 24 L. ed. 558, 561.”

The doctrine of the cases just cited was applied in *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405. It was also recognized and applied in *Walla Walla v. Walla Walla Water Co.* 172 U. S. 7, 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77. In that case the court held valid a stipulation contained in a contract with the water company by which the city of Walla Walla bound itself not to erect waterworks during the stipulated life of a contract, viz., twenty-five years. Speaking of the earlier decisions to which we have above referred, the court, speaking through Mr. Justice Brown, said (p. 9, L. ed. p. 345, and Sup. Ct. Rep. p. 81):

[609] “It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262, 293: ‘And, assuming that such a power’ (granting franchises to establish gas works) ‘may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with the necessary authority.’ This case is directly in line with those above cited. See also *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. ed. 963, 967, 13 Sup. Ct. Rep. 90; *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161.

“Where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.”

That a city if authorized by the legislature, in the absence of limitations in the state Constitution on the legislative power, could validly stipulate in a contract for a supply of water that the existing rates should not be reduced by the municipality during the contract period, was expressly adjudged in the recent case of *Los Angeles v. Los Angeles City Water Co.* (1900) 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736. Indeed, in that case, at the time the contract was made, the city was without authority to make it, but, inasmuch as subsequently its action had been ratified by legislative enactment, the effect of such ratification was held to be equivalent to a prior



original grant. But I need not further pursue this aspect of the case, since, as I understand the opinion of the court, it does not sanction the theory adopted by the supreme court of Illinois on this subject, and hence does not, therefore, in terms overrule the principle so firmly settled by the previous decisions of this court, that the subject-matter of a water supply \*may be contracted for a definite time, and that, when so contracted for, the obligations of the contract are protected from impairment by the Constitution of the United States.

That in the present case some authority was delegated by the legislature to the municipality to contract for water is unquestioned, and it is also undisputed that under the right thus conferred the municipality acted in making the contract which is now in controversy. The issue which, then, arises, is simply this, Did the authority conferred by the legislature upon the municipality authorize it to contract, and, in doing so, to fix the rates to be paid for such supply during the time stated? Of course, an answer to this question involves an analysis of the statutes of Illinois under which the authority to make the asserted contract arises.

Before approaching the text of the statutes it is well to state the scope of the duty which devolves upon this court in determining whether there was a contract, and the principles which must control in doing so. It is elementary, that where a contract is asserted to have been impaired by subsequent state legislation, this court is constrained to form an independent judgment as to the existence of the contract and its terms. It is equally true that where the contract originates from a state statute, if, in the exercise of an independent judgment, the existence or nature of the contract becomes balanced in doubt, such doubt will be resolved in favor of the construction given to the state statute by the court of last resort of the state. But this qualification is not a limitation upon the duty to form an independent judgment, and does not imply that, because the statute has been construed against the contract by the state court, therefore the matter is "balanced in doubt." If the rule did so imply, it would follow that in every case where a right arose from a state statute, and the court below held there was no contract, the review of that question in this court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the state court would have to be followed. The rule, then, to be applied when the matter is balanced in doubt, is this, and nothing more, that if in using its independent judgment as it is its duty to do, a serious \*doubt arises in the mind of the court, then the interpretation by the state court, acting upon a serious doubt created by the exercise of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state court to its own statute. *New Orleans Bd. of Liquidation v. Louisiana*, 179 U. S. 622, 638, ante, 347, 353, 21 Sup. Ct. Rep. 263.

*ante*, 347, 353, 21 Sup. Ct. Rep. 263.

It is unquestioned also that where a right asserted, if enforced, will put a contractual limitation upon the power of the lawmaking authority of a state, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract limitation must arise clearly and by express intendment.

Bearing these principles in mind, I come to consider the legislative acts by which it is asserted the contract in question arose. Whilst it is quite clear to my mind that the powers conferred by the respective statutes were to be exerted under different circumstances, and that the contract which is here in question came more especially within the scope of the act approved April 10, 1872, I shall not stop to discuss this view, since, whether the statutes be treated separately or together, they fully authorize the contract. Under this view I first approach the consideration of the act of April 9, 1872. Its language is that in all cities and villages where waterworks may hereafter be constructed, the city or village authorities "may contract . . . for a supply of water for public use for a period not exceeding thirty years." And the 2d section conferred upon a municipality so contracting power to levy taxes "to pay for the water so supplied." Clearly, authority is expressly conferred to contract for a supply for the period stated. The argument is that this right to contract for the water for the period of thirty years did not include the power to agree upon the sum to be paid for it for that period. In other words, the contention is that the right to contract for the purchase existed for the stated period without the power to fix the price, which was an inseparable and necessary concomitant of the right itself. \*This inevitably follows, since the contract for the supply for a fixed time, and the payment to be made for it, are one and each the correlative of the other. That the statute contemplated that the contract should include the price to be paid is manifestly the result of the 2d section, which confers upon the municipality the right to raise by taxation the money to pay the sum stipulated. Upon the hypothesis that the power to contract for the supply for thirty years did not include the agreement to pay for the supply during the stated period, the 2d section of the act would become wholly superfluous. Indeed, the theory of construction which excludes the rates from the power to contract for the period specified would render the whole act meaningless. Undoubtedly, if waterworks existed and use was made of the streets of the city by the owner of the works, in the absence of contract the power to compel the furnishing of water at just and reasonable rates would exist by operation of law. It



follows that the statute should not be construed as merely authorizing the doing of that which could have been done without its passage, but must in reason be held to have empowered the obtaining of a water supply and facilities by way of extension of the water system, free water for certain public purposes and fire protection and all the other incidents to such contract, for the period named and at the rates to be agreed upon for such period. The same view obtains from considering the provisions of the 1st section of article 10 of the act of April 10, 1872. By this section municipal authorities were authorized to provide for a supply of water by constructing municipal waterworks, or to accomplish the same purpose by authorizing "any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not exceeding thirty years." There was here an express delegation of authority to municipalities, if they did not wish to assume the burden of constructing their own waterworks, to contract with an individual or private corporation to construct and maintain them at "*such rates as may be fixed by ordinance and for a period not exceeding thirty years.*" My mind fails to perceive how language could more directly and positively confer the authority to

[613] contract for the supply and agree as to the rates to be paid therefor for a period of thirty years. Adopting the most technical rules of construction, I do not understand how the words, "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," can be construed as relating to the construction and maintenance of the works for that period, and not to the sum to be paid for the supply for the same length of time. The view adopted by the court below was that the words, "at such rates as may be fixed by ordinance," can be taken out of the text and be treated as following, and not as preceding, the words, "and for a period not exceeding thirty years." But this, as I understand it, instead of construing the statute, would be the equivalent of writing a new one. Obviously, whilst the statute authorized a contract for a supply and the rates to be paid therefor, it contemplated that the rates must in the nature of things be fixed by the passage of an ordinance to be embodied in the contract, and therefore the words, "may be fixed by ordinance," were inserted. In other words, in order to insure under the contract the rates to be agreed upon, it provided that by ordinance these rates should be fixed for the designated period. Both laws, as I have stated, went into effect on the same day, but whilst relating to cognate subjects, contemplated the exercise of the power conferred as a result of somewhat different conditions. The one, the law approved April 9, had in view a contract for a water supply to be made where waterworks were established, and conferred the authority to contract for such supply under such circumstances, and to fix the price to be paid for the supply for the contract term specified in the stat-

ute. The other, the law approved April 10, 1872, authorized a contract to *procure the construction of waterworks*, and also, in doing so, to fix the rates for the definite period which that statute likewise enumerated. To construe the words, "*may be fixed by ordinance and for a period not exceeding thirty years,*" as found in the statute, as a legislative prohibition on the municipality to fix rates for the period stated in the law, is but to say that the power to contract and fix the rates for the definite time was at one and the same identical moment both given and prohibited.

But the construction adopted below and now maintained by "the court, as I understand it, leads yet further. As the words, "may be fixed by ordinance and for a period not exceeding thirty years," are not found in the law authorizing a contract for water supply where waterworks were established when the agreement was made, they cannot be applied to such a contract. The following, then, is the inevitable result of the construction given to the statutes: The power to contract and fix rates for a definite time was conferred in the case where such a contract was made with an established water company. This power, however, was not given, but was expressly prohibited, where the purpose of the contract was to procure the building of waterworks and the purchase of a supply of water to be furnished from the works when constructed. This is but to say that where municipalities were legally entitled to secure the water supply without the necessity for a contract, and at reasonable rates, they were unauthorized to contract for a definite time and at rates to be fixed for that period. But in the case where municipalities had no such power (for they could not, of course, compel an individual or corporation to undertake the expense of erecting waterworks), the power to fix rates for a definite period was absolutely prohibited. In other words, the power was conferred to contract for the supply and fix the price for a definite time where it was not at all needed, and it was absolutely forbidden in the case where in the nature of things such a power was essential. Considering the statutes separately, no doubt whatever, then, arises in my mind as to their import. When they are construed *in pari materia* this conclusion becomes to me an absolute conviction. This must be the result, since it is impossible, in reason, to hold that, if the meaning of each statute is plain when considered separately the significance of each disappears when they are considered together.

The contract as executed, beyond peradventure, expressly fixed the rates for the term for which it was agreed the supply should be furnished. It imposed, moreover, upon the water company duties to construct and extend the works, which could only arise from contract, and which cannot reasonably be assumed to have been entered into but upon the basis of an agreed compensation. The obligations on the water company were not "simply to furnish a supply of water in



accordance with the capacity of the plant existing at the inception of the contract, or provided for therein, but the company came under the duty of largely extending its plant at the discretion of the municipality during the statutory period covered by the contract. The company, moreover, agreed to furnish a large volume of water during the same period without charge. It is inconceivable that all these obligations would have been assumed upon the hypothesis that they were to be performed during the thirty years without any previous understanding or agreement as to the payment to be made during the same time.

Various authorities are cited in the opinion of the court below, and were referred to in argument, upon the theory that they support the contention that where authority is given to contract for a supply of water for a fixed period, this power to contract does not, as a necessary incident, import authority to also agree upon the rates for the same period. In other words, the authorities cited, it is contended, separate the inseparable.

All the authorities cited are excerpted in the margin.† I do not pause to analyze them, contenting myself with the statement that not a single one of them, except the decision of a lower appellate court in Illinois, rendered subsequent to the execution of the contract here considered, has any relation to the proposition which they are cited to maintain. They all proceed upon the theory that where authority is given to a municipality or official board to contract, *without any specification of the time*, the municipality or board can contract only for a reasonable period, to be determined usually by the tenure of office of the official board. That is, *in the absence of a specification of time in the statute*, a limit is to be implied resulting from the nature of the [616] \*functions of the officials by whom the contract is made. I cannot conceive upon what principle these authorities are held to control a case where in the statute conferring authority *the time was expressly fixed*. Indeed, the decisions in Illinois (among them not only the cases cited below, but others which were referred to in those cases), which are now relied upon to sustain the proposition that a power to contract for a supply of a commodity or the services of an individual does not include the authority to agree upon the compensation to be paid, actually refute the contention which it is alleged they sustain. Thus, in *Millikin v. Ed-*

*gar County*, 142 Ill. 528, 18 L. R. A. 447, 32 N. E. 493; *Davis v. School Directors*, 92 Ill. 294; and *Stevenson v. School Directors*, 87 Ill. 255, though it was held, from a consideration of co-related statutes, that where authority was conferred upon statutory boards to employ individuals to render public services, but no period was mentioned in the statute for the duration of such hiring, a contract of hiring might only lawfully be made for the current year, it was conceded that the power existed, as a necessary result of the right to contract, to fix the compensation for such period. These cases demonstrate the unsoundness of the contention, here asserted, that the contract under consideration should be dismembered by dissociating the right to fix rates from the authority to contract for the period authorized by statute, and they also, in my opinion, refute the assumption that because the statute gave express power to fix rates by ordinance, thereby there did or could arise a limitation on the authority to contract for the price for the term for which the contract was authorized.

The contract in its entirety being, then, valid, the question which arises is, Did the power to destroy the contract arise from the reservation contained in the general private incorporation law?

In considering this question it must be borne in mind that there was no reservation whatever of the power to repeal, alter, or amend contained in the law regulating public corporations, nor was such a reservation found in the Constitution of the state. The power conferred upon municipalities to contract for a supply of water or for the construction of waterworks \*authorized them to [617] contract with individuals as well as corporations, and in this particular instance the contract was made with an individual. It is clear, then, that any reservation in the private incorporation act would not have acted upon the contract for the supply of water if that contract had remained in the hands of an individual. To hold, then, that the provision of the 9th section of the law regulating private corporations, which reserved to the general assembly the power to prescribe such regulations and provisions as it might deem advisable as to such corporations, retained the power to abrogate a contract like the one here involved, would import that, although there was no reservation whatever to abrogate or change the contracts as to water supply, made by a municipal corporation, the private incorporation law was intended to deprive private corporations of the power to contract with municipal corporations as to water supply. That is to say, that public corporations were fully authorized to make irrevocable contracts, but such agreements became revocable when a private corporation was the other contracting party. But, aside from these considerations, the views of the contract which I have already expressed, to my mind clearly demonstrate the inapplicability of the reservation relied upon. The reservation, as I have shown, went into effect on

† *Carlyle v. Carlyle Water, Light & Power Co.* 52 Ill. App. 577; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Millikin v. Edgar County*, 142 Ill. 528, 18 L. R. A. 447, 32 N. E. 493; *Gale v. Kalamazoo*, 23 Mich. 354, 9 Am. Rep. 80; *Des Moines Waterworks Co. v. Des Moines*, 95 Iowa, 357, 64 N. W. 269; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; *Greenhood*, Pub. Pol. p. 317; *Cooley, Const. Llm. p.* 206; 1 Dill. Mun. Corp. § 443.

the same day as did the laws which expressly and specifically authorized the making, by municipal corporations, of a contract for a supply of water for a designated period *with individuals* or corporations. The statutes having gone into effect upon the same day, it would be beyond reason to construe the mere reservation of the legislative right to regulate private corporations as abrogating and destroying the express legislative authority to contract for a supply of water for a specified and definite period. To do so would be, by a mere implication, in effect to repeal and set aside the express authority conferred by the statutes, and would amount to holding that the authority had been conferred in the one breath and had been retracted in the other.

[618] Indeed, the statute of 1891 which conferred the power to regulate water rates—under the authority of which the ordinance here complained of reducing the rates was passed—shows \*on its face that it was not enacted under the authority to regulate private corporations, but upon the supposed existence in the legislature of a common-law right to fix rates, any contract to the contrary notwithstanding. This will become manifest when it is observed that the statute in question authorized municipalities to fix the rates for the supply of water, whether furnished by *private individuals* or corporations.

Although no reference was made to it in the opinion below, it is suggested in argument that, as there was a provision in the Constitution of the state of Illinois forbidding a grant of exclusive privileges, therefore the contract here considered was void because, it is asserted, such contract expressly conferred an exclusive right and privilege. It is, however, settled that the mere making of a contract for a water supply for a definite time and the fixing of rates for such time, accompanied with an obligation that the municipality itself would not construct waterworks for such period, does not amount to a grant of an exclusive privilege. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 14, 17, 43 L. ed. 341, 347, 348, 19 Sup. Ct. Rep. 77. This being beyond question, it clearly follows that, even upon the hypothesis that the contract in this case contained an express or implied stipulation that the city would not grant to anyone else the right to use the streets of the city for the purposes of a waterwork system during the life of the contract, the stipulation for such exclusive right, and not the contract, would come within the inhibition of the provision of the Constitution. We say this *arguendo* only, as the controversy here presented involves the validity of the contract in so far as it affected the supply for public use and fixed the rates of such supply during the period stated.

In my opinion, the contract having been expressly authorized for a definite period, the rates agreed upon could not, during the term of the contract, be changed without violating the contract clause of the Constitution of the United States; and I therefore

dissent from the judgment holding otherwise.

\*DANVILLE WATER COMPANY, *Plff. in* (619)  
Err.,  
v.  
CITY OF DANVILLE.

(See S. C. Reporter's ed. 619-624.)

This case follows the decision in the case preceding.

[No. 373.]

Submitted November 12, 1900. Decided March 25, 1901.

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment for defendant on demurrer to pleas in an action by a water company against a city for the rental of fire hydrants. *Affirmed.*

See same case below, 186 Ill. 326, 57 N. E. 1129.

The facts are stated in the opinion.

Messrs. **Alexander Pope Humphrey** and **W. W. Davies** submitted the cause for plaintiff in error:

Contracts by the authority of the municipality, for water to be furnished it and its inhabitants, are made, not in the exercise of the governmental powers of the municipality, but of its proprietary or business powers, and are governed by the rules applicable to business corporations.

*Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Illinois Trust & San. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 186, 40 U. S. App. 257, 76 Fed. 271; *Dill. Mun. Corp.* 3d ed. § 66, cases in note, §§ 26, 27, 949; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Com. ex rel. Roman Catholic High School Trustees v. Philadelphia*, 132 Pa. 288, 19 Atl. 136; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L. R. A. 669, 28 Pac. 516; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Indianapolis v. Gaslight & Coke Co.* 66 Ind. 396; *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Weightman v. Washington*, 1 Black, 49, 17 L. ed. 57.

The city of Danville had the power and right to contract by ordinance with the Danville Water Company for water supply for the public use.

Act Gen. Assem. (Ill.) approved April 9, 1872, in effect July 1, 1872; *Starr & C. (Ill.) Rev. Stat.* 2d ed. p. 865; Act Gen. Assem. (Ill.) approved April 10, 1872, in effect July 1, 1872; *Starr & C. (Ill.) Rev. Stat.* chap. 24, art. 4, § 1; 1 *Dill. Mun. Corp.* 3d ed. §§ 146, 443.



The Danville Water Company, having accepted the original ordinance with its grants and franchise rights, and having carried out its contract with the city and the public as to the construction and operation of its works and the supplying of water, has a contract protected by the constitutional provisions forbidding the passage of a law impairing the obligation of contracts.

2 Dill. Mun. Corp. § 691; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *New Orleans Waterworks Co. v. St. Tammany Waterworks Co.* 14 Fed. 194; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Quincy v. Bull*, 106 Ill. 337; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Louisville Gas Co. v. Citizens Gas Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265.

A binding contract grows out of a license when the license has been acted upon so extensively and substantially that to revoke it would be unjust.

*Gregsten v. Chicago*, 145 Ill. 451, 34 N. E. 426; *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584.

When accepted, this legislative grant becomes irrevocable.

*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; 1 Dill. Mun. Corp. § 53.

Municipal grants and ordinances give rise to the same rights and are subject to the same constitutional prohibitions as other legislative grants.

*Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; 4 Thomp. Corp. §§ 1019, 5427, 5428.

The expediency of the rates was a legislative matter entirely for the council, inducing and contracting with the water company in the original ordinance; and it disposed of such matter by its contracting ordinance. Afterward the question of the existence of expediency is gone, and the question of the existence of the contract alone remains.

*Munn v. People*, 94 U. S. 113, 24 L. ed. 77; *Ruggles v. People*, 91 Ill. 256; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. 180 U. S.

ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97.

The legislature having the power to make such grant, the legislative judgment is conclusive both as to the necessity for the grant and the amount of the service to be rendered. The courts have no power to interfere, however inadequate or inexpedient the consideration or unreasonable the grant may appear to them.

*Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 114, 23 Am. Rep. 713; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 700, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 428, 14 L. ed. 1002; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stocser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

The right of regulation does not give the council or legislature the right to impair contracts made prior to the regulating act, unless the contract is prejudicial to public health, peace, morals, or good order.

*Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Sinking Fund Cases*, 99 U. S. 700, sub nom. *Union P. R. Co. v. United States*, 25 L. ed. 496; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; 2 Morawetz, Priv. Corp. §§ 1101, 1102, 1105, 1112; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; 1 Dill. Mun. Corp. § 142; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Maine C. R. Co. v. Maine*, 96 U. S. 511, 24 L. ed. 841; *Santa Ana Water Co. v. Santa Buenaventura*, 56 Fed. 339.

The great weight of authority is that, when an express power is given to a municipality to contract or provide for waterworks, such municipality has the power to contract for fixed rates and for a definite term.

*Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24; *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Cartersville Improv. Gas & Water Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 70; *Grant v. Davenport*, 36 Iowa, 396; *Saleno v. Neosho*, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190; *State ex rel. Kaiser Water Co. v. Phillipsburg*, 23 Mont. 16, 57 Pac. 405; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; *Greenville v. Greenville Waterworks Co.* (Ala.) 27 So. 764; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Connersville v. Connersville Hydraulic Co.* 86

Ind. 184; *Valparaiso v. Gardner*, 97 Ind. 2, 49 Am. Rep. 416; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Newport v. Newport Light Co.* 84 Ky. 168; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *Memphis v. Memphis Water Co.* 5 Heisk. 529; *Blood v. Manchester Electric Light Co.* 68 N. H. 340, 39 Atl. 335; *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782; *Kimball v. Cedar Rapids*, 100 Fed. 802; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 591; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Westerly Waterworks v. Westerly*, 75 Fed. 181; *Defiance Water Co. v. Defiance*, 90 Fed. 753; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 378, 25 U. S. App. 166, 66 Fed. 140; *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; *Livingston v. Pippin*, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50; *Halc v. Houghton*, 8 Mich. 458; *Re Pryor*, 55 Kan. 724, 29 L. R. A. 398, 41 Pac. 958; *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

Having power to make such contract the mode and manner is entirely within the discretion of the municipality, so long as the rates are fixed by ordinance and the contract does not extend beyond thirty years.

*Grant v. Davenport*, 36 Iowa, 396; *Portland v. Portland Water Co.* 67 Me. 135; *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L. R. A. 294, 45 Atl. 830; *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Utica Water Co. v. Utica*, 31 Hun, 431; *Livingston v. Pippin*, 31 Ala. 542; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

The legislature having authorized the making of the contract between the city and the water company, it must stand unless attacked for fraud.

*Tiedeman, Mun. Corp.* 175; *Cooley, Const. Lim.* 186, 187; 15 Am. & Eng. Enc. Law, p. 1046; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Sherlock v. Winnetka*, 59 Ill. 389; *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74; *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883; *Newport v. Newport Light Co.* 84 Ky. 168; *Memphis v. Memphis Water Co.* 5 Heisk. 529; *Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 114; *State, Van Reipen, Prosecutor, v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

Where an ordinance is repealed, such repeal cannot operate retrospectively to impair private rights vested under the ordinance.

*Dill. Mun. Corp.* § 314; 4 *Thomp. Corp.* § 5413; *Tiedeman, Pol. Power*, § 188; *Sinking Fund Cases*, 99 U. S. 700, sub nom. *Union P. R. Co. v. United States*, 25 L. ed. 496; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Pearsall v. Great Northern R. Co.* 161 U. S. 673, 40 L. ed. 847, 16 Sup. Ct. Rep. 705; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Com. v. Essex Co.* 13 Gray, 239.

The property rights of the water company having been taken from it by the action of the state under the act of 1891 and the ordinance of 1895, without any compensation paid therefor, it was deprived of its property without due process of law.

*Henderson v. Central Pass. R. Co.* 21 Fed. 358; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. 395; *Baker v. Norwood*, 74 Fed. 997; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Kentucky Railroad Tax Cases*, 115 U. S. 331, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 416, 6 Sup. Ct. Rep. 57; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; 2 *Story, Const.* 5th ed. pp. 702, 703, § 1956; 1 *Hare, Am. Const. L.* 347, 348; *Mount Hope Cemetery Proprs. v. Boston*, 158 Mass. 509, 33 Atl. 695; *Harness v. Chesapeake & O. Canal Co.* 1 Md. Ch. 249; *Ex parte Martin*, 13 Ark. 199, 58 Am. Dec. 321; *San Diego Land & Town Co. v. National City*, 174 U. S. 749, 43 L. ed. 1158, 19 Sup. Ct. Rep. 804.

*Mr. George F. Rearick* submitted the cause for defendant in error. *Mr. John H. Lewman* was with him on the brief:

Where power is conferred, it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to carry into effect the purposes for which it was created.

1 *Dill. Mun. Corp.* 4th ed. § 443.

Any ambiguity or doubt arising out of the terms used by the legislature in conferring their powers must be resolved in favor of the public. Any fair, reasonable doubt of the existence of the power is resolved against the corporation, and the power is denied.

*Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574.

The power claimed to bind the city to a fixed price for thirty years must arise from an express grant, or, if that does not exist, then such power must be necessary to carry out a power granted. It is not sufficient that such implied power is convenient, it should be indispensable.

1 *Dill. Mun. Corp.* § 89.

Public grants susceptible of two constructions must receive the one most favorable to the public.

*Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 20 Sup. Ct. Rep. 550.

Authority to contract does not necessarily



imply that the price of the supply shall be fixed for the entire period. The supply could be taken for the entire term, the price to be determined from time to time, and the rates to be settled by the rules of the common law.

*Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 577.

A city under its implied powers may not make a time contract for thirty years.

*Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Garrison v. Chicago*, 7 Biss. 486, Fed. Cas. No. 5,255; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 19 Ill. App. 44, 98 Ill. 415, 38 Am. Rep. 97; *East St. Louis Gaslight & Coke Co. v. East St. Louis*, 47 Ill. App. 411; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 357, 64 N. W. 269; *Flynn v. Little Falls Electric & Water Co.* 74 Minn. 180, 77 N. W. 38, 73 N. W. 108; *Cartersville Improv. Gas & Water Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25; *Illinois Central Hospital for Insane v. Jacksonville*, 61 Ill. App. 199.

To construe these statutes as enacting that the city and company could together make a contract which would prohibit the state from exercising its power to legislate on the subject of water rates would violate the state Constitution.

Cooley, Const. Lim. p. 206; 15 Am. & Eng. Enc. Law, p. 1045; 1 Beach, Pub. Corp. § 554; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The business of supplying water is one impressed with a public use or interest, and as such the state has a right to regulate and fix the maximum charges.

29 Am. & Eng. Enc. Law, p. 11, and authorities cited; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

This power of regulation may extend, not only to matters connected with the health and convenience of the public, but also to prevent extortion by unreasonable charges.

*Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

The provision in the charter of the water company, that it would submit to have its business regulated by the state, qualified the grant; and the subsequent exercise of the power reserved cannot be regarded as within the prohibition of the Constitution.

*Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

The water company took its charter subject to such legislation as the state might thereafter enact, and neither the company nor the city could make a contract which would abridge this power of regulation.

*Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; 180 U. S.

*Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550.

Persons making contracts with the corporation must take notice of the reserved power of the state. Such contracts cannot vary or in any manner modify the relation between the state and the corporation, in respect of the right of the state to exercise the reserved power.

*Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550.

Under the reservation the right to regulate tolls by subsequent legislation exists.

*Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390.

Such charges may be fixed even when the charter gives the corporation the right to fix its fares and charges.

*Ruggles v. People*, 91 Ill. 256, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

It is but reasonable to hold that this corporation in fixing the rates of its toll shall make them reasonable.

*Ruggles v. People*, 91 Ill. 256, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Blake v. Winona & St. P. R. Co.* 19 Minn. 418, Gil. 362.

When the control exercised comes strictly within the exercise of the "police power," no reservation is necessary. In such case the corporation may be regulated without any reservation.

*Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

Under the common law this corporation was under the duty to furnish water to all who should apply, at reasonable rates and on equal terms.

*Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 481.

It will not be presumed that the statutes of 1872 intended to release it from that duty.

*Ruggles v. People*, 91 Ill. 256; *Atlantic & P. R. Co. v. United States*, 76 Fed. 186.

To effect an exemption from the operation of the statute of 1891, it must appear that the power to make the contract in question as claimed is so clearly and unmistakably conferred that the language of the grant (that is, the statutes of 1872) cannot be reasonably construed consistently with the reservation of the power by the state.

*Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way.

*Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832.

The fixing of rates which are *prima facie*



merely, and not absolute, under a law which does not deny relief in the courts, does not deprive plaintiff of its property without due process of law.

*Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247.

No complaint is here made as to the manner in which the rates in question were fixed, and the demurrer admits that they are reasonable and just. If the right to regulate exists, plaintiff's property is not taken.

*San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The act of 1891 is not objectionable because by its terms the city council is to fix the price for the supply to the city itself.

*Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

[619] \*Mr. Justice McKenna delivered the opinion of the court:

The parties to this action were respectively plaintiff and defendant in the courts of the state, and we will so denominate them. The plaintiff is a private corporation, and the defendant is a municipal corporation organized and existing under the general laws of the state. The action was brought by the plaintiff to recover the sum of \$5,000, alleged to be due for the rental of certain fire hydrants.

The cause of action relied on is based on an ordinance passed on the 9th of November, 1882, by the defendant, granting the plaintiff the privilege of constructing and maintaining waterworks for supplying the city of Danville, Illinois, with water. The ordinance provided in detail for the character of the works and the supply, the rates to consumers, whether furnished by meter or otherwise, and the purchase by defendant of the works at the expiration of five, ten, and twenty years, and at the expiration of thirty years of any renewed term.

Section 8 and section 14 are respectively as follows:

[620] "In consideration of the benefits which will be derived by \*the said city and its inhabitants from the construction and operation of the said waterworks, and in further consideration of the water supply hereby secured for public uses, and as the inducement to said water company to accept the provisions of this ordinance and contract, and to enter upon the construction of said waterworks, the rights and privileges hereby granted to and vested in said water company shall remain in force and effect for thirty years from the passage of this ordinance; and for the same consideration and as the same inducement the city of Danville hereby rents of the Danville Water Company, for the uses hereinafter stated, 100 fire hydrants of the character hereinafter described, and for and during the term of thirty years from passage of this ordinance,

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and agrees to locate them promptly along the line of the street mains, on demand of said water company, and on submission by it to said city of a plan of the location of said street mains, and agrees to use the said hydrants carefully and to pay said water company for any injury which may happen to any of them when used by any officer, servant, or member of the fire department of said city, and agrees to pay rent for said 100 hydrants at the rate of \$75 each per year, and agrees to pay during the unexpired term of said ordinance and privilege, for any additional fire hydrants which city may hereafter locate at the rate of sixty-two and fifty one-hundredths dollars each, per year, for the next forty additional hydrants, and for all fire hydrants in excess of 140 at the rate of \$50 each, per year; all of which sum shall be paid by said city to said water company, beginning from the dates when each of such hydrants shall be put into successful operation, in quarterly instalments on the 1st days of February, May, August, and November of each year, and terminating upon the expiration of said term of thirty years, or upon the purchase of said works and their privileges and property by the said city.

"This ordinance shall become binding as a contract on the said city of Danville in the event that the said Danville Water Company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its \*written accept-[621]ance of the terms, obligations, and conditions of this ordinance, and upon such acceptance this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and the said water company."

The acceptance was duly filed by plaintiff. On the 1st of May, 1883, another ordinance was passed amending the first ordinance, for the construction of the works, the streets where the mains should be laid, and the place where the fire hydrants should be put, and how constructed.

Section 2 provided as follows:

"This ordinance shall become binding as a part of the contract existing between the city of Danville and the Danville Water Company in the event that said water company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its written acceptance of it."

Between the 8th of June, 1883, and the 18th of October, 1894, twelve other ordinances were passed, requiring the extension of the mains of the water system to other streets and the erection of fifty-seven additional fire hydrants; all of the ordinances were declared binding as contracts upon acceptance by the plaintiff, and all were accepted. The rental of the hydrants was fixed, as to some of them at \$62.50 per annum, and others at \$50 and \$40 per annum. In the ordinance fixing the latter sums it was provided that nothing therein should "operate to affect in any way any of the provisions of the ordinance heretofore passed by

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said city relative to the Danville Water Company, except to the extent of the reduction of the rental of the additional hydrants therein provided and hydrants thereafter to be provided."

There was an allegation that plaintiff did all things required of it in the construction of the system, and put in all mains and hydrants and kept them supplied with water.

[622] The pleas of the defendant admitted that the sum of \$1,930 was due, but denied liability for anything over that sum, because the rental for the hydrants had been reduced by an ordinance passed by the city January 17, 1895, which was entitled "An Ordinance Prescribing the Maximum Rates and Charges for \*the Supply of Water Furnished by the Danville Water Company of the City of Danville." The ordinance recited that after a careful comparison of water rates and charges in other cities it was found that those of the Danville company were "unjust, excessive, and unreasonable." And that whereas under the act of the state approved June 6, 1891, in force July 1, 1891, and under "other fully competent and complete legal authority," the city was empowered to prescribe the ordinance maximum rates for water furnished by the Danville company; and whereas, after full investigation the members of the council believed the rates prescribed were just and reasonable, a schedule or scale of rates was ordained to take effect on the 1st of May, 1895. The rental of fire hydrants was reduced for the first 140 to a uniform rate of \$50 per annum; for all others then rented and others which should be rented, \$40 per annum. For certain uses of water which had been theretofore furnished free by the plaintiff a rate was fixed, to be paid by the city. Provision was made for the appearance by the city attorney if the plaintiff should desire to apply to the circuit court of the county for a review of the rates.

There was an allegation of notice of the passage of the ordinance to the plaintiff, and the prior ordinances under which plaintiff claimed an irrevocable contract were at the time of the passage of said ordinances in excess of a reasonable compensation for the water supplied, and were at the time of suit "unjust, unreasonable, and excessive."

The plaintiff demurred to each of the defendant's pleas, and the demurrer was sustained. The defendant asked that the demurrer be carried back to the declaration, and elected to stand by its pleas. Judgment was entered for the plaintiff in the sum of \$2,701, motion to arrest, which was denied, and the case was then taken to the supreme court of the state, by which court the judgment was reversed, and the cause was remanded for further proceedings in accordance with the views expressed in the opinion filed in the cause.

On the return of the case to the circuit court the defendant by leave of the court

filed additional pleas, to which a demurrer was sustained. With this action of the court we have no concern.

\*In accordance with the opinion of the supreme court of the state the demurrer of the plaintiff was overruled as to the first and second pleas of the defendant, and sustained as to the third. The plaintiff elected to stand by its demurrer, and judgment was entered for the sum of \$1,930 and costs of all suit. On appeal to the supreme court it was sustained, the court expressing the following opinion:

"This case has practically been before us on two former occasions, the parties then being reversed.

"Counsel for appellant concedes the judgment from which this appeal is taken is in exact conformity with the judgments and opinions in the former cases, and that no new question or matter has intervened since the former hearings here. Manifestly the only purpose of this appeal is to obtain a final judgment in this court to enable appellant to take a further appeal, if it should desire to do so.

"Adhering, as we do, to the reasoning and conclusions announced in *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, and *Same v. Same*, 180 Ill. 235, 54 N. E. 224, on the authority of these cases this judgment will be affirmed."

The chief justice of the state allowed this writ of error.

The questions presented by this record are the same passed on in *Freeport Water Co. v. Freeport*, 180 U. S. 587, ante, 679, 21 Sup. Ct. Rep. 493, and depend upon the same statutes. Upon the authority of that case the judgment of the Supreme Court of Illinois is affirmed.

Mr. Justice White, with whom concur Mr. Justice Brewer, Mr. Justice Brown, and Mr. Justice Peckham, dissenting:

It will be seen from the opinion of the court that this case differs in no material particular from that of the *Freeport Water Co. v. Freeport*, just decided, 180 U. S. 587, ante, 679, 21 Sup. Ct. Rep. 493. Under the sanction of the same statutes considered in the *Freeport Case*, the defendant in error, the city of Danville, contracted with the plaintiff in error, the water company, for the period authorized by the statute, and stipulated as to the rates to be paid for a public \*water supply. These rates were adhered to until, under the authority of the statute of the state of Illinois passed in 1891, referred to in the opinion in the *Freeport Case*, the defendant in error reduced the rates below the contract price. It now asserts in this record that it possessed the power to do so.

For the reasons stated by me for dissenting from the opinion and decree in the *Freeport Case*, I dissent from the opinion and decree in the present case.



ROGERS PARK WATER COMPANY, *Plff.*  
*in Err.*,  
*v.*  
 JOHN B. FERGUS.

(See S. C. Reporter's ed. 624-633.)

*Contracts concerning governmental functions—strict construction—franchise of water company—contract right as to rates—reduction of rates by ordinance.*

1. A contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company, must be strictly construed; and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.
2. An ordinance granting an exclusive franchise to a water company, with the right to use streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise by virtue of a provision that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.

[No. 56.]

*Argued and Submitted October 31, 1900.*  
*Decided March 25, 1901.*

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment sustaining a demurrer to an answer to a petition for mandamus to compel a water company to furnish water at rates fixed by ordinance. *Affirmed.*

See same case below, 178 Ill. 571, 53 N. E. 363.

Statement by Mr. Justice McKenna:

This is a petition for a writ of mandamus which was brought by the defendant in error on the 13th of December, 1897, in the circuit court of Cook county, state of Illinois, against the plaintiff in error, to compel it to furnish him water at rates fixed by an ordinance enacted by the city of Chicago.

The defense is that such ordinance impairs the obligation of the contract which plaintiff in error claims to have with the village of Rogers Park before its annexation to the city of Chicago, as hereinafter mentioned.

The village of Rogers Park was from November 12, 1888, and until April 4, 1893, a municipal corporation organized under the [625] laws of Illinois. At the latter date it was annexed to the city of Chicago.

The Rogers Park Water Company, plaintiff in error, was a corporation, incorporated about the 24th of January, 1889, under the laws of Illinois, to construct and operate a system of waterworks in the village of Rogers Park, and to acquire such property and exercise the powers necessary thereto.

The company constructed and operated a system of waterworks in said village, and the premises of the defendant in error were connected thereto and supplied with water therefrom. The rates for such water under the ordinance of the city of Chicago were \$8.72, payable in advance, for the current half-year from November 1, 1897, to May 1, 1898. Those rates were tendered to the company, and a supply of water demanded of it. The company refused to comply, demanding \$13.50 for such supply, claiming that sum under § 12 of an ordinance of the village of Rogers Park before its annexation to Chicago, and which ordinance empowered the construction of the waterworks system.

The contract which plaintiff in error claims is based on that ordinance. It was passed November 12, 1888, and was entitled "An Ordinance to Provide for a Supply of Water to the Village of Rogers Park, Illinois, and Its Inhabitants, Contracting with H. E. Keeler, his Successors and Assigns, for a Supply of Water for Public Use, and Giving the Said Village of Rogers Park, Illinois, an Option to Purchase the Said Works."

It was provided that, in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois, granted the exclusive right and privilege, for a period of thirty years from the time the ordinance should take effect, "unto H. E. Keeler, his successor and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions" of the ordinance. There was a grant of the use of the streets and alleys for mains and conduits, and power given to extend the system to new territory, if any should be acquired by the village. There were provisions prescribing the character of the system to be constructed, and that the village should pay "an annual rental for fire protection, for less than 5 miles of mains with- [626] in the corporate limits of said village, for the aforesaid period of thirty years, at the rental rate of five hundred and seventy-five (\$575) dollars for each mile of main, to be payable semiannually." There were also provisions for payment of taxes by the company, the flushing of sewers, and the maintenance of fountains, for the supply of water to the inhabitants, the quality of water, and the manner of the supply before prescribed, and for the acceptance in writing by the company of the terms of the ordinance. Provision was also made for the purchase of the system by the village.

Section 12 was as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be \$5."



Then follow the rates for the particular purpose for which the water might be used.

Section 13 provided for the levy of a tax to meet the payments stipulated by the ordinance, which should be irrevocable.

Section 14 was as follows:

"Within sixty days after the passage of this ordinance said H. E. Keeler, his successors and assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer duly authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns."

The plaintiff in error is the assignee of Keeler.

[627] The plaintiff in error claimed in its answer that said ordinance of the village of Rogers Park constituted a contract with plaintiff in error by which it had the right to charge the rates contained in § 12, and that the ordinance of the city of Chicago reducing their rates impaired such contract, and violated not only the Constitution of the state of Illinois, but also \*violated § 10, article 1, of the Constitution of the United States, as well as the 14th Amendment.

One of the defenses of the plaintiff in error was that the premises of defendant in error were connected with the system by reason of his written application, which application was accepted and became a contract. The defense, however, is not made in this court, and further reference to it is omitted.

There was a demurrer filed to the answer of the plaintiff in error, which set up its defenses under the Constitution of the United States. The demurrer was sustained. Certain issues of fact were made on other pleadings, upon which there was a trial by jury, resulting in a verdict for petitioner and judgment on the verdict. The judgment was affirmed by the supreme court of the state (178 Ill. 571, 53 N. E. 363), and this writ of error was sued out. The assignments of error present constitutional questions only.

**Mr. Newton A. Partridge** argued the cause and filed a brief for plaintiff in error:

The right to secure a supply of water for public use has been held to exist in a municipality as implied from the police power, and to preserve health; and such supply of water may be procured by contract as a sanitary and police regulation.

1 Dill. Mun. Corp. 3d ed. §§ 146, 443.

The necessity for a supply of water and the power to procure it for the use of the municipality and its inhabitants is recognized in Illinois and throughout the entire United States.

*New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Quincy v. Bull*, 106 Ill. 337; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 180 U. S.

N. E. 545; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Where the grantee of a franchise has accepted the grant and performed the public service imposed as a condition of the grant, the franchise becomes a contract which is protected by the constitutional provisions forbidding the passage of any law impairing the obligation of contracts.

2 Dill. Mun. Corp. § 691; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *New Orleans Waterworks Co. v. St. Tammany Waterworks Co.* 4 Woods, 134, 14 Fed. 194; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Quincy v. Bull*, 106 Ill. 337; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

Even a mere license, if acted upon in so substantial a manner that to revoke it would be unjust, ceases to be a license, and becomes a valid contract.

*Gregsten v. Chicago*, 145 Ill. 451, 34 N. E. 426; *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584.

A legislative grant becomes a contract and irrevocable after acceptance.

*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; 1 Dill. Mun. Corp. § 53.

Municipal grants and ordinances give rise to the same rights and are subject to the same constitutional prohibitions as other legislative grants.

*Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; 4 Thomp. Corp. §§ 1019, 5427, 5428.

The definition of "franchise" includes the grant of authority to dig up public streets and lay pipes therein for any public service. This has been settled by a long line of concurring authorities.

2 Dill. Mun. Corp. 3d ed. § 691; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans v. Clark*, 95



U. S. 644, 24 L. ed. 521; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

The right to dig up the streets and place therein pipes or mains for the purpose of conducting water to supply the city and its inhabitants is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority.

*Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.

The expediency of measures is a purely legislative question. When rates are fixed before the acceptance of the charter or ordinance, they become part of the contract and are protected by the Constitution.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Ruggles v. People*, 91 Ill. 256; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 114, 23 Am. Rep. 713; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 700, 29 L. ed. 516, 6 Sup. Ct. Rep. 265; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 428, 14 L. ed. 1002; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252. See also *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

The constitutional prohibitions forbid any impairment whatever of the obligation of contracts.

*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Bronson v. Kinzie*, 1 How. 319, 11 L. ed. 146; *McCraeken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; 4 Thomp. Corp. §§ 5427, 5428.

The ordinance complained of, which was held valid by the supreme court of Illinois, was but the exercise by the city of a legislative power which, it assumed, had been delegated to it by the state, and was therefore in legal intendment the equivalent of laws enacted by the state itself.

*City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

An unconstitutional law is not a law. It confers no rights; it affords no protection; it imposes no duties; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

*Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

Mr. Jesse B. Barton submitted the cause for defendant in error:

No contract existed between the parties to

this suit when the petition was filed, and no valid contract ever existed binding the appellee as claimed.

*Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.

The general assembly possesses all legislative powers not expressly reserved by the Constitution.

*Sawyer v. Alton*, 4 Ill. 127; *Mason v. Wait*, 5 Ill. 127; *People v. Wall*, 88 Ill. 75; *Harris v. Whiteside County Supers.* 105 Ill. 445; *Winch v. Tobin*, 107 Ill. 212.

A municipal corporation has no powers except those expressly granted or necessarily implied from those expressly granted.

*Alton v. Atna Ins. Co.* 82 Ill. 45; *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Smith v. McDowell ex rel. Hall*, 148 Ill. 51, 22 L. R. A. 393, 35 N. E. 141.

A person or private corporation claiming a special privilege, the subject of legislative grant, is held to the strictest account as to his or its authority.

*Jackson County Horse R. Co. v. Interstate Rapid Transit Co.* 24 Fed. 306.

Const. 1870, art. 2, § 14, prohibits the irrevocable grant of the special privilege of maintaining a fixed schedule of rates and charges for water to be paid by private consumers.

*Citizens' Street R. Co. v. City R. Co.* 56 Fed. 746, 166 U. S. 562, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058; *Lumbard v. Stearns*, 4 Cush. 60; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 582, 17 Pac. 487; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *People ex rel. McGrath v. Green Island Water Co.* 56 Hun, 76, 9 N. Y. Supp. 168; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The general assembly, aside from any express constitutional limitation, has no power, either directly or through authority which is vested in its municipalities, to irrevocably establish a schedule of water rates and charges to be paid by private consumers during any specified period.

*Ruggles v. People*, 91 Ill. 256; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Cooley*, Const. Lim. 6th ed. pp. 146, 343, 349; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415; *Millikin v. Edgar County*, 142 Ill. 528, 18 L. R. A. 447, 32 N. E. 493; *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 577.

The village ordinance is void under the 14th Amendment to the Constitution of the United States, inasmuch as it takes the property of the consumer of water without due process of law.

*Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The general assembly, by § 1, art. 9, chap. 24, Ill. Rev. Stat. did not empower the vil-



large board to irrevocably establish a schedule of water rates and charges to be paid by private consumers.

*Illinois C. R. Co. v. People*, 95 Ill. 313; *Ruggles v. People*, 91 Ill. 256.

The appellant is subject to any regulation or provision that the general assembly may at any time deem it advisable to prescribe.

*Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; *State, Morris & E. R. Co., Prosecutors, v. Railroad Taxation Comrs.* 37 N. J. L. 228; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247, 15 Wall. 500, 21 L. ed. 133.

[627] \*Mr. Justice McKenna, after making the above statement, delivered the opinion of the court:

At the time of the passage of the ordinance of November, 1888, by the village of Rogers Park, counsel for plaintiff in error says "two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for waterworks to be built and operated by private enterprise." The first is as follows:

"An Act Entitled 'An Act to Enable Cities, Incorporated Towns and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect a Tax to Pay for the Water so Supplied.' (Approved April 9, 1872. In Force July 1, 1872. L. 1871-2, p. 271. This title is as Amended by Act Approved June 26, 1885, in Force July 1, 1885, p. 64.)

[628] "Sec. 1. Be it enacted by the People of the State of Illinois, \*represented in the General Assembly, That in all cities, incorporated towns and villages where waterworks have been or may hereafter be constructed by any person or incorporated company, the city, town, or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885. In force July 1, 1885, L. 1885, p. 64.)

"Sec. 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the cities, villages, and towns act. The title to that act and the article and section bearing upon this case are as follows:

"An Act Entitled 'An Act to Provide for the Incorporation of Cities and Villages.' (Approved April 10, 1872. In force July 1, 1872. Laws of 1871-2, p. 218.)

"Article X. section 1. The city council or

board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs, or waterworks."

These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. We have passed on a similar contention in *Freeport Water Co. v. Freeport*, 180 U. S. 587, ante, 679, 21 Sup. Ct. Rep. 493, and in *Danville Water Co. v. Danville*, 180 U. S. 619, ante, 696, 21 Sup. Ct. Rep. 505; and we need not repeat the reasoning. Besides, it is disputable if the ordinance of 1888 justifies the claim of plaintiff in error. The supreme court of the state held that it did not. A strict construction must be exercised. The contract claimed concerned governmental functions, and \*such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions. [629]

Section 1 of the ordinance recites "that, in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois, hereby grants the exclusive right and privilege, for a period of thirty years . . . unto H. E. Keeler, his successor or assigns," of erecting and maintaining a system of waterworks. The use of the streets was also granted for such purpose.

Section 3 recites, "in consideration of the public benefits and the protection of property resulting from the construction of said system of waterworks," the village agrees to pay a certain annual rental proportional to the length of the mains.

The grantee, on his part to pay "all municipal and village taxes" (§ 3), "in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted" (§ 4), agreed to furnish the village and the residents thereof an adequate supply of water. Failing to supply water for a year in quantity or quality stipulated, the "franchise and all their rights and privileges granted under this ordinance, and the contract entered into, shall be null and void."

If the ordinance contained any other provisions it could not be claimed that the company's charges to consumers of the water furnished them were free from regulation by the municipality if it otherwise had power of regulation. There are other provisions, and especial stress is laid upon them. Section 12 provides as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this



franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be \$5."

Then follows an enumeration of uses and the rates for such uses. There is a schedule for meter rates, and also the following provision:

[630] "Rates for all other purposes that may be applied for, not \*named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns."

This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding. The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate. A reasonable rate the law assured, and assured even against governmental regulation. And the statute of 1891, which is especially complained of, assures it. By § 1 of that statute municipalities are "empowered to prescribe by ordinance maximum rates and charges," and if unreasonable rates and charges be fixed they may be reviewed and determined by the circuit court of the county in which the municipality may be. There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable. Plaintiff in error relies strictly on a contractual right. We think it has no such right, and the judgment of the Supreme Court is affirmed.

Mr. Justice White, with whom concurs Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting:

This case, in my opinion, should be controlled by the same principles which, it seemed to me, should have been applied in [631] the case of the *Freeport Water Co. v. Freeport*, just decided, 180 U. S. 587, ante, 679, 21 Sup. Ct. Rep. 493. The only difference of fact between that and the present one is this: In the *Freeport Case* the matter involved was the power of the city to contract and to fix the rates to be paid for a supply of water for public use during the designated period. Here the question is whether the city of Rogers Park had power to contract for the construction and maintenance of waterworks, and in such contract to fix the

rates to be charged for the water to be supplied to private consumers during the contract period.

The authority under which the contract in question was made was the two acts of the legislature of the state of Illinois considered in the *Freeport Case*, that is to say, the acts of April 9, 1872, and April 10, 1872. There is this difference, however: The act of April 9, 1872, was amended on June 26, 1885 (Public Laws of Illinois, 1885, p. 64), so as to authorize contracts for a supply of water as therein stated to be made with private individuals as well as private corporations. Thus authority existed to contract with individuals under both acts. The ordinance passed by the city of Rogers Park and the contract made, as fully recited in the opinion of the court, was for the erection, maintenance, and operation of waterworks, the extension of the system as might be required, the payment of an annual rental by the city for public hydrants, and the establishment of the rates to be paid by private consumers during the contract period.

The language of the legislative act conferring authority to fix the rates, it seems to me, clearly sanctions the establishment by contract of the rates for private use, as it did those to be paid for the public supply. The fixing of rates is plainly generic, and of necessity embraced those rates which were to be paid for the supply of water which the statute authorized the city to contract for. So far as the power of the legislature to authorize a contract for designated rates for a stipulated time is concerned, I can see no difference between fixing the rates for the public and those for the private supply during the authorized time. This in my judgment is conclusively settled by the authorities to which reference was made in my dissent in the *\*Freeport Case*. Especially is [632] this shown by the ruling of the court in *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 569, 44 L. ed. 892, 20 Sup. Ct. Rep. 736, where it was, in effect, decided that a contract, made by a municipality with a water company, that existing rates to private consumers should not be reduced during the life of the contract, was a valid stipulation, provided that the action of the city was previously sanctioned or was subsequently ratified by legislative authority.

The only question, then, remaining to be examined, seems to me to be whether the particular contract made by the city of Rogers Park, considered in this case, fixed the rates for private consumers for the period of the contract. And this only involves an examination of the contract for the purpose of determining its import. Of course, it is conceded, under the rule of construction stated by me in my dissent in the *Freeport Case*, that if doubt arises from an analysis of the provisions of the contract, that doubt must be solved against the water company and in favor of the municipality. But it is submitted that there can be no doubt, from a consideration of the text of the contract, that it fixed the rates to be paid by private consumers during the life of the contract.



The ordinance established in detail a tariff of specific water rates for private purposes, embracing an enumeration which would seem to include every variety of use. It conferred upon the contractor the right, if he did not choose to charge these rates, to insert in the connection a water meter, and to charge for the water supplied at meter rates, instead of at the aggregate sum otherwise fixed. The opening clause of § 12 read as follows: "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from them at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be \$5." As I understand this language, it without doubt embodies the rates, whether fixed by the purpose for which the water was taken or by the meter measurement, and explicitly stipulates that these rates may be charged during the life of the contract. Indeed, it

[633] seems to me \*impossible to conceive that the  
180 U. S.

contract for the construction, maintenance, and supply would have been entered into without such agreement. Can it in reason be said, in view of the terms of the contract, that if the water company had wished to charge more than the contract price, on the ground that an unreasonably low sum had been fixed in the contract, that it would have had a right at once to ignore the contract stipulation and exact higher rates? If it cannot be, how can it be held that the city had the right at its pleasure to disregard the rates fixed in the contract? Was not the obligation of one the correlative of the right of the other? To say that the provisions of the contract constitute the language of command, and not the language of contract, does not weaken or obliterate the unambiguous provisions of the agreement into which the parties entered. They were indeed, in my judgment, commands, arising from the express authority conferred upon the municipality by the legislature of the state of Illinois, sanctioned by the agreement of the parties, and protected from impairment by the Constitution of the United States.

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# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[685]\**R. R. SCOTT et al., Plaintiffs in Error, v. TEXAS & PACIFIC RAILWAY COMPANY.* [No. 125.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. T. P. Young* for plaintiffs in error.

*Messrs. John F. Dillon, Winslow S. Pierce, and D. D. Duncan* for defendant in error.

January 14, 1901. Judgment *affirmed*, with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the Eastern District of Texas.

A. C. CAMPBELL, *Appellant, v. EDWARD F. WAITE.* [No. 94.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Milton Remley* for appellant.

*The Attorney General and Assistant Attorney General Beck* for appellee.

January 14, 1901. *Dismissed* for want of jurisdiction, on the authority of *Pratt v. Fitzhugh*, 1 Black, 271, 17 L. ed. 206; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148, and cases cited; *Gross v. Burke*, 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 22; *Perrine v. Slack*, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79.

HERSCHEL S. HARKINS *et al., Plaintiffs in Error, v. CITY OF ASHVILLE.* [No. 169.]

In Error to the Supreme Court of the State of North Carolina.

*Mr. Charles A. Moore* for plaintiffs in error.

*Mr. Louis M. Bourne* for defendant in error.

March 11, 1901. Writ of error *dismissed* for want of jurisdiction on the authority of *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Scudder v. Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Baltimore, O. & A. R. Co. v. Ocean City*, 179 U. S. 681, *ante*, 384, 21 Sup. Ct. Rep. 918, and cases cited. 180 U. S. U. S., BOOK 45.

PACIFIC COAST STEAMSHIP COMPANY, *Plaintiff in Error, v. HANS CHR. PANDE et ux.* [No. 298.]

In Error to the District Court of the United States for the District of Alaska. [636]

*Messrs. S. M. Stockslager and Geo. C.* Heard for plaintiff in error.

*Mr. J. J. Darlington* for defendants in error.

March 11, 1901. Writ of error *dismissed* for the want of jurisdiction, on the authority of *Thorpe v. Bonnifield*, 177 U. S. 15, 44 L. ed. 652, 20 Sup. Ct. Rep. 533; *Shute v. Keyser*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960.

MAXIMILIAN W. FALK, *Plaintiff in Error, v. UNITED STATES.* [No. 181.]

In Error to the Court of Appeals of the District of Columbia.

*Mr. Edwin Forrest* for plaintiff in error. *The Attorney General and Solicitor General Richards* for defendant in error.

March 25, 1901. *Dismissed* for want of jurisdiction, on the authority of *Chapman v. United States*, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76.

COLUMBUS CONSTRUCTION COMPANY, *Petitioner, v. CRANE COMPANY.* [No. 492.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. J. R. Ouster, S. S. Gregory, and Grover Cleveland* for petitioner.

*Mr. Charles S. Holt* for respondent.

January 14, 1901. *Denied.*

OLD COLONY STEAMBOAT COMPANY, *Petitioner, v. EDWIN L. PEARCE et al.* [Nos. 511, 512.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Messrs. Harrington Putnam and Edward S. Dodge* for petitioner.

*Messrs. Eugene P. Carver and Edward B. Blodgett* for respondents.

January 14, 1901. *Denied.*

**GUARANTEE TRUST & SAFETY DEPOSIT COMPANY, Petitioner, v. DELTA & PINE LAND COMPANY et al.** [No. 488.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Michael F. McCullen and T. D. Young* for petitioner.

*Messrs. Frank Johnston, Edward Mayes, and J. M. Dickinson* for respondents.

January 14, 1901. *Denied.*

[637]\***JOSEPH N. WOLFSON, Petitioner, v. UNITED STATES.** [No. 527.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Wm. A. Maury, W. O. Hart, J. D. Rouse, Wm. Grant, and A. G. Brice* for petitioner.

*The Attorney General and Assistant Attorney General Beck* for respondent.

January 14, 1901. *Denied.*

**OHIO RIVER RAILROAD COMPANY et al., Petitioners, v. STEPHEN LOCKWOOD.** [No. 528.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Mr. Wm. P. Hubbard* for petitioners.

*Mr. John G. McCluer* for respondent.

January 14, 1901. *Denied.*

**TOWN OF MOUNT VERNON, Petitioner, v. D. B. WESSON.** [No. 525.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. Thomas M. Jett* for petitioner.

*Mr. Thomas C. Mather* for respondent.

January 28, 1901. *Denied.*

**PHILLIPS & BUTTORFF MANUFACTURING COMPANY, Petitioner, v. JAMES G. WHITNEY, as Assignee.** [No. 443.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. J. Quintus Cohen* for petitioner.

*Messrs. O. W. Underwood and Jas. J. Garrett* for respondent.

February 11, 1901. *Denied.*

**FREDERICK WILLIAMS, Petitioner, v. GEORGE C. GAYLORD et al.** [No. 503.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

February 11, 1901. *Granted.*

**SIGUA IRON COMPANY, Petitioner, v. BENJAMIN D. GREENE.** [No. 521.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Wm. B. Hornblower and Howard A. Taylor* for petitioner.

*Messrs. L. Laflin Kellogg and Alfred C. Petté* for respondent.

February 11, 1901. *Denied.*

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**CHRISTIAN SCHWARTZ et al., Petitioners, v. JOHN S. DUSS et al.** [No. 539.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

February 11, 1901. *Granted.* \*Mr. Justice Shiras took no part in the consideration and disposition of this application.

**UNITED STATES, Petitioner, v. A. D. MORGAN, Master, etc.** [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*The Attorney General, Solicitor General Richards and Mr. Edgar Allan* for petitioner.

*Mr. Floyd Hughes* for respondent.

February 11, 1901. *Denied.*

**J. MCGREGOR ADAMS, Petitioner, v. MILTON SHIRK et al.** [No. 553.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. John S. Runnells, Wm. Burry, and Edward S. Isham* for petitioner.

*Messrs. Frederic Ullman and Nicholas W. Hacker* for respondents.

February 25, 1901. *Denied.*

**OTOE COUNTY, Petitioner, v. JOHN MARTIN CLAPP.** [No. 555.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. James M. Woolworth and Wm. D. McHugh* for petitioner.

No appearance for respondent.

February 25, 1901. *Denied.*

**GULF, WESTERN TEXAS, & PACIFIC RAILROAD COMPANY et al., Petitioners, v. NEW YORK & TEXAS LAND COMPANY.** [No. 564.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. L. E. Payson and Maxwell Evarts* for petitioners.

No appearance for respondent.

February 25, 1901. *Denied.*

**BOARD OF COUNTY COMMISSIONERS OF MEADE COUNTY, KANSAS, Petitioner, v. ANNA CORNING.** [No. 465.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. S. S. Ashbaugh* for petitioner.

*Mr. Chas. F. Hutchings* for respondent.

March 5, 1901. *Denied.*

**SECURITY TRUST COMPANY, as Administrator, Petitioner, v. BLACK RIVER NATIONAL BANK.** [No. 540.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

March 5, 1901. *Granted.*



[639]\*FRANKLIN S. BUELL, *Petitioner, v. FARMERS' LOAN & TRUST COMPANY et al.* [No. 542.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. C. Walter Artz for petitioner.

Mr. Herbert B. Turner for respondents.

March 5, 1901. *Denied.*

JOHN E. HANIFEN, ETC., *Petitioner, v. EDWARD A. PRICE et al.* [No. 554.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

March 5, 1901. *Granted.*

HENRY L. WARD, Treasurer, etc., *Petitioner, v. EDWARD JOSLIN.* [No. 558.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

March 5, 1901. *Granted.*

SOUTHERN PINE COMPANY, *Petitioner, v. MRS. OLIVIA B. HALL.* [No. 560.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. T. C. Catchings and T. M. Miller for petitioner.

Messrs. D. B. H. Chaffe and E. J. Bowers for respondent.

March 5, 1901. *Denied.*

CHARLES W. COLTON, *Petitioner, v. JAMES I. RAYMOND.* [No. 561.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. A. Walker Otis, Wayne MacVeagh, and F. D. McKenney for petitioner.

Messrs. E. C. James and John L. Hill for respondent.

March 5, 1901. *Denied.*

HUGO L. HILLER *et al., Petitioners, v. UNITED STATES.* [No. 572.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Albert Comstock and Everit Brown for petitioners.

The Attorney General and Solicitor General Richards for respondent.

March 5, 1901. *Denied.*

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UNITED STATES, *Petitioner, v. RUDOLPH C. HAHN.* [No. 573.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and Solicitor General Richards for petitioner.

Messrs. Albert Comstock and Everit Brown for respondent.

March 5, 1901. *Denied.*

\*ARTHUR W. MUELLER, Trustee, etc., *Petitioner, v. WILLIAM F. NUGENT.* [No. 576.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

March 5, 1901. *Granted.*

KNIGHTS TEMPLARS & MASONS' LIFE INDEMNITY COMPANY, *Petitioner, v. ROSA B. JARMAN.* [No. 570.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

March 11, 1901. *Granted.*

UNITED STATES, *Petitioner, v. LUCIUS BEEBE & SONS.* [No. 574.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Attorney General and Solicitor General Richards for petitioner.

Mr. Wm. R. Sears for respondent.

March 11, 1901. *Denied.*

EDWARD H. CLARKE, *Petitioner, v. WILBUR LABREMORE,* Trustee. [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

March 8, 1901. *Granted.*

GEORGE W. GRIMES, *Petitioner, v. GEORGE ALLEN.* [No. 591.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. E. W. Bradford and W. H. H. Miller for petitioner.

Messrs. James I. Kay and Frederick W. Winter for respondent.

March 18, 1901. *Denied.*

ILLINOIS CENTRAL RAILROAD COMPANY, *Petitioner, v. EARNEST TUTT,* by JOHN TUTT, Guardian. [No. 593.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Wm. A. Maury, J. M. Dickinson, and E. F. Trabue, for petitioner.

No appearance for respondent.

March 25, 1901. *Denied.*





CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

U N I T E D S T A T E S

A T

OCTOBER TERM, 1900.

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Vol. 181.





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# THE DECISIONS

OF THE

## Supreme Court of the United States

AT

OCTOBER TERM, 1900.

{1} EAST TENNESSEE, VIRGINIA, &  
GEORGIA RAILWAY COMPANY et

v.

INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 1-29.)

*Interstate commerce—long and short haul—  
unjust discrimination—effect of competi-  
tion—investigation of facts by court.*

1. Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the Act to Regulate Commerce, may produce the dissimilarity of circumstances and conditions provided in § 4 of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Interstate Commerce Commission.
2. The discrimination in favor of competitive points on account of competition which compels a reduction of rates to those points below the rates charged for shorter distances is not an undue or unjust discrimination prohibited by the Act to Regulate Commerce, § 3.
3. On application to the courts to enforce an order of the Interstate Commerce Commission which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts.

[No. 175.]

Argued February 26, 27, 1900. Decided  
April 8, 1901.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decision affirming a decree sustaining an order of the Interstate Commerce Commission. *Reversed.*

See same case below, 39 C. C. A. 413, 99 Fed. Rep. 52.

Statement by Mr. Justice White:

\*The Board of Trade of Chattanooga, Tennessee, a chartered corporation, petitioned the Interstate Commerce Commission for relief under the Act to Regulate Commerce. The defendants, the East Tennessee, Virginia, & Georgia Railway, and numerous other rail and steamship companies, were alleged to be common carriers subject to the Act to Regulate Commerce, and engaged in the transportation of passengers and freight by all rail, or partly by rail and water, from Boston, New York, Philadelphia, Baltimore, and other places on the eastern seaboard to Chattanooga, Nashville, and Memphis, in the state of Tennessee. [2]

It was alleged that the defendants conveyed freight from the eastern seaboard, through and beyond Chattanooga, to the cities of Nashville and Memphis for a lesser rate to such long-distance points than was charged by them for like freight to Chattanooga, the shorter distance. This, it was averred, was a violation of § 4 of the act, prohibiting a greater charge for the shorter than for the longer haul, under substantially similar circumstances and conditions. And the disregard of the statute in the particular just stated, it was asserted, necessarily gave rise to violations of other provisions of the Act to \*Regulate Commerce; viz., of § 1, [3] which forbids unjust and unreasonable charges, and of § 3, making unlawful the giving of undue or unreasonable preferences.

It is unnecessary to consider the complaint of the lesser charge to Memphis, the longer, than to Chattanooga, the shorter, distance,

since this grievance was in effect held by the Commission to be without substantial merit; and its conclusion on this subject was not reviewed by either of the courts below, and it is not now seriously, if at all, questioned. After hearing, the Commission made elaborate findings of fact, and stated the legal conclusions which were deduced therefrom. 5 I. C. C. Rep. 546, 4 Inters. Com. Rep. 213. An order was made forbidding the defendant carriers from charging a greater compensation for the transportation for the shorter distance to Chattanooga than was demanded to Nashville, the longer distance. The execution, however, of this order, was suspended until a date named, so that the carriers might have opportunity to apply to the Commission to be relieved from the operation of the order. No application to be exempted having been made, and the carriers not having conformed to the behests of the Commission, this proceeding to compel obedience was commenced in the circuit court. In that court additional testimony was taken, but it was all merely cumulative of that which had been adduced before the Commission. The circuit court (85 Fed. Rep. 107), whilst not approving the reasoning by which the Commission had sustained the order by it entered, nevertheless on other grounds affirmed the command of the Commission. The circuit court of appeals for the sixth circuit, to which the case was taken, whilst it held that the Commission had misapplied the law, and although it did not approve of the reasoning given by the circuit court for its decree, nevertheless affirmed the action of that court. 39 C. C. A. 413, 99 Fed. Rep. 52.

*Mr. Ed. Baxter* argued the cause and filed a brief for appellants.

*Mr. L. A. Shaver* argued the cause, and, with *Assistant Attorney General Boyd*, filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[4] \**Mr. Justice White*, after making the foregoing statement of the case, delivered the opinion of the court:

To comprehend the contentions which are made on this record it is essential to give a summary of the condition as depicted in the findings of the Commission, and upon which the relief which it granted was based.

The state of affairs was as follows: Freight from the eastern seaboard to Cincinnati and other western points north of the Ohio river was controlled by the classification and tariff of rates prevailing in what was denominated as the northern or trunk line territory. On the other hand, the area south of the Ohio river, which was denominated the southern territory, was governed by the classification and tariff of rates prevailing in that territory; such classification and tariff giving rise in most instances to a higher charge than that which prevailed in the northern territory. This general difference between the rates in the northern and those in the southern territory the Commission found arose from inherent causes, and,

although they might in some aspects disadvantageously influence traffic in the southern territory, were yet the result of such essentially normal conditions as to give rise to no just cause of complaint. On this subject the Commission said:

"There may be some disadvantage to Chattanooga from this circumstance, since an article of a given class under the first-named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of traffic construction."

The grievance alleged arose in this wise: Where freight destined to a point in the southern territory, instead of being sent \*by [5] the southern routes, was shipped from the eastern seaboard by the northern or trunk line, *via* Cincinnati or other trunk-line points north of the Ohio river, it would be classified and charged for according to the northern trunk-line rates. But such freight thus shipped through the trunk line or northern route, bound for Chattanooga or other southern points, on leaving Cincinnati and on entering the southern area for the purpose of completing the transit, became subject to the southern classification and rates. Thus, irrespective of the mere form, and considering the substance of things, the charge on freight shipped in this way was made according to the northern classification and rate for the transportation in the northern territory to points on the Ohio river, plus the southern classification and rates from those points to the place in the southern territory to which the freight was ultimately destined, this being equivalent to the rate which the merchandise would have borne had it been shipped so as to subject it wholly to the southern-territory rates.

This was, however, not universally the case. The single exception (eliminating Memphis from view) was this: The Louisville & Nashville Railroad, operating from Cincinnati to Nashville, instead of causing the merchandise shipped from the eastern seaboard through Cincinnati to Nashville to bear the southern-territory classification and rate from Cincinnati to Nashville, submitted the traffic between Cincinnati and Nashville to the northern, instead of to the southern, territory rates. It hence followed that merchandise shipped from the eastern seaboard to Nashville through the northern territory bore a less charge than it would have borne if shipped to Nashville through the southern territory.

To compete with the Louisville & Nashville Railroad for Nashville traffic, the carriers in the southern territory fixed their



[6] rate to Nashville so as to make it as low as that charged to that point by the Louisville & Nashville Railroad. It hence came to pass that freight shipped from the eastern seaboard to Chattanooga paid the southern rate, whilst freight shipped to Nashville, although it passed through Chattanooga, went on to Nashville at the lower rate there prevailing, which \*lower rate was caused by the action of the Louisville & Nashville Railroad in exceptionally reducing its charge to Nashville. We say, by the action of the Louisville & Nashville Railroad, because the findings of the Commission expressly establish that the exceptional rate to Nashville, which was established by the Louisville & Nashville Railroad, was not caused by water competition at Nashville, but was exclusively the result of the action of the Louisville & Nashville Railroad in exceptionally charging a lower rate to Nashville different from that which it demanded for traffic to other points through the southern territory. That the other carriers through the southern territory, including those operating from Chattanooga to Nashville, were, in consequence of this condition at Nashville, compelled either to adjust their rates to Nashville to meet the competition or abandon all freight traffic to Nashville, was found by the Commission to be beyond dispute. On both these subjects the Commission said:

"There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

"The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville *via* Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers *via* Cincinnati, and their action is uncontrolled by the defendant lines.

[7] The competition which the latter meet \*at Nashville is distinctly the competition of the trunk lines and the Louisville & Nashville system, whose northern termini are at points on the Ohio river which receive trunk-line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, etc., all of which are interstate carriers subject to the Act to Regulate Com-

merce. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines *via* Cincinnati was the necessary condition upon which the lines *via* Chattanooga could compete for Nashville traffic."

Although the Commission thus found that the competitive conditions at Nashville rendered it absolutely necessary for the other roads to adjust their charges so as to meet the competition if they wished to engage in freight traffic to Nashville, it nevertheless held that the carriers had no lawful right to consider the competition at Nashville in adjusting their rates to that place. This was predicated solely upon the fact that the competition existing at Nashville was caused by carriers who were subject to the Act to Regulate Commerce, and, under the view which the Commission entertained of the law to regulate commerce, competition of that character could not be availed of by a carrier as establishing substantially dissimilar circumstances and conditions without a prior application by the carrier to the Commission for the purpose of obtaining its sanction to taking such competitive conditions into consideration for the purpose of fixing rates to the competitive point. The Commission, in support of this construction of the statute, referred to a previous opinion by it announced in the case of *Trammell v. Clyde S. S. Co.* 5 I. C. C. Rep. 324, 4 Inters. Com. Rep. 120. The proposition decided in the case cited, which it was held governed the case at bar, was thus stated:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the 4th section in all cases where the \*circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the 4th section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this Commission." [8]

Applying this proposition, the Commission said:

"We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

The order entered by the Commission was confined solely to the greater charge to Chattanooga, the shorter, than to Nashville, the longer, distance. Omitting mere recitals, it was adjudged that certain named defendants, "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the state of Tennessee, be and they severally are hereby



required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville. That for the purpose of enabling said defendants to apply to the Commission for relief under the proviso clause of the 4th section of the Act to Regulate Commerce, this order is hereby suspended until the 1st day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned the question of further suspending this order until the hearing and determination of such application will be duly considered."

[9] The record makes it clear that in allowing this order the Commission thought that its literal enforcement would bring about an injustice, and therefore that the order was entered solely because it was deemed that the technical requirements of the \*statute must be complied with. It is also patent from the reasons given by the Commission for allowing the order, that the Commission refrained from considering or passing on any other question arising, either expressly or by implication, from the complaint, such as the reasonableness *per se* of the rates in controversy or the discrimination which might be produced by them. And it also obviously appears that the examination of the issues was thus confined solely to the alleged violation of the long and short haul clause, because it was deemed that all questions as to reasonableness of rates *per se* or discrimination arising therefrom could more properly be considered by the Commission when application was made by the carriers to be relieved from the restraints of the long and short haul clause within the time and in accordance with the permission granted by the order which was rendered. The Commission on these subjects said:

"In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the Commission for relief from the restrictions imposed by the 4th section of the act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the 'special cases' to which the proviso clause of that section should be applied.

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point *via* Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the meas-

ure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater \*volume of traffic [10] at the lower rates prevailing in the trunk-line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the allowance of the same rate to the shorter-distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

"Any such intimation, however, should not be understood as covering an implied endorsement of the present disparity in rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded. It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable.

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided. If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the 4th section, the subject can be more fully considered in disposing of that application."

After reciting the fact that the case had been on both sides presented to the Commission under the assumption that the \*rights of the parties could be adequately [11] adjusted by determining only the controversy arising from the long and short haul clause of the act, the Commission added:

"The question which may arise if permission is sought to depart from the general rule relating to long and short hauls was not specially discussed. On this ground, also, it would seem suitable to allow oppor-



tunity for a further hearing before fixing maximum rates on shipments to Chattanooga."

Taking into view the terms of the order and the reasons given by the Commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the Act to Regulate Commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate commerce, the dissimilarity of circumstance and condition provided in the 4th section could not be produced by such competition unless the previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstance and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, unless the assent of the Commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the Commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the Commission. This logical result of the construction of the statute adopted by the Commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the Commission found as a fact that the competition at Nashville was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer \*haul to Nashville than was asked for the shorter haul to Chattanooga, or abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic unless they applied to the Commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nashville. But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute, which relieves from the long and short haul clause, arises from the command of the statute, and not from the assent of the Commission; the law, and not the dis-

cretion of the Commission, determining the rights of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action was predicated was wrong. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 164, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 654, 655, 44 L. ed. 309, 311, 20 Sup. Ct. Rep. 209.

Although it thus appears that the Commission erred in its construction of the statute, nevertheless it is insisted that the action of the Commission should be affirmed. This contention is supported by propositions which are stated in argument in many different forms, but are really all reducible to the following summary:

Granting that the Commission wrongfully held that the carriers had no right of their own motion to avail of the competition at Nashville as producing the dissimilarity of circumstance and condition provided in the statute, nevertheless the order made by the Commission was right, because, as there was a difference between the rate charged to Nashville and that exacted to Chattanooga, there necessarily resulted an undue preference in favor of Nashville and a discrimination against Chattanooga, \*falling within the inhibition of the 3d section of the Act to Regulate Commerce. And, it is argued, even conceding this to be erroneous, as it was established by the proof that the Nashville rates were adequate, the Chattanooga rates were consequently unreasonably high, and hence were *per se* unreasonable. Assuming this proposition to be without foundation, it is insisted, as Chattanooga was a point at which various railroads centered, it was therefore in a position where, if competition had been allowed full play, it would have a rate at least as low as that at Nashville; and as the proof showed that the higher rate prevailing at Chattanooga was fixed by consent or agreement among the carriers, therefore Chattanooga by the effect of such agreement was deprived of the benefits of competition; the deduction being that the carriers who thus by agreement prevented the normal forces of competition from exerting their proper influence at Chattanooga should not be allowed to avail of the competition at Nashville to charge a lesser rate to that point than they did to Chattanooga. Besides, it is urged that, as it was shown that the lower rate at Nashville was caused by the conduct of the Louisville & Nashville Railroad in exceptionally making lower charges from Cincinnati to Nashville, that road should not be permitted to give a preference to Nashville, and then avail itself of the preference thus given to discriminate against Chattanooga, which would be the case if the difference of rates on freight passing through Chattanooga to Nashville were allowed to continue. This proposition being predicated on the assertion that it was established by proof that the line

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between Chattanooga and Nashville over which the traffic *via* the southern territory, passing through Chattanooga from the Atlantic seaboard, moved to Nashville, was in legal effect to be considered the Louisville & Nashville Railroad, since that corporation was the owner of a majority of the stock of such line between Chattanooga and Nashville, and therefore in effect controlled it.

[14] Pausing for a moment to generally consider the foregoing contentions, it becomes manifest that in so far as they embody propositions of law they concede the error of the legal construction applied by the Commission, and yet invoke a seemingly \*different construction by which the erroneous rule of the Commission is to be in substance upheld. It is also clear that the propositions of fact which they embody cover the field of inquiry which the Commission excluded from view, and which that body held could not be ascertained from the record before it, but must be developed from the new inquiry which it was proposed to make when leave to depart from the restrictions of the long and short haul clause was invoked by the carriers at the hands of the Commission. Indeed, it is substantially accurate to say that the propositions of fact now asserted not only do this, but in effect are repugnant to the conclusions of fact found by the Commission on the branch of the controversy to which the Commission actually extended the inquiry by it made. It might well suffice to allow the result just stated, to which the propositions necessarily lead, to serve as a demonstration of their unsoundness. Inasmuch, however, as the legal contentions embodied in the propositions were in substance adopted by the circuit court upon the assumption that its action in so doing was in accord with the decision of this court in the case of *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45, and as some of the propositions of fact received the sanction of the circuit court of appeals, and were made the basis of its decree enforcing the order of the Commission, we will proceed to analyze them to the extent necessary to determine our duty in relation to them.

Coming to do so, it is at once apparent that the contentions divide themselves into two classes: the first, a proposition of law involving the construction of the Act to Regulate Commerce, and the others embracing ultimate deductions from the facts proven. The legal proposition is this: that where, in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the 4th section of the act arises, it cannot justify a carrier on his own motion in charging a lesser rate for the longer haul to the competitive point than is asked for the shorter haul to the noncompetitive point, if in doing so a preference in favor of the competitive point arises or a discrimination against the noncompetitive point is produced. That is to say, it is insisted that the provision as to substantially \*dissimilar circumstances and con-

ditions of the 4th section and the commands of the 3d section as to discrimination and undue preference, being found in the one statute, must be construed together, so that the dissimilarity of circumstance and condition cannot be availed of if either discrimination or preference will arise from doing so. We quote the exact language in which this proposition is stated by counsel, reproducing the italics by which the import of the contention is emphasized:

"Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practised against Chattanooga and in favor of Nashville, *brings the case within the evil which the Act to Regulate Commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself,—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*"

It is argued that this proposition is sustained by the opinions in the *Alabama Midland Case*, 168 U. S. 164, 42 L. ed. 422, 18 Sup. Ct. Rep. 45, and in *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209, in both of which cases, as we have seen, the right of the carrier to take into view on his own motion competition which substantially affected traffic and rates as the producing cause of dissimilarity of circumstance and condition was upheld.

The portion of the opinion relied upon in the *Alabama Midland Case* is found on page 167, L. ed. p. 423, Sup. Ct. Rep. p. 49, and is as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3d and 4th sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases \*there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

The expressions in the *Behlmer Case* which are relied upon are found on page 674, L. ed. p. 319, Sup. Ct. Rep. p. 219, of the opinion in that case, and are as follows:

"It follows that, whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination

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of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved, as well as those to be derived by the locality to which it is to be delivered."

The reasoning which we have thus quoted in the opinions in question, it is insisted, maintains the doctrine that, although competition of the character therein described may serve to engender dissimilarity of circumstance and condition which a carrier can avail of of its own motion, it does not necessarily do so. Whether it can be allowed to produce this effect, it is argued, must depend upon all the surrounding circumstances, such as the preference or discrimination which may arise from allowing it to be done, and the degree to which the interests of the public may be injuriously affected by permitting it to do so. To support this view, it is argued "that to hold otherwise would be placing Congress in the absurd position of laying down a rule, and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist. In other words, enacting a law and providing at the same time that it should be of no effect."

[17] But in substance this reasoning only amounts to the assertion \*that the settled construction of the statute, by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstance and condition pointed out in the 4th section, is wrong, and should be overruled. The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided; that is, the right of the carrier to take the competitive conditions into consideration as creating dissimilarity of circumstance and condition. The right of a carrier to do so could not have been sustained if the proposition now asserted had not necessarily been decided to be unsound. The summing up or grouping of the various provisions of the act, which was made in the passages relied upon, but served to point out that the provisions of the statute allowing competition to become the cause of dissimilarity of circumstance and condition could operate no injurious effect in view of the other provisions of the act protecting against discrimination and preference; that is, the undue preference and unjust discrimination against which the other provisions of the statute were aimed. True it is that all of the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity that competition could never create such a

dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point than was made to the noncompetitive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a preference in favor of that point, and without giving rise to a discrimination against the noncompetitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition, "however forceful" it may be, cannot produce dissimilarity of circumstance and condition if discrimination \*and [18] preference is held to necessarily arise from the charging of the lesser rate to the longer-distance competitive point.

It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the 3d and 4th sections in such a manner as necessarily to destroy one by the other, instead of construing them so as to cause them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the 4th section of the act, it is conceded or established that the rates charged to the shorter-distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer-distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the 3d section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer Case*, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that, forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construc-



[19] tion adopted by the previous opinions\* of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force, and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play.

[20] That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of\* the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from

the carriage of traffic at less than the cost of transportation to particular places. But no condition of this character is here in question, since the Commission find as follows:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence."

And the fact thus established was not controverted either in the opinion of the circuit court or in that of the circuit court of appeals, and is not now denied. Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public.

\*The circuit court in enforcing the order of [21] the Commission did not seemingly adopt the full scope of the proposition which we have just considered, but applied it in a modified form. Thus, it concluded that although the charge of the lesser rate to the longer point, in some instances, might be justified by the dissimilarity of circumstance and condition arising from competition, and therefore would not *per se* necessarily produce a preference, it would do so if by comparison between the dissimilarity of circumstance and condition and the dissimilarity of charge it was found that the one was disproportionate to the other.

After referring to the previous rulings of the Commission maintaining that competition by carriers subject to the act could not be taken into view by a carrier in fixing rates to the competitive points without the previous assent of the Commission, the court (85 Fed. Rep. 117) quoted the following statement of the Commission in an opinion announced on December 31, 1897:

"Since then, however, the Supreme Court of the United States, by its decision in the case, *Interstate Commerce Commission v. Alabama Midland R. Co.* (decided Nov. 3, 1897), 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law, as applied to the facts



found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the 4th section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs."

The court thereupon said:

[22] "Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition \*is one of the elements which enter into the determination whether the conditions are similar, and if dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then, if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply,—a result contrary to the manifest intent. In other words, my opinion is that the restraint of § 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made. But the long and short haul clause is only one of the specific provisions employed for the general purpose of the act. The 3d section underlies the 4th and supplies the principle on which it rests; so that, if the literal construction referred to be put upon the 4th section, the case would still be exposed to the 3d section, which forbids undue preference to one locality, or the subjection of another to any undue disadvantage."

But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies it. Indeed, it not only does this, but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the less power has this fact to produce the dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the less the rate will be to that point, and the greater, therefore, the disparity between the charge to the competitive point and that made to the noncompetitive one. The proposition, then, is this, that the greater and more potential is the influence of competition on rates and traffic, the less will be its [23] force to engender \*dissimilarity of circumstance and condition; that is to say, that the

causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance.

As the circuit court only affirmed the order of the Commission, which directed the carriers to desist from charging a greater compensation for the shorter haul to Chattanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that, independently of the charge to Nashville, the rate to Chattanooga was *per se* unreasonable. For, of course, a decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point. Indeed, it cannot be held that the order rested upon the unreasonableness *per se* of the rate to Chattanooga, without implying that the court directed and commanded the carrier to bring about a preference and discrimination by charging the same price for the carriage of traffic to Nashville, the much more distant point, that was exacted for the carriage to Chattanooga.

Coming, then, to the propositions of fact, we repeat that each and every one of them involve considerations which were wholly excluded from view by the Commission, under the construction of the statute which was applied, because it was deemed that they would present themselves for consideration when the carrier petitioned the Commission to be relieved from the restrictions of the long and short haul clause, and, moreover, that these propositions of fact are not in harmony with the findings made by the Commission on the particular subject which it passed on. That the propositions of fact referred to are amenable to the considerations we have just stated is indisputable, when it is considered that taken together they assert the existence of conditions which the Commission decided could not be ascertained in the state of the record before it, but could only be arrived at by a further unprejudiced examination, \*which, under the view taken, [24] it was unnecessary to make until a future time. And that the facts now relied on are irreconcilable with what was found by the Commission on the subject which it passed on is likewise clear. Thus, the contention that the rate to Chattanooga is shown to have been absolutely fixed by agreement, and therefore to be abnormally high, is necessarily repugnant to the express finding of the Commission that the rates in the southern territory, whilst originally the offspring of agreement, were also the result of the volume of business in that territory, and, although they might give rise to some disadvantage, did not do so to the extent of making the rates in and of themselves a just subject of complaint. So, also, the insistence that it is shown that Chattanooga by its position was entitled to at least an equality of rates with Nashville is repugnant to



the finding of the Commission, that whilst it was shown that some reduction would be just at Chattanooga the degree of that reduction could not be determined without a further investigation embracing the relation of Chattanooga to other points, and without a careful readjustment of the rates to such point. Again, the assertion that the road from Chattanooga to Nashville growing out of the stock ownership was in legal effect the Louisville & Nashville Railroad is necessarily antagonistic to the express finding of the Commission that the carriers through Chattanooga to Nashville were placed in a position where they must either meet the competition at Nashville or abandon all traffic to that point. The question which then arises is, Shall this court now pass upon all the issues which the Commission excluded from view because of a mistake in law committed by that body, and in doing so not only overthrow the findings of fact made by the Commission, but also adopt new findings antagonistic to those which the Commission made, and this for the purpose, not of affirming the order entered by that body, but to enable us to reach a result which the Commission itself declared could only be justly arrived at after a further and unprejudiced investigation by it of the situation which the controversy involves?

[25] True, it is insisted that such original action is not required at our hands, because, it is asserted, the circuit court of appeals considered and passed on the propositions relied upon, and the action of that court relieves this court from the duty of entering upon an original investigation of the whole evidence to determine the entire field of controversy.

It requires only, however, a brief reference to the opinion of the circuit court of appeals to show that this contention is unfounded. In substance, that court stated in its opinion that it considered that the rates to Chattanooga, which was in the southern territory, had been fixed by agreement of the carriers, as had been the other rates in that territory; that as Nashville, which was also in the southern territory, was given a low rate because of the action of the Louisville & Nashville Railroad in exceptionally lowering its rates from Cincinnati to that point, the situation at Chattanooga entitled it to the same rates. The court, moreover, thought that the Louisville & Nashville Railroad, which owned the line from Cincinnati to Nashville, was in no position, as the owner of a majority of the stock in the road from Chattanooga to Nashville, to avail of the competition at Nashville as a basis for charging the lesser rate for the longer haul through Chattanooga to Nashville. It was, besides, concluded that where a rate to a particular point was the product of agreement which stifled competition, such rate could not become the basis upon which to predicate the right of a carrier to charge a lesser sum for the carriage of freight passing through that point to a more distant place, because of the competition at such more dis-

tant place. The court summed up its conclusions as follows (39 C. C. A. p. 425, 99 Fed. Rep. p. 63):

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the south, this is no ground for refusing to do justice to Chattanooga. The truth is, that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates, when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the Commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not responsive to the conclusion that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville.

Without taking at all into view the legal propositions announced by the circuit court of appeals in its opinion, and conceding, without passing upon such questions, that they were all correctly decided, it is plain that all the premises of fact upon which the propositions of law decided by the circuit court of appeals rest are at variance with the propositions of fact found by the Commission, in so far as that body passed upon



[27] \*the facts. From this it results that to decide the case in the aspect in which it is now presented we would be obliged to go into the whole evidence, as a matter of original impression, in order to determine the complex questions which the case presents. Among those which of necessity would arise for decision would be whether the original agreement fixing rates to the southern territory, made long since and acted on consecutively for years, was of such a nature as to cause those rates to be illegal, although they might be found to be just and reasonable in and of themselves. If not, whether Chattanooga was from its situation properly embraced in the southern territory, and, if not, whether the Louisville & Nashville Railroad had violated the law by exceptionally reducing its rates to Nashville. If it had not, did it follow, because the condition at Nashville gave that city an exceptionally low rate, that Chattanooga was in a position to be entitled, as a matter of right, to as low or a lesser rate?

To state these issues is at once to demonstrate that their decision, as a matter of first impression, properly belonged to the Commission, since upon that body the law has specially imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times constrained to correct erroneous constructions which have been put by the Commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where, under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the Commission upon such subjects. This rule is aptly illustrated by the opinion in *Louisville & N. R. Co. v. Behlmer* (1900) 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209, in which case, after pointing out the same error of construction adopted and applied by the Commission in the present case, the court declined to undertake an original investigation of the facts, saying (p. 675, L. ed. p. 319, Sup. Ct. Rep. p. 219):

"If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from

[28] view by the Commission, and were \*not weighed by the circuit court of appeals, because both the Commission and the court erroneously construed the statute. But the law attributes prima facie effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on re-

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view of the action of the Commission the circuit court of appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238, L. ed. p. 954, Inters. Com. Rep. p. 441, Sup. Ct. Rep. p. 682):

"If the circuit court of appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the Commission in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence; and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was."

"We think these views should be applied in the case now under review."

\*The decree of the Circuit Court of Appeals [29] should be reversed, with costs, and the case be remanded to the Circuit Court, with instructions to set aside its decree adjudging that the order of the Commission be enforced, and to dismiss the application made for that purpose, with costs, the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law. And it is so ordered.

Mr. Justice Harlan dissents.

INTERSTATE COMMERCE COMMISSION, Appt.,

v.

CLYDE STEAMSHIP COMPANY, Georgia  
Railroad Company, et al.

THE SAME

v.

WESTERN & ATLANTIC RAILROAD  
COMPANY et al.

THE SAME

v.

CLYDE STEAMSHIP COMPANY et al.

(See S. C. Reporter's ed. 29-33.)

Interstate commerce—long and short hauls  
46 729

—effect of competition—facts not found by Commission.

1. Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the Act to Regulate Commerce, may produce the dissimilarity of circumstances and conditions provided in § of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Interstate Commerce Commission.
2. On application to the courts to enforce an order of the Interstate Commerce Commission, which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts.

[Nos. 68, 69, and 70.]

*Argued November 5, 6, 1900. Decided April 8, 1901.*

**A** PPEALS from the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming decrees which decline to enforce orders of the Interstate Commerce Commission. *Modified.* See same case below, 35 C. C. A. 217, 93 Fed. Rep. 83.

The facts are stated in the opinion.

**Mr. L. A. Shaver** argued the cause, and, with *Assistant Attorney General Beck*, filed a brief for appellant.

**Mr. Ed. Baxter** argued the cause and filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

[29] \*Mr. Justice **White** delivered the opinion of the court:

[30] \*These cases, with others of like character, originated in complaints brought before the Interstate Commerce Commission by the railroad commission of the state of Georgia in the names of the members of that body. Each complaint averred that the defendant carriers were guilty of wrong in that they were illegally charging a greater rate to certain shorter-distance points than they were asking to certain longer-distance points, in violation of the long and short haul clause of the 4th section of the Act to Regulate Commerce, and, as ancillary to this complaint, that the rates exacted by the defendant carriers were unreasonable and amounted to both an undue preference and an unjust discrimination.

In case No. 68 the complaint was that the rates charged by the defendant for freight transportation by continuous carriage from the city of New York and other eastern seaboard points to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain,—towns and stations situated on the

line of the Georgia Railroad between Augusta, the eastern terminus of that road, and Atlanta, its western terminus,—were greater in each case than the amounts charged and received for freight carried to the city of Atlanta, the longer-distance point.

In case No. 69 the complaint was that the rates of freight charged by the defendants for freight transportation by continuous carriage from the city of Cincinnati and other Ohio river points to Marietta, Acworth, Cartersville, Kingston, Adairsville, and Calhoun,—towns and stations situated on the Western Atlantic Railroad between Chattanooga, the northern terminus of that road, and Atlanta, the southern terminus,—were greater on each class than the amount charged and received for freight carried to Atlanta, the longest-distance point.

In case No. 70 the complaint was that the rates of freight charged by the defendants for freight transportation by continuous carriage from the city of New York and other eastern points to West Point, La Grange, Hogansville, Grantville, and Newman,—towns and stations on the Atlanta & West Point Railroad, Atlanta being the eastern terminus of said road and the town of West Point its western terminus,—were greater on each class than the amount charged and received for freight to a \*longer-distance [31] point, viz., the city of Opelika, situated further west on a connecting railroad known as the Western Railroad of Alabama.

After issues made by answers, and hearing had upon evidence introduced before the Commission, that body entered an order in each case, in substance commanding the defendants to cease and desist from charging and receiving any greater compensation in the aggregate for the transportation of property between the points of initial shipments mentioned in the complaint and the shorter-distance points therein referred to than was exacted to the more distant points specified in the various complaints. The order, however, contained a proviso that it should not be operative until a date designated, to enable the defendants to apply, under the 4th section of the act, to be relieved from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation for a lesser than for a longer haul, under substantially similar circumstances and conditions. 5 I. C. C. Rep. 327, 4 Inters. Com. Rep. 120.

The defendant carriers, not having availed of the permission thus accorded, and refusing to obey, the Commission, in due time, began proceedings in equity in the circuit court of the United States for the northern district of Georgia to enforce obedience to its orders. In the circuit court additional testimony was taken. All the cases were considered and passed on together. The court decided that the Commission had erroneously construed the statute in holding that competition which was actual and substantial in its effect upon rates, if resulting



from the action of other carriers who were subject to the Act to Regulate Commerce, could not produce the dissimilarity of circumstances and conditions provided in the 4th section of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Commission. It moreover found that the rates in controversy were in and of themselves just and reasonable, and did not give rise either to undue preference or unjust discrimination. The court therefore declined to enforce the order of the Commission. 88 Fed. Rep. 186. On appeal to the circuit court of appeals the decrees of the circuit court were affirmed. 35 C. C. A. 217, 93 Fed. Rep. 83.

[32] \*In deciding the *Alabama Midland Case*, 168 U. S. 164, 42 L. ed. 422, 18 Sup. Ct. Rep. 45, we had occasion to refer to the opinion announced by the Commission in the cases now under review, because the ruling of the Commission in the matter which was examined in the *Midland Case* was like the one made in the present cases. The opinion by which the Commission sustained the ruling by it made in the *East Tennessee, Virginia, & Georgia Case*, which we have just examined and decided to be erroneous, was also expressly predicated on the opinion which the Commission had previously expressed in these cases. It follows that the error committed by the Commission in interpreting the statute in these cases has been at least twice heretofore pointed out in the decisions of this court, and hence further examination of the subject is unnecessary. It will be seen from an inspection of the able opinions of the courts below that they expounded the statute in entire accord with the construction which we had previously given to it, and which we have again applied in the *East Tennessee, Virginia, & Georgia Case*. Despite, however, the error of law which the Commission committed in these cases, and in consequence of which error it made no investigation of the facts, but postponed the performance of its duty on this subject until a further application was made for relief, it is now urged that we should enter into an original investigation of the facts for the purpose of considering a number of questions as to discrimination, as to preference, as to reasonableness of rates, as to the relation which the rates at some places bore to those at others, in order to discharge the duty which the statute has expressly in the first instance declared should be performed by the Commission. In the *East Tennessee, Virginia, & Georgia Case*, just decided, 181 U. S. 1, ante, 719, 21 Sup. Ct. Rep. 516, following the ruling made in *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 667, 44 L. ed. 309, 316, 20 Sup. Ct. Rep. 209, and previous cases, we have held that, where the Commission by reason of its erroneous construction of the statute had, in a case to it presented, declined to adequately find the facts, it was the duty of the courts, on application being made to them to enforce the 181 U. S.

erroneous order of the Commission, not to proceed to an original investigation of the facts which should have been passed upon by the Commission, but to correct the error of law \*committed by that body, and, after doing so, to remand the case to the Commission so as to afford it the opportunity of examining the evidence and finding the facts as required by law. The investigation which we have given the questions which arise in these cases, and the consideration which we have bestowed on the issues which were involved in the case of the *East Tennessee, Virginia, & Georgia Railroad*, have served but to impress upon us the necessity of adhering to that rule, in order that the statute may be complied with both in letter and spirit. Acting in accordance with this requirement, whilst affirming the decree below, which refused to enforce the order of the Commission, we shall do so without prejudice to the right of the Commission, if it so elects, to make an original investigation of the questions presented in these records. [33]

The decrees of the Circuit Court of Appeals and of the Circuit Court must be modified by providing that the dismissal of the bills shall be without prejudice to the right of the Interstate Commerce Commission, if it so elects, to make an original investigation of the questions contained in the records pertinent to the complaints presented to that body, and, as so modified, said decrees must be affirmed, and it is so ordered.

Mr. Justice Harlan dissents.

J. L. LOMBARD, E. A. Cummings, W. H. Doble, et al., Plffs. in Err.,  
v.

WEST CHICAGO PARK COMMISSIONERS.

(See S. C. Reporter's ed. 83-45.)

*Assessments for benefits—new assessment after first is held illegal—Federal court following state decision.*

1. Where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work.
2. Whether a municipal ordinance is or is not valid, and the extent to which it is so, having regard to the state Constitution and laws, is wholly a state, and not a Federal, question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.
3. The decision of the supreme court of a state

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Klpley v. Illinois ex rel. Akln.* 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

that it is competent on a new assessment to determine questions of benefit from the proof, even though in so doing a different result is reached from that which had been arrived at when a former assessment, which has been set aside, was made, decides a local, and not a Federal, question.

[No. 160.]

*Argued January 31, 1901. Decided April 8, 1901.*

**I**N ERROR to the Supreme Court of the State of Illinois to review a decision affirming a decree sustaining assessments for benefits. *Affirmed.*

See same case below, 181 Ill. 136, 54 N. E. 941.

Statement by Mr. Justice **White**:

[34] \*The West Chicago park commissioners, in virtue of authority vested in them by the laws of the state of Illinois, proposing to improve Douglas boulevard, and requiring a special assessment to enable them to pay for the work, applied, as the law directed in such case, to the municipal authorities of West Chicago to cause such special assessment to be levied and collected according to law. In March, 1893, the town, acting on this request, adopted an ordinance providing for executing the work and for a special assessment on the abutting property to pay for the same. The only provision of this ordinance which it is essential to note for the purposes of the issues which are now before us is the 2d section thereof, which provided that the sum of the assessment when made should be payable in instalments, the first being 20 per cent of the whole, and the deferred portions to bear interest at a rate fixed in the ordinance. Following the requirements of the state laws, after the passage of this ordinance application was made to the county court of Cook county to take the necessary steps to execute the provisions of the ordinance. Pursuant to the directions of the Illinois statutes the court appointed commissioners, who examined and made a full report on the work, and exhibited an assessment roll stating the sum due by the abutting property; the amount assessed on each piece being stated to have been fixed in accordance with the benefits which it was ascertained would result to each piece from the performance of the contemplated work. After notice to those concerned to appear and urge objections, if any they had, to the assessment roll, and after due proceedings in which ample \*opportunity was afforded to resist the assessment, the court passed a decree of confirmation fixing the amount due by each piece of property in accordance with the report of the commissioners, and declaring that the sum assessed against each piece of property did not exceed the benefit conferred on the property. This decree, however, did not in all respects uphold the assessments made by the commissioners, as it sustained the objections of certain property holders on the ground that the sum assessed against them exceeded the benefits, and as to

these objecting property holders the amount assessed was reduced to correspond with what the court concluded was the actual benefit shown to result. J. L. Lombard was the owner of a piece of property within the assessment district, which had, it seems, been omitted from the roll returned by the commissioners. The decree recited that this property (describing it) had been by consent found to be within the district, and would be benefited to a certain amount, and the sum of this benefit was by consent awarded against the property as described. The assessment, the decree of confirmation provided, was to be paid in instalments as specified.

The collection of the assessment proceeded according to the roll, and the execution of the proposed improvement was undertaken. Some of those who were assessed paid; others did not; and on proceedings being taken as authorized by the laws of Illinois to enforce payment, a controversy arose which, in its final stage, was considered by the supreme court of the state of Illinois, and the court decided that the assessment was void and could not be enforced. The reasoning by which the court so decided was this: That under the statutes of Illinois there was no authority to provide for a payment of a special assessment in instalments, and therefore, as the ordinance had fixed that method of payment, it was void. *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812. And the principle of this case was applied in subsequent cases. *Farrell v. West Chicago*, 162 Ill. 280, 44 N. E. 527; *Connor v. West Chicago*, 162 Ill. 287, 44 N. E. 1118; *White v. West Chicago*, 164 Ill. 196, 45 N. E. 495. The improvement had in the meanwhile been constructed. The West Chicago park commissioners, after the decisions in question, \*dismissed the previous proceedings which had taken place in relation to the assessment. In July, 1895, an act was passed by the legislature of Illinois, which authorized park authorities, whenever a special assessment had been declared void by a court of competent jurisdiction, to "collect a new special assessment on property benefited by said improvement, or completed portion thereof, in the same manner as in other cases, and the lots, blocks, tracts, or parcels of land found benefited by said improvements, or the completed portion thereof, shall each severally be liable to pay for said benefits to the same extent and the same proportion as in other cases." *Hurd's Statutes of Illinois*, 1899, chap. 105, § 20, p. 1244.

After the passage of this law the West Chicago park commissioners in July, 1896, adopted an ordinance providing an assessment to pay for the work of improving Douglas boulevard, which had been completed, as above stated. The 1st section of the ordinance, by way of preamble, recited the occurrences substantially as above stated. The 2d and 3d sections were as follows:

"Sec. 2. That a new special assessment on the property benefited by said improvement, to the amount that the same may be legally assessed for, be levied to pay the cost of said boulevard improvement above specified, and

[36]



the remainder of such cost be paid by general taxation, viz., from the general funds of this board, all in accordance with an act of the general assembly of the state of Illinois, entitled 'An Act to Enable the Park Commissioners or Park Authorities to Make Local Improvements, and Provide for the Payment thereof,' approved June 24 and in force July 1, 1895.

"Sec. 3. That the estimate of the cost of the said improvement be made by this commission and spread of record."

[37] Subsequently the park commissioners made an estimate and report, and application was made to the county court of Cook county for the enforcement of an assessment roll prepared by the park commissioners in accordance with the estimate. This roll stated the total amount of the cost of the work, and charged the individual proprietors in the aggregate with a large portion of the total amount because of the special benefits conferred by "the work upon them; the remainder—an insignificant part—of the cost was charged to the public, because of the general benefit to the public, which, it was found, had been produced by the doing of the work. The sum charged against the individual property holders was distributed among them; and this distribution was shown by a statement containing the name of the owners, the lot owned by him, the total amount of the assessment, the sum to be deducted from this total in consequence of the instalments which had been paid on the former and void assessment, the net result of the benefit after making this deduction being stated in a separate column. To this roll was appended the certificate of the park commissioners, as required by law, that—

"Before entering upon their said duties they examined the locality where the said completed improvement has been made, and the lots, blocks, tracts, and portions of land which are specially benefited thereby, and did estimate what proportion of the total cost of said completed improvement is of benefit to the public, and what proportion thereof is of benefit to the property benefited, and did apportion the same between the said park district and such property, so that each should bear its relative equitable portion; . . . that having found said amounts they did apportion and assess the amount so found of benefit to said property upon the several lots, blocks, tracts, and parcels of land in the proportion in which they are benefited by said completed improvement, and that no lot, block, tract, or parcel of land has been assessed the greater amount than it has been actually benefited thereby; that said assessment roll also shows the credit to which each lot, block, tract of land so specially assessed is entitled to, if any, for or on account of payments on previous assessments or instalments thereof, and the net amount of benefits assessed thereon."

The amount of the assessment against the individual lotowners for benefits in the new roll differed from the sum assessed in the previous one. Indeed, the new roll disregarded the reductions which had been de-

creed in the previous proceedings as to certain of the lotowners, since it increased the amount due by these owners over the sum fixed by the previous decree. "The property of Lombard, which had been placed upon the previous roll by consent at a particular amount, was placed upon the new roll for a larger sum than that shown in the previous roll. After publication of notice of the filing of the roll the present plaintiffs in error appeared in the county court of Cook county and objected to the confirmation of the roll. The objections which were urged were numbered from 1 to 18, and denied the validity of the new roll upon many grounds, all of which involved purely matters of local and non-Federal concern. They subsequently filed a motion to cancel the assessment on eight specified grounds, none of which involved the Constitution or laws of the United States. And this is also true of amended objections which were filed. Later, additional objections were filed, numbered from 1 to 5. The 1st charged, in general terms, that the assessment and the proceeding to confirm the same were in violation of the 14th Amendment to the Constitution of the United States; the 2d, that as the proceeding was not authorized by any valid ordinance at the time the work was done, to confirm the assessment under the assumption that it was sustained by the act of 1895 would be a violation of the 14th Amendment to the Constitution of the United States; the 3d charged that, as the ordinance under which the previous assessment was made had been held to be void, there was no authority for doing the work at the time when it was done, and hence to enforce the subsequent ordinance would also violate the 14th Amendment; the 4th but reiterated that as the work was completed before the Illinois act of 1895 had been passed, to construe that law as authorizing the assessment would also violate the Constitution of the United States; and the 5th repeated in different form the same proposition by asserting that the law of 1895, if held to be retroactively applicable to the work which had been completed at the time of its passage, would be repugnant to the 14th Amendment to the Constitution.

On the hearing, by objections to evidence, by motions to strike out, and by additional pleadings, the grounds above stated were repeated, but were all overruled. Following this, it is stated in the bill of exceptions,—

"And thereupon all the said motions and legal objections having been disposed of, the said cause came on to be tried upon the objections triable by a jury; and thereupon it was stipulated in open court by the petitioners and by said objectors that the said cause should be submitted to the court for trial without a jury upon the said issues, and upon the same evidence in all respects which has been offered upon the said motions and legal objections as hereinbefore set forth, without recalling witnesses or introducing or recalling or offering the said testimony, the same to be treated as having been of-



ferred upon the said issues, which was all the evidence offered on the said hearing. And thereupon the objectors contended that it was shown by the said evidence that the property of the said objectors and each of them, severally, was assessed more than its proportionate share of the cost of the said improvement; but said objections were overruled, and the court found the issues for the petitioners. . . ."

The decree which was entered expressly found that in each particular case the property assessed was benefited to the sum of the assessment. An appeal was taken from this decree to the supreme court of the state of Illinois, and on such appeal errors were assigned numbered from 1 to 20. They repeated in various forms of statement all the objections of a Federal nature which had been previously urged and asserted, besides a number of grounds of purely local concern. The supreme court of Illinois decided that, although it was settled by a course of decisions in that state that there must exist authority for making a special assessment at the time the levy was made and before the work was done, yet the original ordinance under which the first assessment, which had been declared illegal, was made, afforded such an authority. Construing its former opinions, the court said that, whilst it had declared the previous assessment to be void because it provided for a payment in instalments contrary to the state statutes, nevertheless the ordinance to the extent that it directed an assessment remained, albeit it had been held that the provision as to payment by instalments could not be enforced. The court then reviewed all the various objections to the form of the assessment, and [40] held them to be without merit.\* It, moreover, decided that as the previous assessment had been set aside because of the instalment feature, that the sums fixed therein were not conclusive, and on the new assessment it was competent to re-examine the question of benefits and to restate the amounts due, even although, in doing so, it was ascertained that a larger sum was assessable upon some portions of the property than had been decreed by the order which confirmed the previous assessment. As to the property of Lombard, the court decided that the proof established that a change in condition had caused the property to be justly assessed for a larger proportion of benefit than had been attributed to it by consent in the first assessment. 181 Ill. 136, 54 N. E. 941. To this decision the present writ of error is prosecuted.

Mr. Nathan Grier Moore argued the cause, and Messrs. John P. Wilson and William B. McIlvaine filed a brief for plaintiffs in error:

The ordinance of March 28, 1893, by its terms required the entire cost of the improvement to be charged upon the abutting property. This is in conflict with the Constitution of the United States, and the whole proceeding should have been dismissed on motion of plaintiffs in error.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Lyon v. Tona-wanda*, 98 Fed. 361.

When the trial court in Illinois and the supreme court of that state determined that the ordinance of March 28, 1893, was void, but, nevertheless, that it formed a sufficient basis for a special assessment or special tax for work previously completed, it imposed upon the owners of property a charge without due process of law.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 559, 42 L. ed. 854, 18 Sup. Ct. Rep. 445; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *Guthrie*, 14th Amend. p. 45.

The act of the legislature of Illinois passed June 24, 1895, assuming to confer authority to pass a new ordinance for a special assessment, after the work had been done, so as to charge the cost of it on private property, is in conflict with the Constitution of the United States.

*St. Louis, use of Creamer, v. Olemens*, 52 Mo. 133; *Brady v. King*, 53 Cal. 44; *Cooley, Taxn.* 1st ed. p. 227; *Cooley, Const. Lim.* 2d ed. pp. 407, 420, 421; *Spencer v. Merchant*, 125 U. S. 351, 31 L. ed. 765, 8 Sup. Ct. Rep. 921; *New Orleans v. Clark*, 95 U. S. 655, 24 L. ed. 523.

The law being, when this proceeding was begun, that such an ordinance was void, and the court having so decided, the later decision, if in terms to the contrary, would not govern this court.

*Thompson v. Perrine*, 103 U. S. 816, 26 L. ed. 617.

If the judicial authorities of the state deny any litigant the equal protection of the laws, or by judgments charge him or his property without due process of law, it is as much the act of the state as if done by the legislature.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 228, 41 L. ed. 982, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 559, 42 L. ed. 854, 18 Sup. Ct. Rep. 445; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *Guthrie*, 14th Amend. 45.

The rule as to accepting the interpretation of the state court is not universal. It does not strictly apply to the effect and operation of state statutes. The Supreme Court may decline to concur in the view of the state court as to the real effect and operation of a state statute or ordinance and its necessary tendency.

*Guthrie*, 14th Amend. p. 45; *Soon Hing* 181 U. S.



v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Railroad & Telephone Cos. v. Tennessee Bd. of Equalizers*, 85 Fed. 302.

Ordinarily the Supreme Court will not attempt to review and correct the errors of state tribunals in the general administration of the local laws; but if a law or ordinance be systematically administered so as to violate the 14th Amendment the court will interfere.

*Guthrie*, 14th Amend. p. 45; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Arrow-smith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

The decisions of the local courts on questions as to the validity of the ordinance, as they were when the question arose, will be followed by this court; but it will not permit them to refuse a citizen a benefit of the law thus ascertained.

*Thompson v. Perrine*, 103 U. S. 816, 26 L. ed. 617; *Anderson v. Santa Anna*, 116 U. S. 361, 29 L. ed. 634, 6 Sup. Ct. Rep. 413; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968.

An ordinance, though purporting to create a charge against real property for the cost of an improvement, but with no statute to authorize it and no person or court provided to decree or enforce it, is altogether ineffectual. No municipal act done without statutory authority can impose an obligation or duty.

*Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Anderson v. Santa Anna*, 116 U. S. 360, 29 L. ed. 634, 6 Sup. Ct. Rep. 413; *St. Louis, use of Creamer*, v. *Olemens*, 52 Mo. 133; *Brady v. King*, 53 Cal. 44.

It is the statute, and not the ordinance, with no law to enforce it, which creates a charge on private property.

*Weld v. People ex rel. Kern*, 149 Ill. 258, 36 N. E. 1006.

A city council has no right to make an improvement, and then, after it is made, pass an ordinance providing for the making thereof. The passage of the ordinance must precede the making of the improvement; and the making of it, and all steps thereafter, are absolutely void unless preceded by a valid ordinance.

*Pells v. Paxton*, 176 Ill. 318, 52 N. E. 64.

The defects in the first ordinance were incapable of being cured by a retroactive law, for the legislature had no power to dispense with the vital requirement that a valid ordinance should be the first step, and no retroactive statute can cure omissions which it could not have authorized.

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*Cooley*, Taxn. p. 227; *Cooley*, Const. Lim. 2d ed. pp. 407, 420, 421; *Anderson v. Santa Anna*, 116 U. S. 364, 29 L. ed. 635, 6 Sup. Ct. Rep. 413; *St. Joseph Twp. v. Rogers*, 16 Wall. 663, 21 L. ed. 338; *Thompson v. Lee County*, 3 Wall. 331, 18 L. ed. 178. See also *Folsom v. Township Ninety-Six*, 59 Fed. 69; *Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240.

The act of 1895 is not retroactive in any event, so as to make any of the proceedings good from the beginning. If it cures any of these defects at all, it does so only from the date it took effect, and this would leave the constitutional requirement of a valid pre-existing ordinance still lacking.

*Spencer v. Merchant*, 125 U. S. 351, 31 L. ed. 765, 8 Sup. Ct. Rep. 921; *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280; *New Orleans v. Clark*, 95 U. S. 655, 24 L. ed. 523.

*Mr. Robert A. Childs* argued the cause, and, with *Mr. Charles Hudson*, filed a brief for defendants in error:

The United States court will consider only the Federal question. The decision of the state court on all other questions, and on all questions of fact, is final and will not be disturbed.

*Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

Although one Federal question is properly raised, the United States Supreme Court will not consider another Federal question which was not properly raised, in the court below:

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; *Chapin v. Fye*, 179 U. S. 127, *ante*, 119, 21 Sup. Ct. Rep. 71.

Nor is it sufficient that the Federal question be raised below, merely; it is also necessary that the plaintiff in error shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. Errors not assigned according to this rule will be disregarded.

Supreme Court Rule 35; *Stevens v. Gladding*, 19 How. 64, 15 L. ed. 569; *Grape Creek Coal Co. v. Farmers' Loan & T. Co.* 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; 2 Enc. Pl. & Pr. 942, 943.

It is necessary that the Federal question should be raised by the assignments of error in the state supreme court, as well as in the *nisi prius* court; *ergo*, it is necessary that it should be raised in the assignments of error in this court.

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

The United States Supreme Court will not undertake to correct errors of state courts in respect to details of assessments. Its jurisdiction is at an end if it finds that sufficient provision has been made by the state law for contesting the charge when imposed.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Kelly v. Pittsburgh*,



104 U. S. 78, 28 L. ed. 658; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 233, 33 L. ed. 894, 10 Sup. Ct. Rep. 533; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 625; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The objection that the first proceeding in the county court was for collection of a tax, as distinguished from an assessment, and that therefore the question of benefits was not considered, is not founded on fact, is not well taken in law, has been denied by the state supreme court, and raises no Federal question.

*Starr & C. (Ill.) Rev. Stat. 1896 ed. p. 748, chap. 24, art. 9, § 133; Ill. Laws 1895, p. 100; Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; *Cummings v. West Chicago Park Comrs.* 181 Ill. 136, 54 N. E. 941.

That the ordinance of March 28, 1893, was valid so far as to authorize an assessment has been held by the Illinois supreme court, and the objection thereto because declared void in other parts is not well taken in law and raises no Federal question. If a statute or ordinance is void in part only, the rest of it, if separable, will be enforced without reference to the void part.

*White v. Alton*, 149 Ill. 626, 37 N. E. 96; Ill. Const. 1870, art. 4, § 13; 23 Am. & Eng. Enc. Law, p. 225; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Cummings v. West Chicago Park Comrs.* 181 Ill. 136, 54 N. E. 941.

Moreover, where a new statute has been

enacted expressly to take the place of a former unconstitutional statute, this court has held the new act constitutional, and has enforced the assessment thereunder.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

The objection that a law is *ex post facto* will not be considered under a general objection that a decision violates the 14th Amendment.

*Dewey v. Des Moines*, 175 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

\*Mr. Justice **White**, after making the [40] foregoing statement, delivered the opinion of the court:

The assignments of error contained in the record are nine in number, and eleven in addition have been made since the record was filed in this court. The question whether the benefit accruing to each particular piece of property assessed equaled the sum of the assessment placed thereon was foreclosed by the findings of fact of the trial court, to which court the case was submitted without the intervention of a jury. It is suggested, although under the statutes of Illinois a special assessment can only be made for the amount of the benefit shown to exist, this is of no concern in this case, since this levy is not a special assessment, but is a special tax. Where a special tax is imposed under the law of Illinois, it is asserted, no inquiry into the benefits can be had, and, therefore, there arises the question whether the levy was invalid as exceeding the benefits to be derived, \*since all investigation into the [41] amount of the benefits was, as a matter of law, excluded. But this proposition is plainly an afterthought. From the statement of the case which precedes, it is apparent that the objectors to the assessment considered that their defense raised the issue of benefit, that they tendered proof, submitted the question to the trial court without a jury, and had an award against them. It is plain, also, that this contention was not raised by the assignment of errors in the supreme court of Illinois, and such question was not by that court in any way considered. Putting out of view questions of form, the principal contentions made in the supreme court of Illinois, as shown by the assignment of errors in that court, were as follows: That as under the law of the state of Illinois, an authority existing at the time the work was done was necessary to justify an assessment, a violation of the 14th Amendment would be brought about by holding that authority for the assessment was supplied by the Illinois act of 1895, since such law was enacted after the work was completed; and that as the previous ordinance had been declared void by the su-



preme court of Illinois, to hold such void ordinance to be an authority for the subsequent assessment would also violate the 14th Amendment, since it would amount to a want of due process of law and a denial of the equal protection of the laws. And these propositions, stated in varying form, really express every substantial issue raised by the twenty assignments which are here pressed. We do not take up each assignment in detail to show that this is the case, since a statement of them all, as summed up in argument of counsel, is in the margin,<sup>†</sup> and renders a more detailed enumeration unnecessary.

- [42] \*The power of the state of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied.

It is no longer open to question that where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work. *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

With these two propositions in mind it is certain that if the power flowing from the ordinance which the supreme court of the state of Illinois upheld existed prior to the work, the assessment was valid. So, also, if the authority was only given subsequent to the work, it was, from the point of view of the Constitution of the United States, legally conferred. In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned.

- [43] The contention advanced,\* therefore, amounts to this, that a violation of the Constitution of the United States has been produced by the exercise of a power which, whatever view may be taken, could be brought into play without giving rise to a conflict with such Constitution. But in effect, it is asserted, this deduction is inapposite to this

case, since the proposition here relied upon is that the supreme court of the state of Illinois maintained the assessment on a void ordinance, and therefore in effect decided that a valid assessment could be made where there was no authority whatever for the levy. This, however, rests upon an entirely false assumption, since it is manifest that the court below held that there was a valid ordinance, that is, one which sufficiently conferred the authority to make the assessment. Whether the ordinance was or was not valid, and the extent to which it was so, having regard to the state Constitution and laws, was wholly a state, and not a Federal, question, and we are not concerned with it. Accepting the conclusion of the supreme court of the state of Illinois as to the existence of the ordinance by virtue of the state law and Constitution, the proposition pressed upon us comes to the result which we have above indicated, and therefore is obviously without merit. Indeed, the misconception involved in the argument was pointed out in *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229. There it was asserted that a particular assessment was void because of a mistake in the name of the person whose property had been assessed. The supreme court of Louisiana, interpreting the statutes of that state, otherwise decided. It was urged, however, that such decision was in conflict with many prior rulings of that court, and therefore a Federal question was presented. But it was held that as it was within the power of the state of Louisiana, without violating the Constitution of the United States, to direct the assessment without giving the name of the owner, by an adequate description of the property assessed, the decision of the supreme court of the state of Louisiana raised no Federal question. The court said (p. 683, L. ed. p. 625, Sup. Ct. Rep. p. 233):

"The vice which underlies the entire argument of the plaintiff in error arises from a

<sup>†</sup>"1st. As the court will see, this is a hard case. The controversy arises out of an effort to compel a ribbon of land 125 feet wide, along the margin of a boulevard 250 feet in width, decorated and ornamented as a park, to pay the entire cost of its improvement, although it is made for the general benefit of the inhabitants.

"2d. The original ordinance for the improvement was declared by the supreme court, in a direct proceeding, to be void, and so utterly without effect as to form no basis for an adjudication thereon by the county court.

"3d. The Constitution and laws of the state, as uniformly construed, permit no such charge to be created against private property without a previous valid ordinance providing that the cost be paid by special assessment or special tax.

"4th. The previous assessment having been extinguished completely by the decision of the supreme court, there remained no authority of law to charge this property. The legislature thereupon passed a law, after the work had been completed, providing that, notwithstanding the 181 U. S.

said provisions of the Constitution of the state, the work previously completed might be charged upon the private property by a procedure therein for the first time provided.

"5th. On the application for such an assessment the property owners protested, setting up the provisions of the Constitution of the United States in denial of the right.

"6th. The courts of the state, although they had held the original ordinance void, so as to confer no jurisdiction on the courts even to consider it, held that it was valid for the purpose of creating a charge on property of plaintiffs in error.

"7th. If the ordinance was in fact valid, then the original judgment of confirmation, reducing this assessment, was valid and effectual, and should have been applied here.

"8th. By the whipsawing process we have referred to, the courts of the state have held that the ordinance of March 28, 1893, was void, so as to deprive plaintiffs in error of the benefits of its adjudication reducing the amount of their assessment; but valid for the purpose of creating a charge upon their property."

failure to distinguish between the essentials of due process of law under the 14th Amendment \*and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor conterminous.

"The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question, within the final jurisdiction of the courts of last resort of the several states."

And the principle thus inculcated not only disposes of the argument which we have previously considered, but also makes it clear that the supreme court of Illinois decided a local, and not a Federal, question when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment, which had been set aside, was made. The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the supreme court of Illinois, because that court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the supreme court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several states would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same

[45] \*court in former cases. In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the supreme court of the state of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration.

*Judgment affirmed.*

**NATIONAL BANK OF DAINGERFIELD,**  
*Plff. in Err.,*  
*v.*

G. W. RAGLAND.

(See S. C. Reporter's ed. 45, 46.)

*Limitation of actions—usury by national bank.*

The inclusion of usurious interest as principal in notes given to a national banking association does not constitute a payment of the interest within the meaning of U. S. Rev. Stat. §§ 5197, 5198, so as to start the running of the statute against a right of action to recover twice the amount of the interest paid; but "the usurious transaction" from the date of which the statute begins to run is the time when the usurious interest is actually paid.

[No. 200.]

*Submitted March 18, 1901. Decided April 8, 1901.*

**I**N ERROR to the Court of Civil Appeals for the Fourth Judicial District of Texas to review a decision affirming a judgment against a national bank for usury. *Affirmed.*

See same case below, 51 S. W. 661.

The facts are stated in the opinion.

**Mr. James M. Turner** submitted the cause for plaintiff in error:

The period of limitation provided by U. S. Rev. Stat. § 5198, began to run when defendant in error made and delivered his negotiable promissory notes to plaintiff in error, and received from the latter the amount for which they were given, less the amount discounted or reserved therefrom as interest.

*Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888; *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 15 S. W. 132.

The execution of a negotiable promissory note for the interest is "payment" thereof within the meaning of the statute.

*Lebanon Nat. Bank v. Karmany*, 98 Pa. 65.

No brief was filed for defendant in error.

\***Mr. Justice White** delivered the opinion [45] of the court:

At various times between January 1, 1895, and May 22, 1896, the defendant in error, G. W. Ragland, with sureties, executed promissory notes to the Daingerfield National Bank, for various sums of money loaned to said Ragland. The bank was a national banking association doing business in Daingerfield, Morris county, Texas. Each original note embraced not only the amount of the loan, but interest to the date of maturity of the note, calculated at a rate higher than that allowed by law. Certain of the notes were renewed from time to time, the additional interest for the extended period being added, calculated \*also at a [46]

NOTE.—As to the lawfulness of taking interest in advance—see note to *Bank of Newport v. Cook* (Ark.) 29 L. R. A. 761.



usurious rate. The first payment made upon any of the notes so executed was on November 1, 1896, and all the notes were fully paid prior to February 14, 1898.

On March 28, 1898, Ragland filed a petition in the district court of Morris county, Texas, to recover twice the amount of the interest so as aforesaid paid by him, basing his right to recover upon the provisions of § 5198 of the Revised Statutes of the United States. After deducting as an offset the amount of a note executed by Ragland which had been assigned to the bank by the payee thereof, there was found due to Ragland upon the cause of action stated in his petition the sum of \$252.05; and for that amount, with interest, judgment was entered in favor of Ragland in October, 1898. On appeal to the court of civil appeals the judgment was affirmed, and a motion for rehearing was overruled. 51 S. W. 661. An application made to the supreme court of Texas for an allowance of a writ of error was dismissed for want of jurisdiction. Thereafter the Chief Justice of the court of civil appeals allowed a writ of error, and the case is now here for review.

In the assignments of error contained in the record it is conceded by counsel for the plaintiff in error, and the record fully establishes, that the interest, the subject of this controversy, was paid to the plaintiff in error less than two years before Ragland commenced his action. The sole contention in this court is that the courts of Texas erroneously held that the limitation of the statute did not begin to run until the usurious interest was paid. That the courts below, however, did not commit error in this regard is shown by *Brown v. Marion Nat. Bank* (1898) 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 395, where, construing §§ 5197 and 5198 of the Revised Statutes, it was held that the "usurious transaction," from the date of which the limitation of the statute begins to run, is the time when the usurious interest was actually paid, and not the time when it was agreed that it should be paid. This refutes the argument relied on at bar, that the inclusion of the usurious interest as principal in the notes amounted to payment of the interest within the meaning of the statute.

*Judgment affirmed.*

[47] \*EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, NEW YORK,  
Plff. in Err.,

v.

LAWRENCE S. WELLING and Marion Bonnoitt.

(See S. C. Reporter's ed. 47-49.)

Appeal—Federal question—not raised in state court.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Klpley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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The contentions that the decision of a state court denies full faith and credit to public acts of another state, and that the obligation of a contract is impaired, and that a party is deprived of his property without due process of law, will not be considered by the Supreme Court of the United States on writ of error to a state court, where such contentions were not made in the state court until after the case had been remitted to the trial court and application was made for rehearing; and the court will not look into the record to determine whether the existence of such constitutional questions was necessarily involved.

[No. 190.]

Argued March 11, 1901. Decided April 8, 1901.

IN ERROR to the Supreme Court of the State of South Carolina to review a decision affirming a judgment in an action for a penalty. *Dismissed.*

See same case below, 56 S. C. 280, 34 S. E. 409.

Statement by Mr. Justice White:

This action was commenced in the court of common pleas of Darlington county, South Carolina, by Welling and Bonnoitt, to recover of the Eastern Building & Loan Association of Syracuse, New York, the penalty provided by the statutes of South Carolina for wrongfully failing to enter in the proper office satisfaction of a mortgage which had been executed by Welling and Bonnoitt to the association.

The controversy presented by the issue joined was whether the mortgage in question secured merely the payment of seventy-eight promissory notes, each maturing monthly, and aggregating \$6,065.10, or whether in addition such mortgage secured the payment of the dues and assessments upon certain shares of stock in said association which had been subscribed for by Welling and Bonnoitt. The trial court ruled that the mortgage secured only payment of the notes. A judgment entered in favor of the plaintiff upon the verdict of a jury was subsequently affirmed by the supreme court of South Carolina. 56 S. C. 280, 34 S. E. 409. Thereupon a writ of error was allowed.

Mr. William Hephburn Russell argued the cause, and, with Messrs. William Beverly Winslow and D. A. Pierce, filed a brief for plaintiff in error:

A right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes as if it had been specifically referred to and the right directly refused.

*Chapman v. Goodnow*, 123 U. S. 540, sub nom. *Chapman v. Crane*, 31 L. ed. 235, 8

Sup. Ct. Rep. 211; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

Where the Federal question was necessarily raised, and must have been decided adversely to the claim of plaintiff in error, this court will not dismiss the writ of error.

*Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599.

It is for this court to say, and it is its duty under the Constitution to determine, whether in its decision the supreme court of South Carolina gave to the laws of New York and the contract made under those laws the same effect that such laws and contract have in the courts of New York.

*Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

This court may look to the opinion of the supreme court of South Carolina, as it does to opinions in cases coming up from the supreme court of Louisiana.

*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

**Mr. Henry A. M. Smith** argued the cause and filed a brief for defendants in error:

To justify this court in taking jurisdiction on a writ of error to the state court, the Federal question must have been so specially set up and claimed in the state court that the attention of that court was called thereto as one relied on by the party, and the decision of that court must have necessarily involved the denial of the claim.

*F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 633, 44 L. ed. 302, 20 Sup. Ct. Rep. 205.

The question as to the denial of full faith and credit appears for the first time in the petition for a rehearing filed in the state supreme court; and a question set up for the first time in such a petition is too late to bring the case within the appellate jurisdiction of this court.

*Bushnell v. Crooke Min. & Smelting Co.*

148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The claim must have been so set up in the trial court below. If not so set up in that court, then, although the state supreme court, in affirming the decision of the lower court, expressly decided against a right claimed under the laws of the United States, this court has no jurisdiction to review the decision affirming the judgment of the trial court.

*Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417.

Where only one Federal question was raised in the state courts, the party raising it cannot, on writ of error to this court, argue any other Federal question in addition thereto, not raised in the state court.

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

As the plaintiff in error had a full hearing and trial before the circuit court and supreme court of South Carolina, it is impossible to see how, under the decisions, the judgment rendered can be said to have been rendered without due process of law.

*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

\***Mr. Justice White**, after making the foregoing statement, delivered the opinion of the court: [48]

The Federal questions asserted to be presented by the record are in substance the following:

1. That the supreme court of South Carolina, by its decision, refused full faith and credit to public acts of the state of New York;

2. That by such decision the obligation of a contract was impaired; and,

3. That the decision deprived the plaintiff in error of its property without due process of law.

While in various forms, in the trial court, the association in effect claimed that the law of its incorporation formed a part and parcel of the mortgage contract, and that the decisions of the courts of New York respecting the powers and contracts of associations thus incorporated should be given effect, nowhere does it appear that it was claimed that to refuse to concur in the view stated would operate to deny the protection of the Constitution of the United States. The trial court disposed of the case solely upon what it regarded as the plain import of the terms of the contract, irrespective of the laws of New York and the decisions of the New York courts, yet in the numerous exceptions predicated on the rulings of that court there was not contained, either directly or indirectly, any contention that rights of the association protected by the Constitution of the United States had been invaded. It was not until after the supreme court of South Carolina construed the mortgage contract in accord with the claim of the plaintiffs, and that court had hence affirmed the judgment



of the trial court and remitted the cause to that court, that, in an application for a rehearing, numerous grounds were set forth in which were contained assertions that the adverse decision of the supreme court of the state was in conflict with several clauses of the Constitution of the United States. But this came too late. *Bobb v. Jamison*, 155 U. S. 416, 39 L. ed. 206, 15 Sup. Ct. Rep. 357; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88, and cases cited.

- [49] \*The assertion that although no Federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless that it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved,—is demonstrated to be unsound by a conclusive line of authority. *Spies v. Illinois*, 123 U. S. 131, 181, *sub nom. Ex parte Spies*, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21; *French v. Hopkins*, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *Chappell v. Bradshaw*, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 17 Sup. Ct. Rep. 577; *F. G. Oxley State Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247.

The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to be "specially set up or claimed." The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially in the latest case cited, *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.*

*Dismissed for want of jurisdiction.*

SUPREME LODGE, KNIGHTS OF  
PYTHIAS OF THE WORLD, *Piff.*  
*in Err.*,

v.

LILLIAN H. BECK.

(See S. C. Reporter's ed. 49-56.)

*Insurance—death by suicide—violation or attempted violation of criminal law—use of gun to illustrate testimony of witness—estoppel by proofs of loss.*

1. The refusal of the trial court to direct a

NOTE.—On suicide as a defense to suits for life insurance—see notes to *Aetna L. Ins. Co. v. Florida*, 16 C. C. A. 623; *Eldelty & C. Co. v. Egbert*, 28 C. C. A. 284; *Mutual L. Ins. Co. v. Terry*, 21 L. ed. U. S. 236, and *Home Benefit Assn. v. Sargent*, 35 L. ed. U. S. 1161.

As to when death results from violation of 181 U. S.

verdict for the defendant in an action on a life insurance policy on the ground of a violation of the policy by suicide will not be ground of reversal after verdict and judgment for the plaintiff on the policy, where the facts do not show beyond dispute that suicide was committed.

2. The killing of a person by the discharge of a gun which he was carrying, while at a place to which he had gone to get his wife to return home, and while he was coming out of an outdoor closet into which he had gone after making some disturbance, does not constitute a case of death while violating or attempting to violate any criminal or penal law, although he may have intended to use violence against her if she refused, since his act in going into and coming out of the closet was in no manner connected with or part of an attempt to carry out any criminal purpose.
3. A party who produces a gun for his witness to use in connection with his testimony respecting the death of a person by the discharge of a gun that he was carrying cannot complain if the other party uses the same gun for the purposes of other illustration, without giving proof to identify this with the gun that caused the death,—especially when the latter party gives some testimony tending, though perhaps only slightly, to identify it.
4. A statement in proofs of loss on a life insurance policy, to the effect that death was caused by suicide, if made under a misapprehension of the facts, will not estop the beneficiary from proving that death was not caused by suicide.

[No. 194.]

Submitted March 13, 1901. Decided April 8, 1901.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment for plaintiff in an action for life insurance. *Affirmed.*

See same case below, 36 C. C. A. 467, 94 Fed. Rep. 751.

Statement by Mr. Justice Brewer:

\*On April 5, 1895, a certificate of membership, in the amount of \$3,000, was issued by the plaintiff in error to Frank E. Beck, payable on his death to his widow, Lillian H. Beck. The application for membership contained this stipulation:

"It is agreed that if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such

law so as to avoid an insurance policy—see *Gresham v. Equitable Life & Acci. Ins. Co. (Ga.)* 13 L. R. A. 838, and note. See also note to *Blackstone v. Standard Life & Acci. Ins. Co. (Mich.)* 3 L. R. A. 486.

On the right to make experiments in the

death is to the entire expectancy at date of acceptance of the application by the board of control."

[51] \*On October 31, 1896, he was killed by the discharge of a gun at the time held in his hands. After his death a coroner's jury found that he died "by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants. That the shooting was done in the outside water-closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself." Proofs of death were furnished by his widow, in which question 14 and answer were as follows: "14. Was death caused by suicide or violence or from other than natural causes? A. Suicide."

On April 13, 1897, an action was commenced in the district court of the first judicial district of the state of Montana, in and for the county of Lewis and Clark, by his widow, to recover \$3,000, the amount of the insurance. This action was removed by the defendant to the circuit court of the United States for the district of Montana. The answer set up specifically that the in-

sured died from "self-destruction and suicide," and, further, "that prior to said Beck taking his own life said Beck was attempting to and did violate the criminal laws of the state of Montana." In the circuit court a trial was had, which resulted in a verdict and judgment for plaintiff. The judgment was taken by the defendant to the United States circuit court of appeals for the ninth circuit, and by that court affirmed May 16, 1899, 36 C. C. A. 467, 94 Fed. Rep. 751, to reverse which judgment of affirmance this writ of error was sued out.

**Mr. Carlos S. Hardy** submitted the cause for plaintiff in error:

The evidence given on the trial, with all the inferences that the jury could justifiably draw from it in favor of the plaintiff, was insufficient to support a verdict for the plaintiff, and the court should have directed a verdict for the defendant.

*Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Elliott v. Chicago, M. &*

*presence of the jury*—see *Leonard v. Southern P. Co. (Or.)* 15 L. R. A. 221, and note.

*Estoppel by proofs of loss to show death was not caused by suicide.*

In an action on a life policy, proofs of loss stating suicide as the cause of death are admissible, but are not conclusive against the assured. *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388.

In an action on a life insurance policy a claimant is not estopped from claiming that the death of the insured was caused otherwise than by suicide, by the statements and opinions contained in the proofs of death, that the cause of death was mental aberration, where the statements were based on hearsay. *Home Benefit Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332.

The claimant is not estopped from asserting that death was caused otherwise than by suicide, where the proofs of death signed by her, in answer to the question as to whether the deceased's death was caused by his own hand or not, referred to the statement of the coroner's physician, which appeared on the next page and showed that he found "shock from penetrating shot wound in the head (right temple), mental aberration superinduced by chronic headache," and in answer to the question as to whether the death was "caused or accelerated or aggravated by his own hands or acts" the physician stated that he examined the deceased only as coroner's physician, and was unable to make any further statement than above, further than that his mental condition was probably due to chronic headaches which were caused either by chronic meningitis or tumor of the brain,—as the company was in no way prejudiced by the statements and opinions in them. *Sargent v. Home Benefit Asso.* 35 Fed. 711.

In *Waither v. Mutual L. Ins. Co.* 65 Cal. 417, 4 Pac. 413, the claimant, after proving the fact of death, offered in evidence, for the sole purpose of showing a compliance with the requirements of the policy, the preliminary proofs of death of the deceased, which had been furnished

to the company, and which consisted of the proceedings of the coroner's inquest had upon the deceased's body, and statements made by the claimant, together with statements by attending physicians, the undertaker, and a householder. This evidence, which was not contradicted, showed that the deceased died from the effects of prussic acid, and the verdict of the coroner's jury was death by prussic acid administered by his own hands with suicidal intent. The court below found that there was no evidence sufficient to show that the deceased committed suicide, and that the allegations of the answer that he committed suicide were untrue. This finding was based on the proposition that, as the claimant offered the papers referred to solely for the purpose of showing that she had complied with the requirements as to preliminary proofs, they would not be considered for any other purpose. Upon appeal this was held to be error, for the reason that when the papers were in evidence they were before the court, and showed on their face that the cause of death was suicide, and for the purpose of the trial they were prima facie evidence of such fact and should have been so considered, although the claimant might have been permitted to overcome them by evidence that death was due to natural causes.

In *Keels v. Mutual Reserve Fund Life Asso.* 29 Fed. 198, the court held that, although the cause of death in the proof may be stated to be suicide, and this may be found by the proceedings of the coroner's jury attached to the proof of death, and the claimant may admit making such statement on information, and not from personal knowledge, and as not meaning technical suicide by the use of the word, such claimant may show that death was caused by some other means, such as accident, as, at the most, the statement made in the proof is an admission by the claimant, and, with all the other evidence, is to be submitted to and weighed by the jury, and such evidence meets the presumption of accidental death, and puts on the claimant the burden of showing a mistake.

The claimant's evidence contradicting the proof of death by suicide was admitted in *Le-*



*St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Somerville v. Knights Templars & M. Life Indemnity Asso.* 11 App. D. C. 417; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020; *Northwestern Mut. L. Ins. Co. v. Maguire*, 19 Ohio C. C. 502; *Sovereign Camp W. of W. v. Haller* (Ind. App.) 56 N. E. 255; *Merrett v. Preferred Masonic Mut. Acci. Asso.* 98 Mich. 338, 57 N. W. 169; *Kornfeld v. Supreme Lodge, O. of M. P.* 72 Mo. App. 604; *Rens v. Northwestern Mut. Relief Asso.* 100 Wis. 266, 75 N. W. 991; *Mutual L. Ins. Co. v. Hayward*, 12 Tex. Civ. App. 392, 34 S. W. 801, 27 S. W. 36.

The admission in the proofs of loss presented by the plaintiff, of the suicide of the deceased, destroyed the legal presumption

man v. Manhattan L. Ins. Co. 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388, where the proofs of loss furnished the company, containing statements of the undertaker, physician, agent, and friends, as well as the coroner's inquest, declared suicide to be the cause of death, over the company's objection that the plaintiff was bound by these proofs, as the cause of death was mere matter of opinion, there being no testimony whatever on the subject, except the fact that the insured was found dead from a mortal gunshot wound, with a pistol wedged in the bend of his thumb, and the body so disposed as to suggest inferences entirely consistent with accidental death, or at least not of a character to exclude every supposition but suicide.

In *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 1, 41 Atl. 467, in the proofs of death, to which a copy of the coroner's inquest and the testimony given thereat were attached, the claimant entered the following protest: "I have been informed the verdict was suicide, but I decline to be bound by it." The company made no request for further proofs, but accepted them as filed, and on the trial attempted to prove the defense of suicide by offering the proofs of death and a copy of the coroner's notes as admissions by the claimant. The claimant was held not to be bound by them, as, although by attaching a copy of the coroner's verdict and depositions he admitted their existence, yet by his protest he expressly declined to admit the proof of the fact which the company sought to establish.

The beneficiary is not concluded by her statement, in the proofs of loss furnished to the insurer, that the insured committed suicide, where the insurance company was not prejudiced thereby; but the fact that the proofs contain such statement is to be considered by the jury simply as a circumstance in the case, in connection with the other evidence on that issue. *Union Mut. L. Ins. Co. v. Payne*, 105 Fed. 172.

The verdict of the coroner's jury, sent to the company as part of the proof of death at the company's request, and introduced by it to show the claim therein made by the plaintiff that the

in favor of accidental death, and made a prima facie case for the defendant, which, in the absence of countervailing evidence, would have required a verdict for it; and the plaintiff, to overcome this prima facie case, was required to present sufficient evidence to more than offset the affirmative evidence thereafter presented by the defendant.

*Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Sharland v. Washington L. Ins. Co.* 41 C. C. A. 307, 101 Fed. 206; *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 44 N. E. 1099; *Spencer v. Citizens' Mut. L. Ins. Co.* 142 N. Y. 502, 37 N. E. 617; *Prudential Ins. Co. v. Breustle*, 19 Ky. L. Rep. 544, 41 S. W. 9; *Keels v. Mutual Reserve Fund Life Asso.* 29 Fed. 198; *Dennis v. Union Mut. L. Ins. Co.* 84 Cal. 570, 24 Pac. 120; *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Cochran v. Mutual L. Ins. Co.* 79 Fed. 46.

That part of the defendant's answer setting up the defense of death caused or superinduced by the violation or attempted violation of the criminal laws is sufficiently certain and definite, in the absence of a demurrer to the pleadings or the evidence, or

insured had died by his own hand, which is competent upon the issue made on the trial as to whether the death was due to an accident, forms no basis for an estoppel against the company, inasmuch as the plaintiff is not misled or prejudiced thereby, and the utmost he can claim is that the proofs of death, including the verdict of the coroner's jury, are evidence to be considered, together with the other facts upon the issues in the case. *Zimmerman v. Masonic Aid Asso.* 75 Fed. 236. Although this case is not directly in point as showing the conclusiveness of the proofs of loss, yet it is here cited as showing that the proofs are to be considered, along with the other evidence and other facts, upon the issue of the case, and therefore as supporting the view that they are not absolutely conclusive.

In *Supreme Lodge, K. of H. v. Jagers*, 62 N. J. L. 96, 40 Atl. 783, the by-laws of a benevolent society provided that the suicide of a member should invalidate a benefit certificate issued upon his life, and the society, for the purpose of establishing suicide, produced and offered in evidence, a paper asserted to be the official proof of death, which was signed by officers of the lodge and annexed to the affidavit of the attending physician, which stated suicide as the cause of death. It was held that the plaintiff's claim was not precluded by such proof.

A statement in the nature of a certificate, annexed to the proofs of death sent by the local council of a benefit society, of which the deceased was a member, to the governing body, and purporting to be signed by an acting coroner, to the effect that the insured committed suicide, is not admissible in evidence against the beneficiary in an action by her against the society, as it is at best an *ex parte* expression of opinion, and cannot be regarded as a representation made by her. *Supreme Council of Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866.

For an extended discussion of the conclusiveness of proofs of loss as against insured or his beneficiaries, see note to *John Hancock Mut. L. Ins. Co. v. Dick* (Mich.) 44 L. R. A. 846.



other appropriate objections to its defects, at or before the trial.

Mont. Code Civ. Proc. 1895, §§ 740, 770, 778; Cal. Code Civ. Proc. § 475; Colo. Code, Civ. Proc. § 81; N. Y. Code Civ. Proc. § 723; Or. Code Civ. Proc. § 104; *Western Assur. Co. v. Uhlhorn*, 41 La. Ann. 385, 6 So. 486; *Crawford v. Satterfield*, 27 Ohio St. 421; *Bethl v. Woodworth*, 11 Ohio St. 43, 72 Am. Dec. 613; *Burke v. Wilber*, 42 Mich. 327, 3 N. W. 861; *Griffin v. Pratt*, 3 Conn. 513; *Hall v. McKechnie*, 22 Barb. 244; *Page v. Monks*, 5 Gray, 492; *Boyce v. California Stage Co.* 25 Cal. 470; *Bell v. Knowles*, 45 Cal. 193; *King v. De Coursey*, 8 Colo. 463, 9 Pac. 31; *McDermott v. Grimm*, 4 Colo. App. 39, 34 Pac. 909; *Sibila v. Bahney*, 34 Ohio St. 399; *Cummings v. Petsch*, 41 Minn. 115, 42 N. W. 789; *Coates v. First Nat. Bank*, 91 N. Y. 31; *Gillies v. Manhattan Beach Improv. Co.* 147 N. Y. 420, 42 N. E. 196; *Egert v. Wicker*, 10 How. Pr. 193; *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593; *Stokes v. Brown*, 20 Or. 530, 26 Pac. 561; *Dunn v. Durant*, 9 Daly, 389; *Catlin v. Gunter*, 11 N. Y. 373; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; *Quirk v. Clark*, 7 Mont. 231, 14 Pac. 669; *Pettis v. Westlake*, 4 Ill. 535; *Malcom v. O'Reilly*, 89 N. Y. 156; *Doyle v. Knapp*, 4 Ill. 334; *Gegan v. O'Reilly*, 32 Cal. 11; *Engel v. Hardt*, 56 Wis. 456, 14 N. W. 625; *Paul v. Silver*, 16 Cal. 75; *Mulliken v. Hull*, 5 Cal. 245; *Coleman v. Playsted*, 36 Barb. 26; *Clark v. Dales*, 20 Barb. 42; *New Orleans, O. & G. W. R. Co. v. Lindsay*, 4 Wall. 656, 18 L. ed. 330; *Ewing v. Howard*, 7 Wall. 500, 19 L. ed. 918; *Conboy v. Railway Officials & Employes' Acci. Asso.* 17 Ind. App. 62, 46 N. E. 363.

The undisputed evidence establishes beyond question that the death of the deceased, if not suicidal, was caused or superinduced by the violation or attempted violation of the criminal law, and the court should have given the instructions tendered by the defendant as to this defense.

*Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469; *Neill v. Travelers' Ins. Co.* 31 U. C. C. P. 394; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Travelers' Ins. Co. v. Scaver*, 19 Wall. 531, 22 L. ed. 155; *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 437, 13 L. R. A. 637, 22 Atl. 530.

**Mr. C. B. Nolan** submitted the cause for defendant in error:

If there is any evidence to sustain the verdict this court will not inquire as to its sufficiency. It is only where there is no evidence that an appellate tribunal will interfere.

*Hyde v. Stone*, 20 How. 170, 15 L. ed. 874; *Lancaster v. Collins*, 115 U. S. 222, 29 L. ed. 373, 6 Sup. Ct. Rep. 33; *Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; *Locwer v. Harris*, 6 C. C. A. 394, 14 U. S. App. 615, 57 Fed. 368; *Insurance Co. of N. A. v. Johnson*, 17

C. C. A. 418, 37 U. S. App. 413, 70 Fed. 794.

Experiments in the presence of a jury are generally discountenanced.

Thomp. Trials, § 620.

The matter of the allowance or disallowance of experiments is largely within the discretion of the court.

*Ball v. United States*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192; *United States v. Ried*, 42 Fed. 134; *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *Homan v. Franklin County*, 98 Iowa, 692, 68 N. W. 559; *Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *Leonard v. Southern P. Co.* 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887; *Heath v. State*, 91 Ga. 126, 16 S. E. 657.

The test invariably is, Will the evidence tend to enlighten the jury and enable them the more intelligently to consider the issues presented?

*Burg v. Chicago, R. I & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Boyd v. State*, 14 Lea, 161.

Experiments, to be admissible, must be based on conditions similar to those existing in the case on trial.

*Eidt v. Cutter*, 127 Mass. 522; *Leonard v. Southern P. Co.* 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887.

Where an experiment is offered to prove a fact or theory already established by the testimony, the allowance or disallowance of such experiment is not error of which either party can complain.

12 Am. & Eng. Enc. Law, 2d ed. p. 401; *Osborne v. Detroit*, 32 Fed. 36.

The burden of proof is upon the company.

*Niblack, Ben. Soc.*, § 326; *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 76 N. W. 683; *Standard Life & Acci. Ins. Co. v. Thornton*, 40 C. C. A. 564, 49 L. R. A. 116, 100 Fed. 582.

Preliminary proofs are admissible as prima facie evidence of the facts stated.

*Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Bachmeyer v. Mutual Reserve Fund Life Asso.* 82 Wis. 255, 52 N. W. 101; *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486, 7 N. E. 408; *Home Benefit Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Sharland v. Washington L. Ins. Co.* 41 C. C. A. 307, 101 Fed. 206; *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 44 N. E. 1099.

There is no waiver of the defense that an answer does not state facts sufficient to constitute a defense, and this defect may be urged in the appellate court for the first time.

*Territory ex rel. Blake v. Virginia Road Co.* 2 Mont. 100; *Gillette v. Hibbard*, 3 Mont. 419; *Largey v. Sedman*, 3 Mont. 476; *Foster v. Wilson*, 5 Mont. 57, 2 Pac. 310; *Milligdn v. Savery*, 6 Mont. 131, 9 Pac. 894; *Quirk v. Clark*, 7 Mont. 233, 14 Pac. 669; *White-side v. Lebcher*, 7 Mont. 478, 17 Pac. 548; *Raymond v. Wimsettc*, 12 Mont. 557, 31 Pac. 537.

Death must clearly appear to have been



the natural and legitimate consequence of a violation of the law, to render such act effective as a defense in a suit on a policy of life insurance.

*Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 6 Am. Rep. 115; *Griffin v. Western Mut. Ben. Asso.* 20 Neb. 620, 57 Am. Rep. 848, 31 N. W. 122.

The act in violation of law, and the act causing death, must be part of the same continuous transaction.

Cooke, Life Ins. § 48.

The wrongful act must be the proximate cause of death.

Bacon, Ben. Soc. § 339; *Goetzman v. Connecticut Mut. L. Ins. Co.* 3 Hun, 515; *Harper v. Phoenix Ins. Co.* 19 Mo. 506; *Overton v. St. Louis Mut. L. Ins. Co.* 39 Mo. 122.

There must be some causative connection between the act which constitutes the violation of law, and the death of the insured.

*Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652, 61 N. W. 485.

[51] \*Mr. Justice **Brewer** delivered the opinion of the court:

The principal question discussed by counsel for plaintiff in error, and the important question in the case, is whether the trial court erred in refusing a peremptory instruction to find a \*verdict for the defendant. [52] It is said that the testimony established the fact of suicide, and that there was no sufficient doubt in respect thereto to justify a submission of the question to a jury. We have recently had before us a case coming, like this, from the trial court, through the court of appeals (*Patton v. Texas & P. R. Co.* 179 U. S. 658, ante, 361, 21 Sup. Ct. Rep. 275), in which the action of the trial court in directing a verdict was vigorously attacked as an invasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the court of appeals. In that case, although the question was doubtful, we sustained the rulings of the lower courts; and the considerations which then controlled us compel a like action in the present case. We said that a trial court had the right, under certain conditions, to direct a verdict one way or the other (citing several cases to that effect), but added:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that, ordinarily, negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for de-

termination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record; and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions." P. 660, ante, 363, Sup. Ct. Rep. p. 276.

\*Whether the deceased committed suicide [53] was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the deceased committed suicide. The following are the facts, at least, from the testimony, the jury was warranted in finding them to be the facts: The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic who had worked in the family for two or three years, but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily his reply was that "a man that has as much trouble as he had, the sooner the end came the better," and a similar remark at another time, that such a man "would be better off dead than living." Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single-barrel shotgun, belonging to his wife, and one a double-barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver who had brought the policeman called out that the deceased had gone into the back yard and into a water-closet. The hack driver heard him go into the closet, and after a minute or so heard



[54] him step outside, and immediately the gun was discharged, and on examination \*he was found with the upper part of his head shot off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under those circumstances it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from an intentional act. At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the court of appeals we are not justified in disturbing it.

Neither can it be said that death came "in violation of or attempt to violate any criminal law." Before he left home with the gun he said he was going hunting. While from his conduct he apparently changed his mind, and doubtless went to the house where his wife was stopping with the view of persuading or compelling her to return home, and may have intended violence against her if she refused, yet the death resulted, not as a consequence of any violation or attempt to violate the criminal law. In this respect the court charged the jury as follows:

[55] "Here is an instruction asked which I refuse, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man, in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating \*that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

This instruction correctly states the law. The death must in some way come as a consequence of the violation or attempted violation of the criminal law, and the stipulation does not apply when it is simply contemporaneous and in no manner connected with the alleged violation or attempt to violate. For instance, if the deceased had

started with the avowed intent to kill his wife, and while walking down the street a tree had fallen and killed him, the fact that he was starting upon an intentional violation of the law would not make this stipulation applicable, because the cause of his death would be entirely disconnected from the criminal act. So here, whatever may have been the general thought and purpose running in his mind as he went to the house where his wife was, his act in going into and stepping out of the water-closet was in no manner connected with or part of an attempt to carry out any criminal purpose, and at that time came the shot, intentional or accidental, which killed him.

These are the substantial matters presented in the record. There are one or two minor questions. For instance, when the undertaker was on the witness stand, the defendant produced a gun, and asked him to show the jury how the mark which he said he found on the face of the deceased could be caused, and the gun was used for that purpose. On cross-examination it appeared that his arm was not long enough to reach the trigger, and, therefore, to fire it off in the position in which he had placed it, he needed a pencil or something of that kind. Subsequently, the plaintiff introduced testimony tending to show the length of the arm of the deceased and the improbability of his being able to reach the trigger, with his face on the muzzle, as described by the undertaker, which testimony was objected to on the ground that the gun had not been identified as the one which had caused the death, but the objection was overruled and the testimony admitted. There was testimony subsequently offered by her as to its identity, but that testimony was, to say the least, not clear and satisfactory, so that it cannot be said \*that the gun was fully identified as the one which caused his death. [56] Still, we cannot think that this furnishes a sufficient ground for reversing the judgment. The defendant produced the gun, and while it cannot be said that the mere production carried with it a declaration that this was the gun which caused the death, yet it certainly suggested the fact; and if not so it ought to have offered testimony to that effect. It presented the gun for use and illustration before the jury, and there was no material error in permitting the plaintiff to use the same gun for the purposes of other illustration, especially when she followed that with testimony tending, although, perhaps, only slightly, to identify it.

Another matter is this: The plaintiff in her proofs of loss stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this matter the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained, and the jury were satisfied that the death did not arise from suicide, she was not con-



cluded by this declaration. We see no error in this ruling. None of the elements of estoppel enter into the declaration. The condition of the defendant was not changed by it, and if under a misapprehension of facts she made a statement which was not in fact true, she could explain the circumstances under which she made the statement and introduce testimony to establish the truth.

Some other matters are mentioned in the brief of plaintiff in error, but nothing that we deem of sufficient importance to deserve notice. *We see no error in the judgment, and it is affirmed.*

[57] \*TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*,  
v.

EMMA HUMBLE.

(See S. C. Reporter's ed. 57-67.)

*Injury to married woman—right of action—conflict of laws—action in her own name—right of husband at their domicile—adoption of statute of other state—loss of earning capacity as element of damages.*

1. The right of a married woman to bring an action for personal injuries in her own name under Sand. & H. (Ark.) Dig. § 5641, is not lost by defendant's removal of the action into a Federal court, but the law of the state furnishes the rule of decision, under U. S. Rev. Stat. § 721.
2. The contention that an action brought by a married woman cannot be maintained because the husband alone has the right to bring the action cannot be regarded in the Supreme Court of the United States, when the point was not presented in the court below.
3. The right of a married woman to sue in Arkansas in her own name for personal injuries, under Sand. & H. (Ark.) Dig. § 5641, extends to a woman injured in that state, but domiciled in Louisiana, where the damages claimed would constitute community property.
4. The possibility that a judgment obtained by a married woman in her own name for personal injuries, in an action brought in the state where she was injured, would not be recognized as a bar to an action by her husband in the state of their domicile for the same cause of action, will not preclude the court in her action, which is removed into a Federal court, from sustaining her right of action in her own name, in accordance with the law of the state in which she was injured.
5. In an action by a married woman to recover damages for a personal injury, under Sand. & H. (Ark.) Dig. § 5641, the impairment of her capacity to perform labor may be considered as an element of the damages, since the husband's right to recover for loss of services does not preclude her right to recover

—NOTE.—On the construction of adopted statutes—see *Ryalls v. Mechanics Mills* (Mass.) 5 L. R. A. 667, and note.

As to action by wife for damages for personal injuries—see *Wolf v. Bauereis* (Md.) 8 L. R. A. 680, and note. See also note to *Skoglund v. Minneapolis Street R. Co.* (Minn.) 11 L. R. A. 222.

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for the loss of her capacity to earn for herself.

6. The fact that the Arkansas statutes respecting the rights of married women (Sand. & H. Dig. §§ 4940, 4945, 4946, 4949, 5641) were nearly identical with the New York act of 1860 does not show that the prior construction of the New York act was adopted, where it is not shown that the statute was in fact adopted from New York, instead of from Massachusetts, where there was a similar statute in force.
7. The right of a married woman to recover for loss of capacity to labor or earn money on account of a personal injury will not be denied because there is no evidence showing any capacity to labor or earn money at and just before she was injured, where it appears that she had been for some years in business on her own account, though it had been discontinued at the time of the injury on account of temporary illness.

[No. 177.]

*Argued March 7, 8, 1901. Decided April 8, 1901.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment in an action by a married woman for personal injuries. *Affirmed.*

See same case below, 38 C. C. A. 502, 97 Fed. Rep. 837.

Statement by Mr. Chief Justice Fuller:

This was an action brought by Emma Humble against the Texas & Pacific Railway Company in the circuit court of Miller county, Arkansas, to recover compensation for personal injuries sustained by her in the defendant's station at Texarkana, Arkansas, on April 9, 1898, by reason of defendant's negligence, and removed on defendant's petition to the United States circuit court for the western district of Arkansas. Plaintiff obtained judgment, which was affirmed by the circuit court of appeals for the eighth circuit, 38 C. C. A. 502, 97 Fed. Rep. 837, and thereupon this writ of error was sued out. [58]

The evidence, in addition to establishing the circumstances of the infliction of the injury, tended to show that Mrs. Humble had been a resident of Arkansas for nearly ten years; that she had kept a boarding house and a hotel at Pine Bluff, in said state, for some years, conducted by her as her sole and separate business and in her name, until she left Pine Bluff for Texarkana, in October, 1897, where she remained until April 9, 1898, and during this time began to run a hotel, but became temporarily ill, and gave it up. Her husband had taken up his residence in Louisiana at the time of the injury, and she had then started to go to him.

Prior to the trial the railway company moved the court to compel Mrs. Humble to make her husband a party plaintiff, but the court overruled the motion, and defendant excepted. Defendant objected to all evidence tending to show that plaintiff's capacity to labor was diminished by the injury, and saved an exception to its admission.

At the close of the evidence defendant requested the court to give the jury certain instructions, of which the third, fourth, sixth, and seventh are as follows:

3. "The plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor or earn money at and just before she was injured."

4. "In this case the plaintiff being a married woman and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

6. "The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having her present and prospective home in the state of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in future has been lessened by the injury, and by the law of that state she cannot recover such damages."

[59] "You will therefore allow nothing as damages for any diminished capacity to labor and earn money."

7. "Plaintiff cannot recover anything on account of her diminished capacity to labor. "Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession, or occupation."

"And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

The court declined to give these instructions, and each of them, and the defendant excepted to the refusal of each.

The court instructed the jury as follows: "If you should find for the plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs, her physical condition before the injury, and her physical condition after the injury, and the nature and character of the injury she received, whether it be permanent or temporary in its nature, and find for her such sum as will fairly and reasonably compensate her therefor, including therein fair and reasonable compensation for any physical and personal pain and suffering she may have undergone as the result thereof."

Defendant excepted to so much of this portion of the charge as allowed the jury to "take into consideration her age and earning capacity before and after the injury was received as shown by the proofs."

**Mr. John F. Dillon** argued the cause, and, with *Messrs. Winslow S. Pierce* and *David D. Duncan*, filed a brief for plaintiff in error:

Plaintiff being a married woman, her domicile was in Shreveport, in the state of Louisiana, where her husband resided.

*State v. Barrow*, 14 Tex. 183, 65 Am. Dec. 109; *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; *Nichols v. Nichols*, 92 Fed. 1; *Story*, Conf. L. § 136;

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*Schouler*, Dom. Rel. § 38; *Cord*, Legal & Equitable Rights of Married Women, § 1116.

Compensation for an injury to a married woman, under La. Code, arts. 2399-2404, belongs to the husband.

*Ford v. Brooks*, 35 La. Ann. 157; *White v. Vicksburg, S. & I. R. Co.* 42 La. Ann. 990, 8 So. 475.

This right to sue for damages was a right acquired after the domicile was fixed in Louisiana, and the law of that state gave it to the husband.

*White v. Vicksburg, S. & I. R. Co.* 42 La. Ann. 990, 8 So. 475.

The provisions of N. Y. Laws 1860, chap. 90, relating to the wife's right to sue in her own name, were not intended to, and do not, affect the right of the husband to recover for consequential damages for loss of services, in any other cases than those in which by these statutes she is entitled solely to sue.

*Filer v. New York C. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Brooks v. Schwerin*, 54 N. Y. 343; *Blaehinska v. Howard Mission & Home for Little Wanderers*, 130 N. Y. 497, 15 L. R. A. 215, 29 N. E. 755.

The rule of the New York court of appeals, as stated in these cases, is a correct exposition of the law and of the statutes in question, and is the law of Arkansas on the question now presented.

*Cooley*, Const. Lim. 5th ed. 64,\*52.

The general rule, as pronounced by this honorable court, is to adopt the construction of the courts of the state by whose legislature the statute was originally adopted.

*Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Hedden v. Robertson*, 151 U. S. 520, 38 L. ed. 257, 14 Sup. Ct. Rep. 434.

The statutes of Arkansas relating to married women, providing that their earnings shall be their sole and separate property, do not divest a husband of the right to his wife's services, nor, where her death has been caused by negligence, preclude him from recovering for the loss of such services.

*St. Louis S. W. R. Co. v. Henson*, 7 C. C. A. 349, 19 U. S. App. 169, 58 Fed. 531.

In Texas, where the statute provides that all property acquired by a husband or wife during the marriage shall be community property, except any acquired by gift, devise, or descent, the supreme court of that state has decided that damages recovered for injury to the wife are community property, and must be sued for and recovered by the husband, and that the right to sue for such damages is a chose in action, and is property in the legal sense.

*Ezell v. Dodson*, 60 Tex. 331, citing 2 Bishop, Married Women, § 271; *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260.

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The same general doctrine is held in other states.

*Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L. R. A. 808, 28 Pac. 1021; *Redfield v. Oakland Consol. Street R. Co.* 112 Cal. 220, 43 Pac. 1117; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Henry v. Klopfer*, 147 Pa. 178, 23 Atl. 337, 338; *Scott v. Metropolitan R. Co.* 4 Mackey, 152; 2 Rorer, Railroads, p. 1094; Reeve, Dom. Rel. 4th ed. pp. 87, 89.

The husband should have been made a party plaintiff because he was domiciled in Louisiana, which state was also the domicile of his wife, and in which state compensation for injury to a married woman belongs to her husband and suit therefor must be brought in his name.

*Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; *Ford v. Brooks*, 35 La. Ann. 157; *White v. Vicksburg, S. & I. R. Co.* 42 La. Ann. 990, 8 So. 475.

Mr. Oscar D. Scott argued the cause and filed a brief for defendant in error:

The provisions of the Constitution and statutes of Arkansas in relation to married women are for the protection of the wife's property against the husband's creditors.

*Rudd v. Peters*, 41 Ark. 177; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753.

The earnings of a married woman, arising from labor or services done and performed on her sole account, become her separate property.

*Sellmeyer v. Welch*, 47 Ark. 485, 1 S. W. 777.

If the proceeds or results of the earning capacity become the separate property of the wife, it would seem that the potentiality or capacity to make those earnings must be her separate property.

*Harmon v. Old Colony R. Co.* 165 Mass. 100, 30 L. R. A. 658, 42 N. E. 505; *Jordan v. Middlesex R. Co.* 138 Mass. 425; 2 Sedg. Damages, § 486; *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

Under the decisions of Arkansas, the husband, if entitled to recover, could recover only the amount of her probable earnings during his expectancy, and not for any period beyond.

*Fordyce v. McCants*, 51 Ark. 509, 4 L. R. A. 296, 11 S. W. 694, 55 Ark. 384, 18 S. W. 371.

Under the married women's statutes in most states the moneys earned by the wife in keeping boarders become her separate property.

*Hedge v. Glenney*, 75 Iowa, 513, 1 L. R. A. 479, 39 N. W. 818; *Stratton v. Bailey*, 80 Me. 345, 14 Atl. 739; *Nuding v. Ulrich*, 169 Pa. 289, 32 Atl. 409.

If there was any evidence tending to show that Mrs. Humble had at the time of the injury any earning capacity, and that it, or any portion of it, belonged to her as her separate property, she was entitled to have the jury take this into consideration, even though a portion of the result of that earning capacity, so long as exercised in purely

domestic affairs, became the property of the husband.

*Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597.

\*Mr. Chief Justice Fuller delivered the [59] opinion of the court:

Plaintiff in error contends that the judgment should be reversed because the circuit court erred in declining to direct the joinder of the husband; in applying the law of Arkansas in the trial of the case, and not that of Louisiana; and in allowing impaired earning power to be considered as an element of recovery.

\*The statutes of Arkansas provided that a married woman might "maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character, or property." Sandels & Hill's Dig. § 5641. [60]

This action was brought in the state court, and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit in her own name and for her own benefit; and indeed by § 721 of the Revised Statutes, the law of Arkansas furnished the rule of decision. In some jurisdictions it is held under similar statutes that the wife must sue alone under such circumstances, and that to make the husband a co-plaintiff works a fatal misjoinder. The circuit court was right, then, in not attempting to compel a joinder which the statute had expressly dispensed with.

But it is said that under the laws of Louisiana compensation for personal injuries to a married woman belongs to the husband; that he alone can sue therefor; and that, therefore, error was committed in the admission of evidence, the refusal of instructions, and in the charge of the court. We do not think the point as now presented was made below. The objection to evidence, the sixth instruction refused (which referred to the law of Louisiana), and the part of the charge excepted to, related to diminished capacity to labor. And the motion as to Humble was that he should be joined as a plaintiff. The answer simply raised the issue whether or not Mrs. Humble received any injuries to her person by reason of the acts complained of. It was nowhere insisted that the action could not be maintained because not brought by the husband alone.

However, whether the objection be that under the laws of Louisiana she could not recover in her own name at all, or could not, except her husband was a co-plaintiff, because the damages claimed were community property, we agree with the circuit court of appeals that plaintiff's rights in suing in Arkansas for an injury sustained there did not differ from those of any married woman domiciled in that state; that the legislature of Arkansas had determined by whom a suit might be brought for personal injuries sustained by a married woman; had enlarged the rights of married women in respect of

damages recoverable by them on account of personal injuries sustained within the state; and that these laws necessarily inured to the benefit of every married woman who subsequently sued in the courts of the state for personal injuries there sustained, and must be held to have been intended to have, and to have, a uniform operation throughout the state.

The argument *ab inconvenienti* is pressed that Humble might sue for the same injury in Louisiana, and that this judgment could not be pleaded in bar, although only covering damages particularly pertaining to the wife. In other words, that the Louisiana courts would decline to give any faith and credit to the recovery in Arkansas permitted by the jurisprudence of the latter state in the name of the wife only. We must decline to be moved by the supposed hardship suggested. These injuries were inflicted and this action was brought in the state of Arkansas. The place of the wrong and the place of the forum concurred, and the law of that place governed. If an action should be brought in Louisiana, the fact that the law of Arkansas differed from that of Louisiana would not prevent its application, unless opposed to some general public policy, the existence of which is not to be assumed. *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978.

This brings us to the point on which the chief stress of the argument was laid. The circuit court charged the jury that if they found for plaintiff they might take into consideration in assessing the damages "her age and earning capacity before and after the injury was received, as shown by the proofs," and refused an instruction to the contrary; and exceptions were duly preserved.

In view of the evidence, was plaintiff entitled to be allowed anything for diminution of earning capacity?

Section 7 of article 9 of the Constitution of Arkansas provides:

[62] "The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may \*choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *femme sole*, and the same shall not be subject to the debts of her husband."

Sections 4940, 4945, 4946, 4949, and 5641 of Sandels & Hill's Digest of the Statutes of Arkansas are as follows:

4940. "The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *femme sole*; and the same shall not be subject to the debts of her husband."

4945. "The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in

good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant, or conveyance from any person; that which she has acquired by her trade, business labor, or services carried on or performed on her sole or separate account; that which a married woman in this state holds or owns at the time of her marriage, and the rents, issues, and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her, in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent."

4946. "A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this state on account of the said property, business, or services."

4949. "In an action brought or defended by any married \*woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character, or property, if judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property."

5641: "Wherea married woman isa party, her husband must be joined with her, except in the following cases:

"First. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state. . . .

"Second. She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character, or property. . . .

"Third. Where the action is between herself and her husband she may sue and be sued alone."

The particular point before us may not have been passed on by the supreme court of Arkansas, but that tribunal has recognized this legislation as intended for the protection of the wife's property against the husband's creditors, and has held that the earnings of a married woman arising from labor or services done and performed on her sole account become her separate property. *Sellmeyer v. Welch*, 47 Ark. 485, 1 S. W. 777; *Rudd v. Peters*, 41 Ark. 177; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753.

Granting that the statutes have not de-



prived the husband of the services of the wife in the household, in the care of the family, or in and about his business, yet they have bestowed on her, independent of him, her earnings on her own account, and given her authority to acquire them. They proceed upon the difference between the discharge of marital duties and independent labor.

[64] As the results of her earning capacity when exerted for herself belong to her, deprivation of that capacity must be to that extent her individual loss. The husband may recover for loss of services belonging to him, but not for loss of the wife's potentiality \*to earn for herself, nor for her expectation of life in that connection; and if he cannot, she can.

The precise question arose under statutory provisions not materially different from those in Arkansas in *Harmon v. Old Colony R. Co.* 165 Mass. 100, 30 L. R. A. 658, 42 N. E. 505; and it was decided that in an action by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor might be considered as an element of the damages. The reasoning of the opinion seems to us so convincing that we quote from it at length.

The supreme judicial court, after referring to the statutes of 1846, 1855, 1857, and 1874, said:

"By virtue of this legislation a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his; subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her the right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him [65] \*during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound

to support his wife, and therefore was entitled to her services. By the statutes which modify the common law, his right to her services is abridged, though his obligation to support her remains. It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which perhaps may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duties. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicile, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground must be left to the jury to determine, under the circumstances of each particular case."

Counsel for plaintiff in error earnestly urges, however, that the Arkansas statute was adopted in 1873, and was nearly identical with an act of New York of 1860; that a different construction had been put on that act by the courts of New York; and that this construction should be followed in the present instance. But the statutes of Massachusetts, in the particulars material here, were in force long prior to 1873, and we are not advised that the statutes of Arkansas were transcribed from the statute book of New York, rather than from that of some other state. We do not regard this as a case for the adoption of a construction by presumption. Nor need it be conceded that the decisions \*of the courts of New York are opposed to the rulings of the circuit court on the facts of this case. [66]

In *Filer v. New York C. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327, the decision was that unless the wife was actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she had lost by reason of the injury, she had sustained no consequential damages.

In *Brooks v. Schuerin*, 54 N. Y. 343, there was evidence that the plaintiff before the injury took care of her family and, also, that she was working out by the day and earning 10 shillings a day. To proof of these facts defendant objected on the ground that her time and services belonged to her husband, and could not form ground of damages in the action. The court overruled the objection.

and defendant excepted. The defendant also excepted to the refusal of the court to charge as requested by him, "that the plaintiff cannot recover for the value of her time and services while she was disabled; such services and time belong, in law, to the husband." It was held that the rulings of the court were proper, and Earl, C., said:

"If the defendant had requested the court to charge that the plaintiff could not recover for the loss of service to her husband in his household in the discharge of her domestic duties, the request could not properly have been refused. But the request was broader, and proceeded upon the idea that all her time and services belonged to her husband, and that she could not recover anything for the value of her time, or for the loss of any service while she was disabled. She was earning in an humble capacity 10 shillings a day, and so far as she was disabled to earn this sum, the loss was hers, and the jury had the right to take it into account in estimating her damages."

In *Blacchinska v. Howard Mission*, 130 N. Y. 497, 15 L. R. A. 215, 29 N. E. 755, it was ruled that recovery could not be had by a married woman, in an action to recover damages for injuries sustained through defendant's negligence, for loss of her services in the discharge of household duties, and of other services rendered by her to her husband; and *Brooks v. Schwerin* was distinguished, because in "that case the wife worked for a stranger, while in this she worked for her husband."

In the present case the evidence tended to show that before the plaintiff was injured she had been engaged for some years in business on her own account, supporting herself and her children, which business had been discontinued for a few months, was renewed, and then given up on account of temporary illness, from which she had in substance recovered, when the injuries sustained incapacitated her from further work.

Under these circumstances we think the circuit court did not err in refusing to charge that plaintiff could not recover for diminished capacity to labor because there was "no evidence showing any capacity to labor or earn money at and just before she was injured." To pin the evidence of capacity down to the very point of time when the injury was inflicted upon her was refining too much on the principle involved.

This loss of ability to make earnings outside the discharge of household duties and irrespective of her husband was, under the statutes of Arkansas, her loss, and not her husband's, and the mere fact that at the moment of the injury she happened to be out of business should not deprive her of the benefit of the rule which would have been otherwise applicable, according to *Filer v. New York C. R. Co.* and *Brooks v. Schwerin*.

We have assumed, as the jury presumably did, that the earning capacity referred to in the charge had relation to earnings on plaintiff's own account; and if defendant wished this to have been made more explicit, it should have so requested.

The third paragraph of the seventh instruction refused was, "And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery." But this was not asked as an independent proposition, and the exception was saved to the refusal to give the entire instruction, which as a whole was erroneous and properly refused.

We find no reversible error, and the judgment is affirmed.

\*BROWNE, MANZANARES, & COMPANY, [68]

*Plffs. in Err.,*

*v.*

FRANCISCO CHAVEZ, Second.

BROWNE, MANZANARES, & COMPANY,

*Appts.,*

*v.*

FRANCISCO CHAVEZ, Second.

(See S. C. Reporter's ed. 68-72.)

*Judgment—scire facias—limitation of time for.*

A scire facias, if it lies at all, under the Code of New Mexico, to revive a judgment, is included in the word "action" as used in § 3086, authorizing execution without an action to revive a judgment; and also as that word is used in the act of February 24, 1891, § 2, providing for actions upon judgments within seven years after their rendition, and that "all actions upon such judgments not commenced within the time limited by this act shall be forever barred."

[Nos. 165 and 247.]

*Argued and Submitted March 6, 1901. Decided April 8, 1901.*

IN ERROR to and Appeal from the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment dismissing a writ of scire facias. *Writ of error dismissed. Judgment appealed from affirmed.*

See same case below, 9 N. M. 316, 54 Pac. 234.

Statement by Mr. Chief Justice Fuller:

This case was brought here both by writ of error and appeal. As there was no trial by jury, and the issues were only questions of law determined by the trial court on demurrer, the writ of error is dismissed, and the cause considered on the appeal.

On the 7th of October, 1885, the firm of Browne, Manzanares, & Company, composed of L. P. Browne, since deceased, and F. A. Manzanares, recovered judgment against Francisco Chavez, 2d, in the district court of Bernalillo county, for the sum of \$4,170, damages and costs. No action was taken in respect of this judgment, and no execution was issued upon it, so far as this record discloses. September 30, 1895, a writ of scire facias was sued out and service had. The defendant filed two pleas; the first suggesting the death of one of the plaintiffs "since the rendition of the judgment, which plea



was abandoned; the second, the plea of the statute of limitations, to which a demurrer was interposed by plaintiffs, which was overruled by the court. Plaintiffs thereupon refused to plead further, and stood by their demurrer, whereupon the court rendered judgment dismissing the writ.

The statutes referred to are as follows:

An act of January 23, 1880, compiled in 1884 as §§ 1860 and 1861, as follows:

[69] "Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their \*causes accrue, and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any court of record of any state or territory of the United States, or the Federal courts of the United States, within fifteen years."

An act of February 10, 1887, compiled in 1897 as §§ 3085-6, as follows:

"Sec. 3085. That hereafter it shall not be necessary to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.

"Sec. 3086. An execution may issue at any time, on behalf of anyone interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same."

An act of February 24, 1891, as follows:

"Sec. 1. That so much of the laws of the territory of New Mexico as is compiled as § 1861 of the Compiled Laws of the Territory of New Mexico of 1884 be and the same is hereby repealed, and the following be and is hereby substituted therefor:

"Sec. 2 '(1861). Actions founded upon any judgment of any court of the territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward; and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the Federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: *Provided*, That actions may be brought upon any existing judgment which, but for this proviso, would be barred, within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred."

This section was brought forward as § 2914 of the Compiled Laws of 1897.

**Mr. William B. Childers** submitted the cause for plaintiffs in error and appellants:

A judgment at common law was not barred, but remained in full force and effect for twenty years after rendition. Executions could be issued at any time within that period, provided one execution had been previously issued within a year and a day; and  
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in that case there was no presumption of satisfaction within a less period of time than twenty years.

3 Bl. Com. 421; 2 Freeman, Judgm. 4th ed. § 464; 2 Black, Judgm. §§ 992-994.

The proceeding by writ of scire facias is but a continuation of the original action, and is not the bringing of a new suit.

2 Tidd, Pr. p. 1096, note *a*; 3 Bl. Com. p. 421; 2 Freeman, Judgm. § 442; 21 Am. & Eng. Enc. Law, 1st ed. pp. 855-957; 18 Enc. Pl. & Pr. 1039, 1060; *M'Knight v. Craig*, 6 Cranch, 183, 3 L. ed. 193. See also *Lee v. Giles*, 1 Bail. L. 449, 21 Am. Dec. 476, and note; *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 Am. Dec. 271; note to *Frierson v. Harris* (Tenn.) 94 Am. Dec. 223; *Fitzhugh v. Blake*, 2 Cranch C. C. 37, Fed. Cas. No. 4,840; *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 314; *Brearly v. Peay*, 23 Ark. 172.

The following additional authorities all hold that a scire facias is a continuance of the original action; some of them use the expression "proceeding in the original suit," in distinction from the bringing of a new action of debt based on the judgment already rendered.

*Smith v. Stevens*, 133 Ill. 183, 24 N. E. 511; *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Comstock v. Holbrook*, 16 Gray, 111; *Humphreys v. Lundy*, 37 Mo. 320; *Dickey v. Craig*, 5 Paige, 283; *M'Gill v. Perrigo*, 9 Johns. 259; *Ingram v. Belk*, 2 Strobb. L. 207, 47 Am. Dec. 591; *Irwin v. Nixon*, 11 Pa. 419, 51 Am. Dec. 559.

The revival of a dormant judgment by scire facias is not the bringing of a new action, but merely the continuation of an old one in which a judgment was rendered.

Freeman, Judgm. § 442, and cases cited in note 1, p. 764; 2 Tidd, Pr. 1102; *Fitzhugh v. Blake*, 2 Cranch C. C. 37, Fed. Cas. No. 4,840; *Adams v. Rowe*, 11 Me. 89, 25 Am. Dec. 266; *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585; *Irwin v. Nixon*, 11 Pa. 419, 51 Am. Dec. 562; *Fetterman v. Murphy*, 4 Watts, 424, 28 Am. Dec. 734, note.

General statutes of limitation do not bar the writ of scire facias, unless it is expressly mentioned therein.

*Burns v. Conner*, 1 Wash. 6, 23 Pac. 837; *Marx v. Sanders*, 98 Ala. 500, 11 So. 764; *Maples v. Muckey*, 89 N. Y. 148; *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 485; *Hunter v. Leahy*, 18 Neb. 80, 24 N. W. 680; *Humphreys v. Lundy*, 37 Mo. 323; *Brown v. Byrd*, 10 Ark. 533; *Evans v. White*, 12 Ark. 133; *Tyler v. Winslow*, 15 Ohio St. 369; *Montgomery v. Brittin*, 23 Ark. 322.

Statutes of limitation barring remedies or actions are restricted to the cases falling expressly within their terms, and will not be extended by implication.

Sutherland, Stat. Constr. 368; Endlich, Interpretation of Statutes, § 343; *Elder v. Bradley*, 2 Sneed, 247; *Campbell v. Holt*, 115 U. S. 626, 29 L. ed. 486, 6 Sup. Ct. Rep. 209; *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194; 13 Am. & Eng. Enc. Law, p. 703. See also *Hauenstein v. Lynham*, 100 U. S. 488, 25 L. ed. 630.

If a party has a right to several actions,

one is not necessarily barred because the others are.

13 Am. & Eng. Enc. Law, p. 691; *Lamb v. Clark*, 5 Pick. 198; *M'Donald v. M'Donald*, 8 Yerg. 145; Wood, Limitation of Actions, 112; *Bedford v. Brady*, 10 Yerg. 350.

An action of debt to recover the amount of a dormant judgment, and a scire facias to revive it, may both be pending at the same time, and a judgment on the scire facias cannot be pleaded in bar of the action of debt.

*Carter v. Coleman*, 34 N. C. (12 Ired. L.) 274.

**Mr. Bernard S. Rodey** argued the cause and filed a brief for defendant in error and appellee:

A judgment that has died a death of limitation cannot be revived by scire facias, even though execution has been issued upon it during its life. This holding was made under statutes like ours.

*Vick v. Chewing*, 31 Miss. 201; *Stewart v. St. Clair County Ct. Justices*, 47 Fed. 482; *Seibels v. Hodges*, 65 Ga. 245; *Mullikin v. Duvall*, 7 Gill & J. 355.

Statutes of limitation are now regarded as statutes of repose and "highly beneficiary to the community," and the day has passed when courts sought to suppress by all their ingenuity such a defense.

See note to 13 Am. & Eng. Enc. Law, pp. 692, 693.

Scire facias is an action, and has been held to be such in numerous cases.

*Gibbons v. Goodrich*, 3 Ill. App. 591; *Bryant v. Smith*, 7 Coldw. 113; *Kirkland v. Krebs*, 34 Md. 93; *Bilbo v. Allen*, 4 Heisk. 31; *Howard v. Randall*, 58 Vt. 564, 5 Atl. 403; 21 Am. & Eng. Enc. Law, p. 856, notes and cases cited; *Potter v. Titecomb*, 13 Me. 40; 2 Co. Litt. § 505; *Pulteney v. Townson*, 2 W. Bl. 1227; *Grey v. Jones*, 2 Wils. 251; *Fenner v. Evans*, 1 T. R. 267; *Greenway v. Dare*, 6 N. J. L. 306; *Gonnigal v. Smith*, 6 Johns. 106.

[70] \*Mr. Chief Justice **Fuller** delivered the opinion of the court:

The writ of scire facias has been, among other things, customarily used to obtain execution on a judgment which has become dormant. At common law it lay in real actions and on a writ of annuity, if the plaintiff did not take out execution within a year and a day; and it was given, under the same circumstances, in personal actions, by the statute of Second Westminster, 13 Edw. 1. Stat. 1, chap. 45, before which act the plaintiff was put to a new action on his judgment. *Foster on Scire Facias*, 2, and cases cited.

The writ in this case was taken out to obtain execution of the judgment in question. That judgment was recovered October 7, 1885, and no execution had been issued thereon. The writ was dated September 30, 1895. The statute provided that "actions founded upon any judgment of any court of the territory of New Mexico," and "upon any judgment of any court of record of any other territory or state of the United States, or of the Federal courts, may be brought within seven years from and after the rendition of

such judgment, and not afterward: *Provided*, That actions may be brought upon any existing judgment which, but for this proviso, would be barred, within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." It thus appears that this judgment was barred, according to the terms of the act, some years before the writ was issued, but it is contended that, although that was so, the bar did not apply to the writ of scire facias, by the use of which the judgment could be revived and an execution issued upon it notwithstanding the lapse of time.

It is argued that scire facias is not included in the words "all actions," barred by the statute, because a proceeding by scire facias is not an action, and because to hold it to be would be "inconsistent with another [71] statutory provision that actions should be commenced by "the filing in the proper clerk's office of the petition, declaration, bill, or affidavit." Compiled Laws 1884, § 1867. But we think that the averments in the writ are equivalent to a petition or declaration; and while it is true that a scire facias for the purpose of obtaining execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it; and in many cases it has been classified as in substance a new action. *Foster*, 13; *Coke Litt.* 291a; *Fenner v. Evans*, 1 T. R. 267; *Winter v. Kretchman*, 2 T. R. 46; *Holmes v. Newlands*, 5 Q. B. 370; *Owens v. Henry*, 161 U. S. 645, 40 L. ed. 837, 16 Sup. Ct. Rep. 693; *Kirkland v. Krebs*, 34 Md. 93; *Potter v. Titecomb*, 13 Me. 36; *Gonnigal v. Smith*, 6 Johns. 106; *Cameron v. Young*, 6 How. Pr. 374; *Murphy v. Cochran*, 1 Hill, 339.

In *Fenner v. Evans* a scire facias had been issued to revive a judgment entered prior to the act of 17 Geo. III. chap. 26, and execution had been taken out upon it. The scire facias and the execution were both set aside, the court holding that scire facias was an action within the 2d section of that act, providing "that no action shall be brought on any such judgment already entered," etc.

By section 40 of chapter 27, 3 & 4 Wm. IV., it was provided that "no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." And it was held that no scire facias could be sued out to revive such a judgment after the lapse of twenty years. *Foster*, 14, 29; *Farnan v. Beresford*, 10 Clark & F. 319; *Farrell v. Gleeson*, 11 Clark & F. 702. In these cases it was ruled that scire facias on a judgment was not a mere continuation of a former suit, but created a new right.



In many jurisdictions provision is made for the revival of judgments by scire facias within a specified time, but our attention is [72] \*called to no such provision in these statutes. The reference to revivor in such cases treats scire facias, if used, as an action. It was enacted by the act of 1887, now §§ 3085 and 3086 of the Compiled Laws of 1897, that it should not be necessary "to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this territory, except in cases where such judgment had been rendered for a period of five years or more," and that an execution might issue at any time "on behalf of anyone interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same." Assuming that scire facias lies under the Code of New Mexico to revive a judgment, it is included in the word "action" in this section, and we think it may properly be assumed to have been used in the same comprehensive sense in the act of 1891, prescribing the limitation on "all actions founded upon any judgment."

We agree with the supreme court of New Mexico that the construction contended for is unreasonable, and would defeat the manifest object of the legislature, and that, after a judgment is barred under the statutes of New Mexico, a scire facias giving a new right and avoiding the statute cannot be maintained.

*Writ of error in No. 165 dismissed; judgment in No. 247 affirmed.*

[73] \*JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,  
v.

WILLIAM M. WARREN.

(See S. C. Reporter's ed. 73-77.)

*Constitutional law—insurance—statute as to effect of false answers by applicant.*

The power of the legislature to define the public policy of the state in respect to life insurance, and to impose conditions on the transaction of business by life insurance companies within the state, is exercised without violation of the Federal Constitution by Ohio Rev. Stat. 1894, p. 1899, § 3625, providing that an answer by an applicant shall not bar recovery on the policy unless clearly proved to be wilfully false and fraudulently made and also material, and that it induced the company to issue the policy, and that the agent of the insurer had no knowledge of the falsity or fraud of such answer.

[No. 196.]

*Argued and Submitted March 19, 1901.  
Decided April 8, 1901.*

IN ERROR to the Supreme Court of the State of Ohio to review a decision affirming a judgment in an action on a policy of life insurance. *Affirmed.*  
181 U. S.

See same case below, 59 Ohio St. 45, 51 N. E. 546.

Statement by Mr. Chief Justice **Fuller**:

This action was brought in the common pleas court of Delaware county, Ohio, on a policy of insurance issued September 27, 1895, by the John Hancock Mutual Life Insurance Company on the life of George E. Warren and for the benefit of William M. Warren. The insurance company resisted payment on the ground that the policy had been fraudulently obtained by the decedent, in that the answers made by him in his application made a part of the policy, and which were expressly warranted to be complete and true, the policy providing that if any of the statements were untrue it should be void, were false, and that he made them for the purpose of defrauding the insurance company, which would not have issued the policy had it known of the falsity of the answers.

Section 3625 of the Revised Statutes of Ohio provided that "no answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would \*not have been issued; and, [74] moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer." Rev. Stat. Ohio, 1894, p. 1899.

The trial judge charged the jury as follows: "This law, being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case. And is applicable to the questions and answers in the application that by the terms of the policy are made express warranties, as well as those that are not." The defendant duly excepted to that portion of the charge, and to other portions of the same purport. The defendant also requested the court to give the jury the following instruction: "The policy or contract upon which this action is based, and the application made by George E. Warren for the same, constitute a warranty that all answers by said Warren contained therein are true; and if any one or more of said answers is untrue, though made without actual fraud, and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the contract is void *ab initio*, and your verdict will be for the defendant." The court declined to give this instruction, and defendant duly excepted.

The jury returned a verdict for the plaintiff, and judgment was entered thereon, which was affirmed by the circuit court, and finally by the supreme court of Ohio. *John Hancock Mut. L. Ins. Co. v. Warren*, 59 Ohio St. 45, 51 N. E. 546.

**Messrs. George K. Nash, W. Z. Davis, and Louis G. Addison** submitted the cause for plaintiff in error:

Even though the statute on its face was not vulnerable to the objection raised, if the court in construing it made it effective to deprive persons of their constitutional privileges, it is equally vicious, and must fall under the inhibition of the Constitution.

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

Under the Ohio statute the insurer is deprived of the rights and remedies conceded to the assured. This the legislature has no power to do.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Frorer v. People, use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599, 40 N. W. 731; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 51 N. W. 858; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Vanzant v. Waddel*, 2 Yerg. 260; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

The fact that the plaintiff in error, or others who are affected by this statute, may be corporations, in no way changes this rule of law.

*Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17

Sup. Ct. Rep. 198; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The denial of a remedy for a wrong inflicted deprives a party of property as effectually as if it had been taken from him by direct legislative enactment.

*Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040; *Normal School Dist. Bd. of Edu. v. Blodgett*, 155 Ill. 441, 31 L. R. A. 970, 40 N. E. 1025.

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground,—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

It cannot be said that the legislature of a state has the right or the power to decide or declare what shall be the public policy of the state and what are proper subjects of police regulation.

*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

This statute cannot be upheld under the guise or favor of the so-called police power of the legislature.

*Tiedeman, Pol. Power*, p. 290; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627; *Vanzant v. Waddel*, 2 Yerg. 260; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 234.

The legislature cannot escape the inhibition of the 14th Amendment by attempting to classify such legislation, because the classification here attempted is unreasonable and arbitrary, and this is sufficient to condemn it.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 51 N. W. 858; *Brown v. Alabama G. S. R. Co.* 87 Ala. 370, 6 So. 295; *Gilman v. Tucker*, 128 N. Y. 190,



13 L. R. A. 304, 28 N. E. 1040; *State v. Goodwill*, 33 W. Va. 182, 6 L. R. A. 621, 10 S. E. 285; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Fraser v. People, use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Colon v. Lisk*, 153 N. Y. 194, 47 N. E. 302; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599, 40 N. W. 731; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

Mr. John S. Jones argued the cause, and, with Messrs. W. B. Jones and F. M. Marriott, filed a brief for defendant in error:

The authority granted the plaintiff in error to carry on the business of life insurance in Ohio emanates from the state, and the privilege the authority confers is a franchise. The plaintiff in error could not carry on its business in Ohio without first obtaining the authority of the state. To do so would be the unlawful exercise of a franchise.

*Western U. Telcg. Co. v. Mayer*, 28 Ohio St. 522; *State ex rel. New England Mut. L. Ins. Co. v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30; *State ex rel. Atty. Gen. v. Western Union Mut. L. Ins. Co.* 47 Ohio St. 167, 8 L. R. A. 129, 24 N. E. 392; *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161; *California v. California P. R. Co.* 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

In case of a foreign insurance company doing business within the borders of a state, the state has the constitutional right to impose what conditions it sees fit; and if the company accepts the conditions by doing business in the state, it waives all objections to the statutes.

*State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828; *Lafayette Ins. Co. v. French*, 18 How. 407, 15 L. ed. 451; *Paul v. Virginia*, 8 Wall. 163, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 415, 19 L. ed. 973; *Doyle v. Continental Ins. Co.* 94 U. S. 541, 24 L. ed. 151; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *State ex rel. New England Mut. L. Ins. Co. v. Reinmund*, 45 Ohio St. 218, 13 N. E. 30; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Liverpool & L. & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029; 181 U. S.

*Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

The right of the people of a state to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state has been settled by this court.

*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93.

This statute and others of a similar nature rest upon considerations of public policy.

*Queen Ins. Co. v. Leslie*, 47 Ohio St. 413, 9 L. R. A. 45, 24 N. E. 1072; *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828.

The rule is well settled that the statutes of a state in which a foreign insurance company is permitted to do business enter into and form a part of the contract of insurance.

*Smith v. Parsons*, 1 Ohio, 239, 13 Am. Dec. 608; *Bank of Chillicothe v. Swayne*, 8 Ohio, 283, 32 Am. Dec. 707; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 224; *Jewett v. Valley R. Co.* 34 Ohio St. 607; *Lindemann v. Ingham*, 36 Ohio St. 10; *Compton v. Wabash, St. L. & P. R. Co.* 45 Ohio St. 619, 16 N. E. 110, 18 N. E. 380; *Weil v. State*, 46 Ohio St. 452, 21 N. E. 643; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45, 24 N. E. 1072; *Wabash R. Co. v. Defiance*, 52 Ohio St. 314, 40 N. E. 89; 1 Joyce, Ins. § 194; *Hoagland v. Cincinnati & Ft. W. R. Co.* 18 Ind. 452; *Wauschaff v. Masonic Mut. Ben Soc.* 41 Mo. App. 211; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. 314; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

That the statute is not obnoxious to the inhibition against class legislation is well settled.

*Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

\*Mr. Chief Justice Fuller delivered the [74] opinion of the court:

In *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828, it was ruled that as foreign insurance companies and associations, whether incorporated or not, before commencing business in the state, were \*required to obtain a certificate of authority to do so, which conferred on the company or association receiving it the right and privilege of carrying on its business in the state, the privilege so conferred was a franchise. In the course of the opinion the court quoted with approval, from *Spelling on Extraordinary Relief*, as follows: "Where, by statute, the legal exercise of a right, which at common law was



private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern, that is, a franchise, the assumption and exercise of which, without complying with the conditions prescribed, would be a usurpation of a public or sovereign function. . . . There was no class of business the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost if not quite all the states, stringent requirements as to security of the persons dealing with insurers and the making and filing reports of public officers for public information are provided, and must be strictly observed and complied with before any person, association, or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right."

In the present case the supreme court of Ohio sustained the constitutionality of § 3625 of the Revised Statutes, which was in force at the time this policy was issued, upon the ground that the state had a right "to prescribe the terms and conditions upon which it grants such franchise; and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits." The legal effect was held to be the same "as if the section was copied into and made a part of the policy." And it was said that the statute had also been held constitutional in *National L. Ins. Co. v. Brobst*, 56 Ohio St. 728, 49 N. E. 1113, where no opinion seems to have been delivered.

The section in question applies to all life insurance companies doing business in the state of Ohio, and the state can certainly do [77] \*with foreign corporations what it may do with corporations of its own creation.

In *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, we held that provisions in the Revised Statutes of Missouri, that "in all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property," etc.; and "that no condition in any policy of insurance contrary to such provision [of this article] shall be legal or valid,"—were not in conflict with the Constitution of the United States. And this was affirmed in *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

In *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, where a statute of Texas was assailed on the ground that it took away the liberty of contract, Mr. Justice McKenna, delivering the opinion of the court, said: "The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of

Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the state over them. What those rights are, and what that power is, has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations." And as the state court had held that the statute was a condition imposed on the oil company on doing business within the state, it was said of it that "whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit, and were accepted with it." And see *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

It was for the legislature of Ohio to define the public policy \*of that state in respect of [77] life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the state of its undoubted power over corporations. .

*Judgment affirmed.*

ANNA V. WHITNEY, Appt.,

v.

EDWIN B. HAY.

(See S. C. Reporter's ed. 77-92.)

*Trusts—oral contract for land.*

1. The failure of the owner of premises to invest another with the legal title in accordance with a parol agreement under which possession has already been transferred, and his transfer of the legal title to a third party in violation of his agreement and with intent to defraud the promisee, is such a wrong as will entitle the latter to a decree specifically declaring that the grantee holds the title in trust for him.

NOTE.—On trusts *ex maleficio*—see notes to *Brown v. Doane* (Ga.) 11 L. R. A. 381; *Curdy v. Berton* (Cal.) 5 L. R. A. 189; and *Angie v. Chicago, St. P. M. & O. R. Co.* 38 L. ed. U. S. 55.

On parol promise to leave property by will as within the statute of frauds—see *Pond v. Sheean* (Ill.) 8 L. R. A. 414, and note. And see note to *Krell v. Codmah* (Mass.) 14 L. R. A. 816.



2. The statute of frauds is not violated by a decree declaring a trust in land conveyed in violation of an oral contract under which, in consideration of the support of the grantor and his wife for life, the title should be conveyed, by will or otherwise, to the promisee, and which has been partially performed by delivery of possession of the premises on the one hand, and on the other by furnishing support to the owners according to the contract, since the relief rests, not upon the parol contract, but upon the equities arising out of the subsequent acts and conduct of the promisor.

[No. 112.]

*Argued November 15, 16, 1900. Decided April 8, 1901.*

**A** PPEAL from the Court of Appeals of the District of Columbia to review a decision affirming a decree declaring a trust. *Affirmed.*

See same case below, 15 App. D. C. 164.

Statement by Mr. Justice Harlan:

[78] \*This suit was brought to obtain a decree declaring that the defendant Whitney held in trust for the plaintiff Hay the title to certain lots, with the building thereon, situate on Corcoran street in the city of Washington.

By a final decree in the supreme court of the District the relief asked was given, that court adjudging that the defendant Whitney, within a time named, make, execute, and acknowledge a deed of conveyance of the premises to the plaintiff Hay, and that in default thereof the decree should have the same effect as if such conveyance had been made.

Upon appeal to the court of appeals of the District the decree of the supreme court was affirmed, an elaborate opinion on behalf of the appellate court being delivered by Mr. Justice Shepard. 15 App. D. C. 164, 173.

The principal facts upon which the plaintiff relies in support of his suit will appear from the following statement based upon the record:

Circumstances not necessary to be detailed brought Piper and Hay into each other's society while the latter was in the west, with the result that Doctor and Mrs. Piper conceived and expressed the warmest affection for Mr. and Mrs. Hay, and in many ways indicated that they wished the latter to stand in the relation to them of son and daughter.

[79] As early as May 27th, 1883, Hay and wife received a letter written by Mrs. Piper for herself and husband, which was addressed, "Dear Son Edwin and Daughter Florence." It closed with these words: "Do be careful, Daughter Florence. As ever most affectionately, Father and Mother Piper." These relations continued during 1883, 1884, and 1885. And on the 23d day of December, 1885, Doctor Piper wrote to Hay, addressing him as "My Dear Boy." After referring to Hay's then recent sickness, he said: "I wish that we were in Washington to look after you a little—per-

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haps we could help you some in that direction. By the way, what do you think of our looking to your city as a residence for the few years still perhaps left to us? Suppose I could command, say \$25,000 certainly, and perhaps nearly as much more, what would you think it? We have no relations or friends to whom we owe anything as to the final disposition of our property." That letter thus closed: "Good night, with much love to you all, son, daughter, grandchildren, and all."

Under date of January 11th, 1886, Piper again wrote Hay, addressing him as "Dear Son Ned." And on the 14th of January, 1886, another letter, signed "Father and Mother Piper," and addressed to "Darling Edwin and Florence," was written as Piper and wife were about to leave Chicago for San Francisco, in which city the doctor was to appear as an expert witness in the matter of handwriting. In that letter, which was written by Mrs. Piper for herself and husband, Hay and wife were informed that a will had been prepared and left in the custody of Judge Charles H. Wood of Chicago, by which "we bequeath to you the whole of our property with the exception of a few legacies amounting to about \$500." In the same letter it was said: "In case of Dr.'s death Edwin and I are appointed executors of the Dr.'s will. In case of our death by accident on the journey, Edwin will attend to all business connected with all property left by us, which with the exception of the legacies goes to Edwin as above stated. He will of course find the will deposited as above said with Judge Wood, and with it a schedule of property, and also a key to box in safe deposit vault of First National Bank, containing property as set forth in schedule above noticed. Edwin will look after this matter as soon after our death as possible, as there are some things in the papers and the will which will need immediate attention." The following postscript was added: "In case we are killed on our journey, going or returning, Edwin will \*find in connection with [80] the will what we would desire to have done with our remains."

Under date of June 6th, 1886, they wrote to "Dear Son Edwin and Daughter Florence," about the case upon which the doctor had been engaged as an expert in handwriting, saying: "He has been very busy with a case which I wrote you about in my last, for this, which required an immense amount of work, he received \$5,000; of course this is not to be mentioned to anybody but our children. The case was won." That letter closed with these words: "Good night from us both dear children. May heaven's choicest blessing be showered upon you. As ever affectionately, Mother and Father Piper."

Two days later, June 8th, 1886, they wrote another letter addressed to "Dear Son Edwin and Daughter Florence," in which they said: "And now dear children I need not tell you how much we want to see you and the darling children. . . . when we

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meet, which we shall do some time if nothing providential prevents, when I trust all can be arranged to the satisfaction of you our dear children and ourselves. . . . Mr. Hyde, to whom we introduced you, is an excellent man, knows nothing of the relation we bear to each other particularly; only of course we tell him as we do everybody that you and yours are very dear to us, and that we look upon you as our children; we did not enter into further particulars." That letter closed with these words: "We both send you oceans of love dear ones, let us hear soon, and believe us to be now and ever, on this side and the other if permitted, your affectionate father and mother, R. U. and E. F. Piper."

[81] Other letters of like character were written during August and September, 1886. Under date of October 5th, 1886, Piper and wife wrote to Hay, saying: "We rejoice to hear that you are all well, and thank you again dear, dear children for your loving words, which we well know come from your loving hearts; we fully appreciate them all, I cannot tell you in words how much. . . . We shall be most happy to come to Washington, when it is convenient all round, more of that dear Edwin and Florence, if we reach Chicago in safety. Write us when you can, it is always a joyful event to us to receive your dear letters. \*We long to see you all, and if we live shall come when you are ready; in the meantime may heaven shower upon you and yours its choicest blessings. Dr. always reiterates *all I say*. I write *all* letters for him as that helps a little. As ever most affectionately, Father and Mother Piper." "We know you and Florence are truly happy in each other, dear Edwin, and that is one reason why we love you both so much. As ever affectionately, Mother and Father Piper."

Hay received another letter under date of November 7th, 1886, addressed to him as "Dear Son Edwin," in which it was said: "The Dr. sends you the duplicate of a draft. The Dr. says: My legal friends here tell me that it would be evidence of property in the hands of an administrator in case of my death, and of course you would know how to collect it." Upon the back of that letter was the following indorsement: "The draft is for \$5,300, fifty-three hundred dollars. We have also with us four trunks, containing clothes, and valise, microscope in box, and two valises."

Under date of November 19th, 1886, Hay and wife received another letter addressed "Dear Daughter and Son," in which these passages occurred: "Dr. is anticipating great enjoyment from rides with Edwin, Jr., Now from Dr. He wishes me to say: We have now, in safety deposit vaults, \$20,000 in cash, besides as you know the house built two years since, which is worth \$10,000. Dr. is anxious about investment and wishes you were here to consult him about it. Would you think it best to invest more here? Please write on receipt of this what you think of the matter, or is best to wait until we come to W. and then invest?"

Please answer at once. As ever dear children, Father and Mother Piper."

Shortly after that letter was written a girl was born to Hay and wife, and was named for Mrs. Piper. Under date of December 15th, 1886, Mrs. Piper, addressing Hay and wife as "Dear, Dear Children," on behalf of "Father and Mother Piper," wrote: "We are both much pleased with your kind thoughtfulness in naming the dear little one for us both, the Piper for Dr. and the Elizabeth for me. . . . Would you both not rather call her Elizabeth Frances Piper Hay, you could then call the darling \*Frances, rather than by the perhaps old-fashioned name of Elizabeth." This request of Mrs. Piper was complied with, and the baby was named Elizabeth Frances Piper Hay. Later, January 17th, 1887, Mrs. Piper wrote: "Dr. has for several weeks called me grandma, and I am very proud of the title; I forget sometimes to call him grandpa, but shall soon become accustomed to doing so." [82]

According to the evidence of Hay, several letters followed in relation to Doctor and Mrs. Piper coming to Washington. The result was that Hay and his wife consented to their coming to Washington. Under date of March 11th, 1887, Mrs. Piper wrote to Hay: "I feel, however, that the Dr. must go somewhere before that time, and if it is not perfectly convenient for us to come to Washington at present, we will wait and take a short trip to Colorado or somewhere else. Now my dear son and daughter, tell us the exact truth with regard to this matter, as there should surely be no hesitation in stating facts between us. Our best love to darling Florence, and the babies, and a large share from us both for yourself. As ever affectionately, Father and Mother Piper."

This was followed by another letter, dated March 18th, 1887, in which it was said: "I feel very anxious about him, I am still; and as physicians and friends all insisted that a change was better for him than anything else, and he is so much attached to you all, that I ventured to press the matter to our children, so I am sure you will appreciate. If we live and Dr. is able, I think we will start for W. some time next week, to-day being Friday the 18th. I would not come now as you are situated did I not feel so anxious about the Dr., and I cannot get him started for any other place now, although he did think he would go to Colorado, but he dreads going among strangers. As ever affectionately, Father and Mother Piper."

Doctor and Mrs. Piper arrived at Washington on the 25th of March, 1887, stopping at Hay's residence. Being asked under what conditions or arrangements they came to his home, Hay testified: "Pursuant to the conversations we had had and the communications that had passed between us prior to their arrival, they came to live with us as a mother and father would \*come to live with children, and their dwelling with us was conditioned upon a covenant and [83]



agreement entered into that in consideration of permitting them to reside with us in this relationship during the balance of their lives and the services and care to be given to them, that he would build a house in the city of Washington, District of Columbia, in which we should live together, and that at his death, not only the house, but all of his property, should be willed to me." Hay further testified: "And Doctor Piper further stated that should I be taken away that he would provide for Mrs. Hay and the children as if they were his grandchildren and she his daughter, and that should both of us be taken away during his lifetime that he would likewise provide for the children, and that he would rear and raise them, and upon this Mrs. Piper and Doctor Piper, Mrs. Hay and myself shook hands, and the Doctor himself called upon Heaven to witness the sincerity of the agreement." Being asked whether it was part of any agreement with Doctor and Mrs. Piper that they were to pay board at his house, Hay testified: "No; such a thing as board was absolutely never considered for a moment, nor, in fact, did the Doctor ever, for himself or his wife, pay one cent of money to me or Mrs. Hay for anything, but especially for board. Such was not the condition nor the agreement nor the understanding, as we were not breaking up our family and our family relations to take boarders, as there was no necessity to do such a thing. . . . The Doctor paid nothing whatever toward the running expenses of my house in any way whatever or for anything, except, it occurs to me, at one time while we were away during a few weeks in the summer he asked if the hired manservant might return to wait upon him; and, if so, he would pay to him the sum of \$10 per month. I don't know how much the Doctor paid, but it was not more than two months' wages."

[84] Believing that the arrangement with Dr. Piper and his wife was to last during their lives, and desiring to make home as pleasant and agreeable as possible, Hay incurred considerable expense in furnishing proper apartments for them. The painting and papering were renewed. Rooms were set apart for their exclusive use, toward the furnishing of which the doctor \*paid nothing. In expectation of their coming to his house as their permanent home, Hay had a bay window constructed on the front of his house, and erected a back building, so as to give an additional and larger dining room, a sleeping room, and a hall and bath room. The situation of Piper and wife in their new home was thus described by Hay in his deposition: "Doctor and Mrs. Piper were taken into our family just the same as if they had been our own father and mother; if anything, they were treated better than blood relations could possibly have been treated, as it was the constant desire of both Mrs. Hay and myself to make life as pleasant for them as it possibly could be under any circumstances, and so we put ourselves out in order to do so, notwithstanding

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ing that in prior communications they insisted that there should be no change in the relationship in our family and their family affairs."

Being asked what change, if any, was caused by the presence of Piper and wife in his home, Hay said: "The daily care of their rooms, the additional preparation and provision of food, and the especial manner of cooking it necessary to satisfy the Doctor, he being exacting in this particular. . . . There were certain meats that the Doctor did not eat, steak being the favorite meat for himself, and it having always to be provided for him; the cooking of a number of other dishes, different from what we had been accustomed, entailing additional and extra labor upon the cook." He further testified: "Everything was done for the pleasure of Doctor and Mrs. Piper. We were at home in the evenings, and brought in friends whom we thought would be congenial to the Doctor in his peculiar tastes. Doctor Piper, being a universally well-read man, was ready to converse upon almost every subject. . . . Originally he graduated as a doctor of medicine and surgery, and in his early days was the author of a wonderful book in its time, titled 'Piper's Surgery.' Being an artist, he was the first among the etchers in our country, and this book contains upwards of 1,800 illustrations, produced entirely with his pen. This book was used during the war in the army. Since that time he has illustrated a book upon 'Trees,' and has done very much fine microscopic work; and so he became interested in \*everything that could come under it, and finally got into handwriting, the use of the camera lucida being his method of examination. Since that time he had lost all other occupations, except that of being an expert in handwriting, and also a microscopic for the examination of food and of blood, and has been engaged in many cases that are recorded in the books. . . . As the letters indicated, the Doctor did not seem to be well, but he has always been complaining. . . . He required constant and particular attention, so much so that a physician was called in regularly and constantly for the purpose of frequently looking the Doctor over, and he continued his attentions to Dr. Piper during the years he was with us. . . . They were perfectly contented and happy, and when a few weeks afterwards, to wit, in August, 1887, we were away at the seashore, many, many affectionate letters were written by them. The following is from one dated August 8th, 1887, speaking of the Doctor: 'He says, tell the dear children with much love that he rejoices in their happiness, and I assure you that he will do everything possible to promote it, and be assured I will second all his efforts.' This last letter was addressed to 'Dear Daughter Florence and Son Edwin,' and was signed, 'As ever affectionately, Father and Mother Piper.'"

The circumstances under which the lots in question were purchased and a house erected thereon may be thus summarized:

[86] Shortly after Doctor Piper reached Washington he insisted upon the purchase of a lot and the building of a house upon it to be occupied by the Hay family, in connection with himself and wife. His avowed purpose was to have a house in which all could live, and in which everything would be according to their liking. After looking at many lots, the one on Corcoran street was purchased, and attention was at once given to the preparation of plans for a residence. Hay drew the plans and submitted them to Dr. Piper before engaging the service of an architect. They were not revised by the doctor, he saying that "whatever Mrs. Hay wanted was satisfactory to him," and that everything should be done as she desired. The plans were such as to give a double house, with a hall through the center. The sitting room, parlor, and the dining room, as an "assembly" \*place for the whole family, were to be on the first floor. On the second floor it was arranged that upon the left of the hall, fronting north, the doctor should have a sitting room; back of that a sleeping room and a bath room, all of which were for their exclusive use, apart from the rest of the house.

As soon as the lot was purchased and paid for by Doctor Piper's check, and the plans for building were completed, and the ground broken for the house to be built, Piper insisted upon employing an attorney to write a will that would cover this and all other property owned by him. In the presence of Hay and the attorney engaged to write the proposed will, Mr. W. A. Cook, the doctor referred to a former will made by him and deposited with Mr. Wood in Chicago, and stated "that as he had acquired additional property in the District of Columbia since that time, and wishing everything to be exactly right in the matter, that he would make another will, so he instructed Mr. Cook, in my presence, to make a will, including this property in the District of Columbia, No. 1512 Corcoran street, and the lots upon which it stands, and all of his property wherever situated, especially naming that in Chicago, and devising all the same to me, in trust for his wife, and at her death to belong to myself, my heirs and assigns forever." Subsequently to this interview with the attorney, the doctor informed Hay that the will had been prepared and witnessed by three persons, and that he had "deposited it in the safe deposit company on the avenue." Hay did not know what became of that will.

The statements of Hay in reference to the making of that will are sustained by the testimony of Mr. Cook, who stated in his deposition that he had prepared for Dr. Piper a will, which was duly signed, acknowledged, and attested by witnesses, and by which the property in dispute on Corcoran street was devised to Hay. Doctor Piper stated to Mr. Cook "that the house [on P street] belonging to Mr. Hay was not a sufficient house, and that he ought to have a better and larger house, and he proposed to buy a lot, to which I have referred [on

Corcoran street], and have a house erected on it suitable for Mr. Hay, and for his own accommodation, and one that would exist absolutely in Mr. Hay, when completed." Again, the same witness: "He, \*Doctor [87] Piper, said he was exceedingly pleased with the disposition that he had made of the house in giving it to Mr. Hay; that he had no regret in doing so; that his comforts and enjoyments had been greater after the giving of the house and after it was occupied by Mr. Hay than his comforts and enjoyments had been previously, and that if he had it to repeat he would make the same will and the same disposition of the property."

The work upon the house was watched with great interest by Doctor Piper and his wife. Quite a number of changes were made during its progress. They were made, Hay testified, "at the request of Mrs. Hay—the Doctor acceded to her wishes as he said he wished to have everything as Mrs. Hay desired it, because the house was being built for us and it should be in accordance with our ideas." The original intention was to have the house heated by furnace. But that was changed to steam heat at an expense of \$1,000, of which Hay paid \$700.

The house having been completed, possession was delivered by Doctor and Mrs. Piper to Hay and wife. The latter moved into it on the 1st day of August, 1888, and have been in possession ever since. Hay furnished the house completely with the exception of Dr. Piper's sitting room, which was fitted up by the latter with furniture brought from Chicago. In addition to the furniture taken from the P street house, Hay was compelled to supply other furniture to the amount of about \$1,200. He also paid for gas fixtures and mantels throughout the house; also for chandeliers. Going from the P street house into the house on Corcoran street necessitated the employment by Hay of two additional servants. Substantially, the entire expense arising from the occupancy of the new house was met by Hay.

Mr. A. S. Worthington argued the cause, and, with Mr. B. F. Leighton, filed a brief for appellant:

One who asks specific performance of a contract must establish the contract he sets up by cogent evidence.

*Purcell v. Miner*, 4 Wall. 513, sub nom. *Purcell v. Coleman*, 18 L. ed. 435; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *Hennessey v. Woolworth*, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. Rep. 109; *De Sollar v. Hanscome*, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; *Nickerson v. Nickerson*, 127 U. S. 668, 32 L. ed. 314, 8 Sup. Ct. Rep. 1355.

Where there is any reasonable doubt as to whether all the terms of the alleged agreement are before the court, specific performance will be refused and the complainant left to his remedy at law.

*Colson v. Thompson*, 2 Wheat. 336, 4 L. ed. 253; *Dalzell v. Dueber Watch Case Mfg. Co.* 181 U. S.



149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886.

To avoid the statute of frauds the complainant relies upon his being in possession as part performance of the alleged oral agreement.

But that possession is seen to have been held, for nearly three years before the suit was brought, under a written lease. Having retained possession under that instrument, he cannot be allowed now to claim that he is in possession under a different and wholly inconsistent agreement.

*Ham v. Goodrich*, 33 N. H. 38; *Haisten v. Savannah & G. R. Co.* 51 Ga. 199; *Wood v. Thornly*, 58 Ill. 465; *Purcell v. Miner*, 4 Wall. 513, sub nom. *Purcell v. Coleman*, 18 L. ed. 435.

There must be some point of time in contracts of this kind, at which, for a violation of it, the injured party's remedy would be by an action at law, and not by a suit for specific performance.

*Cox v. Cox*, 26 Gratt. 308.

Where the consideration of a contract is personal services to be performed by one of the parties, it cannot be specifically enforced. As to the one party, the court will not undertake to compel him to render the services; and as to the other, he must fail because, unless the remedy is mutual, equity will not interfere.

*Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955.

**Messrs. A. A. Hoehling, Jr., and Jeremiah M. Wilson** argued the cause, and, with **Mr. E. B. Hay**, filed a brief for appellee:

Specific performance of a parol agreement will be compelled by a court of equity, where one party to it has wholly or partially performed it on his part, so that its nonfulfilment by the other party is a fraud.

*Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Rivers v. Rivers*, 3 Desauss. Eq. 195, 4 Am. Dec. 609; *Izard v. Middleton*, 1 Desauss. Eq. 116.

Agreements for family arrangements with respect to property are viewed with favor by this court. They ought to be respected and scrupulously carried out by the parties to them; and if they are not, a court of equity ought to enforce their execution.

*Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Parsell v. Stryker*, 41 N. Y. 480; *Davison v. Davison*, 13 N. J. Eq. 246; *Van Duyne v. Vreeland*, 12 N. J. Eq. 143; *Guplon v. Gupton*, 47 Mo. 37; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438; *Twiss v. George*, 33 Mich. 253; *Warren v. Warren*, 105 Ill. 568; *Atkinson v. Jackson*, 8 Ind. 31; *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Brinker v. Brinker*, 7 Pa. 53; *Sutton v. Hayden*, 62 Mo. 101.

Equity may enforce specifically the performance of contracts to dispose of property by will.

*Shakespeare v. Markham*, 72 N. Y. 400; *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession and the donee, 181 U. S.

induced by the promise to give it, has made valuable improvements on the property.

*Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273.

A promise to transfer the title to real property by will is equally enforceable with one to transfer by deed.

*Van Duyne v. Vreeland*, 11 N. J. Eq. 370; *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Carmichael v. Carmichael*, 72 Mich. 76, 1 L. R. A. 596, 40 N. W. 173; *Guplon v. Gupton*, 47 Mo. 37; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258.

This principle applies, not only in the case of agreements where the date of the promised conveyance is fixed and certain, but also where it is unfixed and indefinite.

*Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921; *Lamb v. Hinman*, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709.

Aside from the memoranda of the contract established by the various writings set forth in the record and by the oral testimony, the acts of performance by complainant are sufficient to take the case out of the statute of frauds.

*Lamb v. Hinman*, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258.

Such agreements sought to be enforced must be certain in essential terms. The certainty of proof required is not absolute, but reasonable.

*Mundy v. Jolliffe*, 5 Myl. & C. 177; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273; *Pom. Spec. Perf. § 137*.

The present contract is definite and certain in its terms.

*Tolson v. Tolson*, 10 Gill. & J. 159; *Willett v. Carroll*, 13 Md. 459.

Where a party not originally bound by his covenant has completely performed, so that he may no longer be restored to the condition he occupied prior to such performance, it does not lie with the other party to complain of the original want of mutuality, even if such had in fact then existed.

*Fry, Spec. Perf. § 445*, p. 204; 3 *Pom. Eq. Jur.* p. 2163; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4; *Wilks v. Georgia P. R. Co.* 79 Ala. 180; *Warren v. Warren*, 105 Ill. 568; *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. Rep. 273.

[87] \*Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court:

[88] \*It appears from this statement that Doctor and Mrs. Piper, each somewhat advanced in years, were without children, and had no kin to whom the husband desired to bequeath his estate. They longed for the comforts and happiness of a home in which they would have the sympathy, attention, and care of younger people upon whom they could look as their children.

The bill alleged that the property in question was purchased by Doctor Piper in execution of an agreement in parol between him and Hay, whereby Piper and his wife were to become members of Hay's household in Washington and to be supported, maintained, and cared for by Hay during their respective lives, in consideration of which Piper was to convey by will or otherwise to Hay all of his property of every kind and wherever situated; that in part execution of that agreement Piper purchased the lots in question and built a house thereon; that in further execution of it Piper put Hay in possession of the lot and house to be occupied as a home by the latter and his family in connection with Piper and his wife; and that while the plaintiff was in actual occupancy of the premises as his home,—and he was still in such occupancy when this suit was brought,—Piper, in violation of his agreement and for the purpose solely of defrauding the plaintiff, put the title to the property in his niece, the defendant Whitney.

Was there any such agreement between Piper and Hay? If so, was there such part performance of it as entitled the plaintiff to a conveyance from Piper, had he lived until the decree was passed? These are the questions for determination in this case.

In the allegations of his bill and in every essential fact Hay is so thoroughly sustained by witnesses that we do not hesitate to declare that the agreement with Piper is proved to have been just as stated by him. There can be no reasonable doubt as to its subject-matter or its terms. There was no element of fraud or misrepresentation on the part of Hay. The terms of the agreement between him and Hay were clear and definite; its provisions fair, just, and reasonable; the consideration mutual and entirely adequate. What Hay asked was not in any sense inequitable. That which he under-

[89] took to do in execution \*of the agreement was done by him promptly and in such way as to give no cause for complaint or objection by Piper. And all that he did had reference to and was consistent with the agreement, and can be referred to nothing else. His plans of life were materially altered in order that he might take care of Piper and wife during their respective lives. Piper put Hay in actual possession of the premises in question in execution of his agreement with Hay. But he failed to do that which was vital to Hay, namely, to put the absolute title to the property in him. Under all the circumstances, the fail-

ure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him, under the established principles of equity, to the protection which would be given by a decree specifically declaring that the defendant holds the title in trust for him. We are of opinion that such relief is consistent with the objects intended to be subserved by the statute of frauds; for the decree in favor of Hay does not charge Piper upon his parol contract with him, but rests upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement.

Referring to the statute of frauds and to the mischiefs intended to be reached by it, Mr. Justice Story says: "It is obvious that courts of equity are bound as much as courts of law by the provisions of this statute; and therefore they are not at liberty to disregard them. That they do, however, interfere in some cases within the reach of the statute, is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it." A case of such interference is when a court of equity enforces the specific performance "of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be enabled to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and \*the objects of the statute are [90] promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." 1 Story, Eq. Jur. §§ 754, 759.

This rule finds illustration in cases in this court: in *Neale v. Neale*, 9 Wall. 1, 9, 19 L. ed. 590, 591, where it was said that "the statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed;" in *Brown v. Sutton*, 129 U. S. 238, 239, 32 L. ed. 664, 666, 9 Sup. Ct. Rep. 273, which was a suit to enforce the specific performance of an oral engagement to convey certain real estate to the promisee, in consideration of her taking care of the promisor during the remainder of his life, as she had done in the past, the court holding that there had been such "part performance in its ex-



ecution" as to bring the case within the exception made by that doctrine in the requirement of the statute of frauds that the sale of the lands must be in writing; and in *Townsend v. Vanderwerker*, 160 U. S. 171, 184, 40 L. ed. 383, 387, 16 Sup. Ct. Rep. 258, 261, where it was said that "the general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defense, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a *quantum meruit* for the value of his services." "Courts of equity," said Lord Cottenham, "exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing \*the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it could, what the terms of it really were. It is not necessary, in this case, to adopt any such course of proceeding; for I think an agreement for a lease sufficiently proved, and that acts of part performance are proved, so as to take the case out of the statute of frauds; and I think the defenses set up have wholly failed." *Mundy v. Joliffe*, 5 Myl. & C. 167, 177.

To the like effect are numerous other American and English cases which are familiar to the profession, and need not be cited. They all proceed upon the ground that, although, in a suit to enforce the specific performance of a parol agreement in reference to land, the defendant cannot be directly charged upon the alleged contract itself, he may be held—the evidence clearly showing part performance, in substantial particulars, of such agreement—to do what justice requires to be done under the equities arising from acts done after the making of the agreement and in execution of its provisions. To refuse under some circumstances to compel the full execution of an agreement of that kind which has been partly performed would make the statute an instrument of fraud, and that a court of equity will not permit. "It is not arbitrary or unreasonable," said the Lord Chancellor in *Maddison v. Alderson*, L. R. 8 App. Cas. 407, 476, "to hold that when the stat-

ute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract."

The alleged agreement being one which a court of equity would specifically enforce if it had been in writing, and it having \*been [92] partly performed by Hay in reliance upon performance by Piper, and Hay being ready and willing to do what, under the agreement remained to be done by him during the lives of Doctor and Mrs. Piper, he was entitled to the decree rendered in his favor; and it is affirmed.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,  
v.

CALL PUBLISHING COMPANY.

(See S. C. Reporter's ed. 92-104.)

*Common law — effect of interstate commerce — questions of fact on writ of error to state court.*

1. The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactments.
2. Questions of fact once settled in the courts of the state are not subject to review in the Supreme Court of the United States on writ of error to a state court.

[No. 117.]

*Argued and Submitted December 4, 1900.  
Decided April 15, 1901.*

IN ERROR to the Supreme Court of the State of Nebraska to review a decision affirming a judgment in favor of plaintiff for illegal charges by a telegraph company. *Affirmed.*

See same case below, 58 Neb. 192, 78 N. W. 519.

Statement by Mr. Justice Brewer:

This was an action commenced on April 29, 1891, in the district court of Lancaster county, Nebraska, by the Call Publishing Company, to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error,

NOTE.—On the adoption of the common law in the United States—see *McKennon v. Winn* (Okla.) 22 L. R. A. 501, and note.

As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to what questions the United States Supreme Court will review on writ of error—see note to *Parks v. Turner*, 18 L. ed. U. S. 883.



for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called the Lincoln Daily Call. The Nebraska State Journal was another newspaper published at the same time in the same city, by the State Journal Company. \*Each of these papers received Associated Press despatches over the lines of defendant. The petition alleged:

"4th, That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid \$75 per month for such despatches, amounting to 1,500 words or less daily, or at the rate of not less than \$5 per 100 words daily per month, it charged and collected from the said State Journal Company for the same, like, and contemporaneous services only the sum of \$1.50 per 100 words daily per month.

"Plaintiff alleges that the sum so demanded, charged, collected, and received by the said defendant for the services so rendered the plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was \$3.50 per 100 words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company.

"That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services, or to do without the same; that plaintiff could not dispense with such despatches without very serious injury to its business."

The telegraph company's amended answer denied any unjust discrimination, denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and reasonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for like services. The defendant further claimed that it was a corporation engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and other Purposes," approved July 24, 1866 [14 Stat. at L. 221, chap. 230]; that it had constructed its lines under the authority \*of its charter and that act; and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had resulting in a verdict and judgment for the plaintiff, which judgment was reversed by the supreme court of the state. 44 Neb. 326, 27 L. R. A. 622, 62 N. W. 506. A second trial in the district court resulted in a verdict and judgment for the plaintiff, which was affirmed by the supreme court of the state (58 Neb. 192, 78 N. W. 519), and

thereupon the telegraph company sued out this writ of error.

Mr. Rush Taggart argued the cause, and, with Mr. John F. Pillon, filed a brief for plaintiff in error:

The Western Union Telegraph Company is engaged in interstate commerce, and as such is entitled to the same exemptions from state control and supervision as railways or other common carriers.

*Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

Whatever subjects of this power over interstate commerce are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such nature as to require exclusive control by Congress.

*Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387; *Ex parte McNiel*, 13 Wall. 236, 20 L. ed. 624; *State Freight Tax Case*, 15 Wall. 232, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146; *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710; *The Lottawanna*, 21 Wall. 558, sub nom. *Rodd v. Heartt*, 22 L. ed. 654; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Ouachita & M. River Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Leisy v. Hardin*, 181 U. S.



135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

By no method of procedure, whether by legislation or by decision of its courts in enforcing the common law of the state, can the state of Illinois control the rate of freight for shipments beyond the boundaries of the state.

*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The same principles and necessities which furnish the reason for a national regulation by Congress apply to a statute, or to an attempt to regulate rates or control the same by the application of the principles of the common law as expounded and applied by any particular state.

*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 486, 31 L. ed. 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The common law is interpreted differently in the different states. It may mean one thing in Iowa, and a very different thing in Illinois or Nebraska.

*United States v. Worrall*, 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766.

There is no national common law. The courts of the United States do, in actions between citizens of different states, enforce a common law constantly, but it is the municipal law, or common law of the state, which is thus enforced, and not a national common law.

*Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Re Burrus*, 136 U. S. 597, 34 L. ed. 514, 10 Sup. Ct. Rep. 850; 6 Am. & Eng. Enc. Law, 2d ed. pp. 285, 286; *Garner v. Wright*, 52 Ark. 388, 6 L. R. A. 715, 12 S. W. 785; *People v. Folsom*, 5 Cal. 374; *Hudson Furniture Co. v. Harding*, 30 L. R. A. 513, sub nom. *Phipps v. Harding*, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468.

There is no national common or general law, in the sense of a rule of civil conduct, prescribed by the nation as sovereign, which may be made the basis of an action to recover back rates, simply because the court may find them to be unreasonable.

*Swift v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 858, 5 Inters. Com. Rep. 116, 64 Fed. 59; *Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 112, 28 L. R. A. 556, 63 N. W. 589.

**Mr. Franklin W. Collins** submitted the cause for defendant in error. **Mr. John M. Stewart** was with him on the brief:

It is true that the legislative control of commerce between the states is vested in Congress, but it does not thereby follow that state courts may not hear and determine controversies between their citizens, growing out of such business and involving constitutional and Federal laws governing the same.

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*Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 515, 42 L. ed. 1128, 18 Sup. Ct. Rep. 685; *The Moses Taylor*, 4 Wall. 429, sub nom. *The Moscs Taylor v. Hammons*, 18 L. ed. 401; *Martin v. Hunter*, 1 Wheat. 334, 4 L. ed. 104; *Murray v. Chicago & N. W. R. Co.* 62 Fed. 42, 4 Inters. Com. Rep. 806; *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

The courts may look to the common law for guidance in determining controversies between litigants, relating to and arising out of interstate commerce.

*Murray v. Chicago & N. W. R. Co.* 4 Inters. Com. Rep. 806, 62 Fed. 24, 35 C. C. A. 62, 92 Fed. 868; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Chicago & N. W. R. Co. v. Osborne*, 3 C. C. A. 347, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. 912; Story, Const. 5th ed. p. 112, note; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 136, 42 L. ed. 691, 18 Sup. Ct. Rep. 289; 6 Am. & Eng. Enc. Law, 2d ed. pp. 285, 286; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Silver v. Missouri P. R. Co.* 101 Mo. 79, 13 S. W. 410; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 79 Mo. 478; *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455; *Raisler v. Oliver*, 97 Ala. 710, 12 So. 238.

The fact that a right of action is given in the Federal court does not raise the presumption that the jurisdiction of all other courts over such subject is excluded.

*Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 515, 42 L. ed. 1128, 18 Sup. Ct. Rep. 685.

\***Mr. Justice Brewer** delivered the opinion [94] of the court:

The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal Company. In the brief of counsel it is said: "The contention was consistently and continuously made upon the trial by the telegraph company, that as to the state law it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject." The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce [95]



and in respect to such commerce are absolutely at the mercy of the carriers. It is true, counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not; and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loth to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce.

It may be well at this time to notice what the exact rulings of the state court were: The charge to the plaintiff was \$5 per 100 words, and to the State Journal Company \$1.50 per 100 words. When the case came to the supreme court for examination of the proceedings in the first trial it appeared that no proper exceptions to the instructions had been preserved, and the only question, therefore, for consideration, was the sufficiency of the evidence to sustain the verdict; and the court held that the mere fact of a difference in charge was not sufficient to invalidate the contract made with the plaintiff, and that there was no satisfactory evidence that the difference in the charge was unreasonable. In the course of its opinion the court said:

"There was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show, either that another person was obtaining despatches for a less sum than the plaintiff, without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference

[96] \*in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate. . . . As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there was also shown a difference in conditions affecting the expense and difficulty of rendering the services, which at common law would justify some difference in rates, and this difference was one which the proviso quoted

from the 7th section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof, when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent, it is permitted to measure one against the other, and to say that to the extent of \$1 or to the extent of \$1,000 the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof, a verdict must be based upon the proof, and a verdict must be founded upon evidence, and not upon the conjecture of the jury or its \*general judgment as [97] to what is fair, without evidence whereon to found such judgment."

Under this construction of the law the first judgment was reversed, and the second trial proceeded upon the lines thus laid down by the supreme court. On that trial the court charged:

"You are instructed that not every discrimination in rates charged by a telegraph company is unjust. In order to constitute an unjust discrimination, there must be a difference in rates under substantially similar conditions as to service; the rate charged must be a reasonable rate; under like conditions it must render its services to all patrons on equal terms; it must not so discriminate in its rates to different patrons as to give one an undue preference over another.

"It is not an undue preference to make one patron a less rate than another where exist differences in conditions affecting the expense or difficulty in performing the services which fairly justify the difference in rates; and where it is shown that a difference in rate exists, but there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions.

"In this action there is shown to exist, not only, on the one hand, a difference in the rates charged to the patrons of the telegraph company, the Call Publishing Company, and the State Journal Company, but, on the other hand, also a difference in the condi-



tions under which the telegraph services were rendered to the two companies; and the question that you have particularly to direct your attention to is how far this difference in condition justified the difference in rates charged; to what extent, if any, the difference in rates charged the rival companies was disproportioned to the difference in conditions under which the services were rendered. If you find such disproportions to have existed, and that by reason thereof the amount charged the plaintiff was in excess of what a reasonable rate would be under the circumstances, then you are to find, if facts have been presented to you by which [98] you can find, \*the amount of such excess as the amount which the plaintiff would be entitled to recover.

"The burden of proof is upon the plaintiff to show by a preponderance of the evidence the existence of the discrimination claimed by it; also that the differences in conditions shown are disproportionate to the difference in charges made, as well as all the other material allegations of its petition.

"You should approach this case, not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere. The telegraph company is a common carrier, and is said to exercise quasi-public functions. On the other hand, the Call Publishing Company has certain legal rights. It embarks in an enterprise in the city of Lincoln. It has for a competitor the State Journal Company, and perhaps others. In its race for success it ought not to be unfairly handicapped. For the purpose of getting the news both it and the Journal use the Associated Press despatches. In fixing its charges to these two competing companies for these despatches it is the duty of the telegraph company not to unjustly discriminate in favor of either, as explained to you in these instructions; and, as before stated to you, if the plaintiff has been able to convince you that the defendant has so discriminated, then the telegraph company would be required to answer to the plaintiff in whatever damages the plaintiff has satisfied you he has suffered.

"In arriving at your verdict you should consider whatever evidence there is going to show charges made by the telegraph company to other persons or in other places for like services under like conditions; the increased cost of operating plant occasioned by increased work, if any; the difference of volume of business between the telegraph company's day and night work, as it would be a reasonable discrimination for the company [99] \*to make this difference the basis for a difference in charges; the difference in charges between day and night services gen-

erally, as shown by the evidence; also the difference in the character of the night and day work; the time required to perform it, as shown by the evidence; the charges made by the company for other services unless made under circumstances and conditions different from those under consideration, so as not to furnish a fair criterion as to charges; the general operating expenses of the company as affected by rates charged; as well as all other facts before you which may aid you in arriving at a conclusion. However, this is to be understood: That for the plaintiff to recover it must show the discrimination; that the discrimination was unjust, as explained in these instructions; and, further, you must be able from the evidence furnished you to measure the damages, if any, sustained by the plaintiff. You are not to fix the damages in any haphazard manner, nor by mere speculation, but by reasons sustained by the evidence and showing in a reasonable way the amount thereof.

"The jury are instructed that the defendant telegraph company is not presumed to have unjustly discriminated against any of its patrons and in favor of certain other of its patrons, but, on the contrary, it is presumed to have properly and justly established its rates according to the various kinds of service it may be called upon to render, considering its duty to the public and to its stockholders."

And it was under these instructions that the jury returned a verdict for the plaintiff. The case, therefore, was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to discriminations, but upon the propositions, distinctly stated, that, where there is dissimilarity in the services rendered, a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination; and that the recovery must be limited to the amount of the unreasonable discrimination.

No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce \*or [100] in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference,



and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no Federal common law, and that such has been the ruling of this court; there was no Federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company.

This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the states. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free; and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no Federal common law different and distinct from the common law existing in the several states. Thus, in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was said by Mr. Justice Matthews, speaking for the court:

[101] \*"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes: *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is none the less the law of that state." P. 478, L. ed. 512, Inters. Com. Rep. 808, Sup. Ct. Rep. 569.

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several states, in the sense that there

is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, Com. 471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time \*out of mind; or, in the [102] solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification." 1 Bl. Com. 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.

But this question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 275, 36 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 96, 12 Sup. Ct. Rep. 844, 847, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379, chap. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers."



In *Bank of Kentucky v. Adams Exp. Co.* and *Planters' Nat. Bank v. Adams Exp. Co.* 93 U. S. 174, 177, 23 L. ed. 872, 874, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the [103] course of transit \*the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court, after describing the business in which the companies were engaged, said: "Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers."

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the circuit court in the northern district of Iowa, in *Murray v. Chicago & N. W. R. Co.* 62 Fed. Rep. 24, in which is collated a number of extracts from opinions of this court, all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the states, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that, even if there be a law which controls, there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a state, are not subject to review in this court. *Dower v. Richards*. 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226-242, 41 L. ed. 979-986, 17 Sup. Ct. Rep. [104] 581; \**Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; *Gardner v. Bonestell*, 180 U. S. 362, ante, 574, 21 Sup. Ct. Rep. 399.

These are the only questions of a Federal nature which are presented by the record, and, finding no error in them, the judgment of the Supreme Court of Nebraska is affirmed.

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JOEL PARKER WHITNEY *et al.*, Appts.,  
v.

UNITED STATES, Eloisa Bergere, *et al.*

(See S. C. Reporter's ed. 104-117.)

*Private land claims—Mexican grants—power of governor—presumptions.*

1. A title under a Mexican grant of land in New Mexico, made in 1845 by the governor, is incomplete and does not make a case for confirmation under the Mexican colonization law of August, 1824, and the regulations of 1828, where there is no evidence of the approval of the grant by the assembly, and no record of further proceedings to obtain the approval of the supreme government, and there is no record of its existence in the archives of New Mexico.
2. No presumption that the supreme Executive of the Mexican nation had delegated his power to the governor or political chief of a province or state can be indulged for the purpose of upholding a grant of land made by the governor in violation of the Constitution or laws which had theretofore been adopted or passed, where there is nothing in the laws of the nation providing in terms or by inference for the general delegation of power by the supreme Executive to make such grants, even if he himself had such power.

[No. 133.]

*Argued March 1, 1901. Decided April 15, 1901.*

**A** PPEAL from the Court of Private Land Claims to review a decision rejecting a claim under an alleged grant of land in New Mexico. *Affirmed.*

Statement by Mr. Justice Peckham:

The appellants in this case come here on appeal from a judgment of the court of private land claims rejecting their claim, which arose under a grant of land in New Mexico called La Estancia grant, consisting of some 415,000 acres, made in 1845, by Governor Armijo, to one Antonio Sandoval, under whom they claim. Upon the trial it appeared that Sandoval in 1845 was a Mexican citizen of high distinction residing in the territory of New Mexico. By petition dated December 5, 1845, and presented on the 7th of that month, Sandoval petitioned the governor of New Mexico for a grant of land in the name of the supreme authority of the Mexican nation, the land being described in the petition, and the petitioner stating that it was \*vacant land in a condition of mort-[105]main, and might be granted without prejudice to any third party. He stated in his petition that he had for the last thirty years and more been rendering services to the country, both by personal service and property, and without ever having been paid anything in the way of compensation for such services, and in consideration of all of which he asked and prayed the governor for the sake of justice to accede to his prayer. On December 7, 1845, Governor Armijo

granted the petition, and placed the following memorandum thereon:

This government being convinced of the valuable services Don Antonio Sandoval has rendered and is now rendering the country, as well during the time to which he refers as also during the six years he served administering the prefecture of the second district, with the salary of \$1,500, of which not even a half real has been paid to him, the sum due him amounting to \$9,000, and the statements in this petition being true, I do, in the exercise of the power in me vested by the laws, and also in consideration of all the premises and as a just title acquired, make to him the grant for the land he solicits, with all the dimensions and pasture land he asks, that he may enjoy the same in the name of the supreme government of the Mexican nation and under my concession, free and exempt from all tax or tribute.

Manuel Armijo.

Following the memorandum is a written certificate signed by the comptroller of the departmental treasury of New Mexico and acting treasurer of the same, certifying that Antonio Sandoval, during the period of forty years, as appears from the record of the books of the treasury, has been serving the nation as a military and civil officer, and has loaned during that time numerous sums of money to the nation without receiving one-half real interest, and that there are now due him large sums, as appears from the interest entries in the office and the evidences in possession of the parties interested on account of salaries and loans. Then follows the written certificate of José Baca y Ortiz, dated at La Estancia, December 15, 1845, in which \*he certifies that on that day he, accompanied by witnesses, placed Antonio Sandoval, *through his agent, Juan Antonio Aragon*, in juridical possession of the granted lands.

On July 8, 1848, Sandoval conveyed, by a deed of gift, the above-described land to his nephew, Gervacio Nolan. This conveyance was acknowledged before the clerk of the county of Bernalillo, territory of New Mexico, on July 8, 1848.

After the passage of the act of Congress, July 22, 1854, establishing the office of surveyor general in New Mexico, and on July 12, 1855, Nolan, the grantee of Sandoval, filed in the office of the surveyor general the papers above described, upon which he asked for the approval of that officer, and that he would recommend the grant for confirmation by Congress. Nolan died in 1858, before anything was done in regard to his petition. After his death his widow and children, by guardian, applied to the surveyor general, stating the fact of his death, and asked that the grant of the land should be confirmed to them as the present owners, and that a patent should be issued in their favor. Testimony was taken in 1861 relating to the petition, before the then surveyor general, but no final action was had in the case until it was submitted to Surveyor Gen-

eral Proudfit, who, on January 4, 1873, reported that in his opinion the title was perfect in the legal representatives of Nolan, deceased, and recommended that it be confirmed by Congress. Congress did not, however, confirm the grant, and under instructions from the Commissioner of the General Land Office the case was re-examined by Surveyor General Julian, who, in a report to the Commissioner, dated July 21, 1886, recommended the rejection of the claim by Congress for the reasons therein stated by him. This report was concurred in by the Commissioner, and by him transmitted on December 17, 1886, to Mr. Lamar, Secretary of the Interior. No further action seems to have been taken. The appellants herein take title from the widow and children of Nolan by conveyance dated September 23, 1880.

Mr. John H. Knaebel argued the cause, and, with Mr. Ernest Knaebel, filed a brief for appellants.

Mr. Matthew G. Reynolds argued the cause, and, with Solicitor General Richards, filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

\*Mr. Justice Peckham, after making the [107] above statement of facts, delivered the opinion of the court:

The judges of the court below, while rejecting the claim of appellants, differed widely in regard to the grounds upon which such rejection should be placed. Mr. Justice Sluss, in an opinion that was concurred in by Mr. Justice Fuller, said that the case was to be decided under the Mexican colonization law of August 18, 1824, and the regulations of November 21, 1828, which in his judgment had not been totally repealed by the law of April 4, 1837, and the grant, being subject to the first-named law and to the regulations above mentioned, could not be valid for a greater quantity than 11 square leagues, nor become a perfect title until the grant had been approved by the departmental assembly.

It appears that 11 square leagues would embrace about 50,000 acres of land, and hence a grant of 415,000 acres would, under the law and regulations, be far beyond the power of the officials to make to any one person.

Mr. Justice Murray, while concurring in the conclusion to reject the claim, was of opinion that the law of 1824 and the regulations of 1828 had been entirely repealed by the law of April 4, 1837, but he did not think that the governor had the power merely as representative of the supreme Executive to make the grant, and there was no evidence of any special power having been delegated to him.

Mr. Chief Justice Reed also concurred in the conclusion to reject the claim, but did not agree with all that was said in the opinion of Mr. Justice Sluss, being himself of opinion that, while the law of 1824 was repealed by that of 1837, the regulations of 1828 were not thereby wholly repealed. He



thought that the grant in this case was made, not under the law of 1824, but under the regulations of 1828; that the law regulated the matter of the disposition of the public lands *within the states*, and conferred upon the Executive the power to make all [108] necessary \*regulations for the disposition of such lands *within the territories*, of which New Mexico was one, and the question in his judgment was, not whether the law remained in force, but whether the regulations continued operative when the grant was made; that it was manifest the law which governed the matter within the states might be repealed without at all affecting the regulations established by the Executive governing the same subject within the territories. Being subject to those regulations, we suppose the quantity of the grant was an insuperable bar to its validity, in the view of the Chief Justice.

Mr. Justice Stone dissented from the decree rejecting the claim, and was of opinion that the making of the grant in question was within the competency of the supreme Executive, and that Governor Armijo was his appropriate ministerial agent in its execution.

In reviewing questions arising out of Mexican laws relating to land titles we recognize what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846-1848. This difficulty exists because of the frequent political changes which took place in that country from the time the Spanish rule was first thrown off down to the American occupation. Revolutions and counter-revolutions, empires and republics, followed each other with great rapidity and in bewildering confusion, and emperors, presidents, generals, and dictators, each for a short period, played the foremost part in a country where revolution seems during that time to have been the natural order of things. Among the first acts of each government was generally one repealing and nullifying all those of its predecessors.

If, however, the validity of this grant were to be decided under the provisions of the colonization law of 1824 and the regulations passed in 1828, it seems to us there would be little difficulty in determining that the appellants had failed to make out their case. The provisions of the act of 1824 were plainly violated in this grant, because it contained more than 11 square leagues. This was [109] prohibited by that law. Reynolds' \**Compilation of Spanish & Mexican Land Laws*, pp. 121, 122, § 12; Hall's *Mexican Law*, p. 149, § 498.

And also, before the grant in question was made, there had been a previous one, dated November 28, 1845, conveying to Sandoval the land embraced in what was called the Bosque del Apache grant, which also exceeded 11 square leagues in extent, the grant being made by the same governor (Armijo), although juridical possession was not delivered until March 7, 1846. Having obtained 181 U. S.

a grant of more than 11 square leagues before he made his petition for the grant now in issue, he had acquired all that the law of 1824 permitted him to take, and the subsequent grant was not valid. *United States v. Hartnell*, 22 How. 286, 16 L. ed. 340.

Another objection to the title is that there is no record of its existence in the archives of New Mexico. Although no question is made as to the genuineness of the papers set forth in the foregoing statement of fact, namely, the petition of Sandoval, its allowance by Governor Armijo, the certificate of the comptroller and acting treasurer, and the certificate of the delivery of juridical possession by the justice of the peace, yet none of these came from the archives of the country, and there is no record that the departmental assembly ever concurred in the grant, as is necessary under the law of 1824. Reynolds, p. 142, § 5. If the approval of that body could not be obtained, the governor was to report to the supreme government, forwarding the proceedings in the matter for its consideration. § 6. Nothing of this kind appears in the archives or in the records of the assembly. Nor has there been produced, even from the hands of the claimants, any approval of the grant by the assembly. No matter how formal and complete the written documentary evidence of title may be, yet, when coming from private hands, it is insufficient to establish a Mexican grant if there is nothing in the public records to show that it ever existed. *Peralta v. United States*, 3 Wall. 434, 440, 18 L. ed. 221, 223. Mr. Justice Davis, in delivering the opinion of the court in that case, said:

"The Mexican nation attached a great deal of form to the disposition of its lands, and required many things to be done before the proceedings could ripen into a grant. But the important \*fact to be noticed is that a [110] record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy what portions of the public lands had been alienated. *The record was the grant*, and without it the title was not divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession; but this 'título' did not divest the title unless record was made in conformity with law."

The title here is incomplete because there is no evidence whatever of approval by the assembly, or, failing in that, any record of further proceedings to obtain the approval of the supreme government.

In *United States v. Teschmaker*, 22 How. 392, 16 L. ed. 353, Mr. Justice Nelson said, at page 405, L. ed. 357: "We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court."

In *Berreyesa v. United States*, 154 U. S. 623, and 23 L. ed. 913, 14 Sup. Ct. Rep. 1179, the court held that the case came within the



principle of those cases in which it had decided adversely to claims made under alleged Mexican grants, all because it did not appear that a grant from the Mexican government had been "deposited and recorded in the proper public office among the public archives of the republic." See also *United States v. Ortiz*, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466; *United States v. Elder*, 177 U. S. 104, 44 L. ed. 690, 20 Sup. Ct. Rep. 537.

In this case, as we have said, there is no record or mention of the case in the archives in New Mexico. The papers came from private hands, the claimant Nolan presenting them to the surveyor general in 1855, when he applied to that officer for his recommendation to Congress for a confirmation of the grant. That they have remained in the surveyor general's office since that time does not make them a record or an archive of the government within the meaning of those cases above cited.

The certificate of Baca, the justice of the peace, certifying to his delivery of juridical possession to Sandoval on December 15, 1845, bears the indorsement that it was recorded in book letter B, pages 166, 167, and is certified to by the recorder, Donaciano [111] \*Vigil, at Santa Fé, November 17, 1849. This book has been lost, but it was kept in obedience to a provision contained in what is called the "Kearney Code," providing for the recording of papers brought to the recorder by parties, which affected or constituted their title to lands they claimed to own. The book was not an original archive of the country. The certificate of record indorsed upon the paper shows that it was produced from private hands, and no presumption that any papers relating to this grant were recorded in or placed among the archives of the government of New Mexico arises from the fact that a record of this paper was made pursuant to the provisions of the Kearney Code. There is no proof that this paper or any document connected with the grant under discussion had ever been delivered to the recorder for record and retained by him in his official custody from 1849 until it had been turned over to the custody of the surveyor general upon the creation of that office in 1854. The language contained in the report of Surveyor General Proudfit would negative any such presumption, because he says that the papers were filed in his office July 12, 1855, by Gervacio Nolan, the claimant himself. The fact, however, would have been immaterial in any event. The paper would not have been a document found in the records or archives of New Mexico, because it came from private hands, and was by the claimant delivered to the recorder, and his keeping it thereafter and turning it over to the surveyor general would not have constituted it a record or a paper found among the archives and turned over to that officer.

It does appear from the evidence that there may have been some loss or destruction of papers which constituted a part of the records or archives of New Mexico in the possession of the territorial librarian in the

year 1869 or 1870. The history of the transaction is stated by the witness Bond, and it would seem from his account that it was extremely doubtful whether any really important papers relating to grants of land had in fact been destroyed, although some of them may have been. Unless we should regard this possibility as a sufficient excuse in every case of a land grant in New Mexico for the failure to show any archive title or record of title of such \*grant, it cannot be [112] admitted in this particular case. That it is not a sufficient excuse has been decided by this court. *United States v. Castro*, 24 How. 346, 16 L. ed. 659. The appellants did prove by the witness Tipton, whose great experience in connection with the surveyor general's office in New Mexico is well known, that he had not seen in the archives of the government any record of grants made by Armijo or signed by him, although the witness knew nothing about the condition of the archives prior to the spring of 1876. We think this is insufficient to show the destruction of all archives pertaining to grants made by Armijo about this time (1845).

Taking all these objections to the title into consideration, we think it clear that no case for confirmation under the colonization law of August, 1824, and the regulations of 1828, was made out.

In the early history of these Mexican land titles it had been supposed that the colonization law and the regulations above mentioned were all that were in force in Mexico after their dates. *United States v. Cambuston*, 20 How. 59, 63, 15 L. ed. 828, 830; *United States v. Vallejo*, 1 Black, 541, 552, 17 L. ed. 232, 234; *United States v. Vigil*, 13 Wall. 449, 450, 20 L. ed. 602, 605.

Subsequently, the claim was urged that that law and the regulations had been repealed by virtue of the law of April 4, 1837. Reynolds, p. 222; see also law of April 17, 1837, p. 224 of Reynolds's Compilation.

The claim was urged by way of argument by counsel, and referred to by Mr. Justice Lamar in his opinion in *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 578, 35 L. ed. 278, 282, 11 Sup. Ct. Rep. 656. Again, in *United States v. Coe*, 170 U. S. 681, 696, 42 L. ed. 1195, 1201, 18 Sup. Ct. Rep. 745, Mr. Justice McKenna, in speaking of the colonization law of August 18, 1824, said that "by a law passed April 4, 1837, all colonization laws were certainly modified, and may be repealed."

The weight of the argument of counsel for appellants rests upon the assumption and assertion that this grant was not made under the law of 1824 or the regulations of 1828, nor under the law of 1837 above mentioned, but that it was made by the supreme Executive of Mexico through his trusted minister and agent, Governor and Commandant General Manuel Armijo, \*who in mak- [113] ing such grant was not restricted by any prescribed rules or limitations. This broad proposition counsel has sought to maintain by reference to the various acts of Mexico subsequent to 1828, and up to the making of this grant.



Treating Armijo as the *alter ego* in New Mexico of the supreme Executive of Mexico, and claiming for the latter full and absolute power to dispose of the public lands in accordance with the views held by that officer, counsel ask that the same presumption of the validity of grants made by Governor Armijo should be indulged which was accorded to the grants of certain officials in the Louisiana and Florida cases, herein referred to. We think no such presumption ought to obtain in this case.

In *United States v. Cambuston*, 20 How. 59, 63, 15 L. ed. 828, 830, Mr. Justice Nelson, in speaking of the difference between the cases involving Spanish titles in the territories of Louisiana and Florida, such as *United States v. Arredondo*, 6 Pet. 691, 729, 8 L. ed. 547, 561; *Delassus v. United States*, 9 Pet. 117, 134, 9 L. ed. 71, 78; *United States v. Peralta*, 19 How. 343, 347, 15 L. ed. 678, 680, and those which involved Mexican titles, said:

"But no such presumptions are necessary or admissible in respect to Mexican titles granted since the act of the 18th of August, 1824, and the regulations of the 21st of November, 1828. Authority to make the grants is there expressly conferred on the governors, as well as the terms and conditions prescribed upon which they shall be made. The court must look to these laws for both the power to make the grant and for the mode and manner of its exercise, and they are to be substantially complied with, except so far as modified by the usages and customs of the government under which the titles are derived, the principles of equity, and the decisions of this court. 17 How. 542, 15 L. ed. 241."

[114] The case was decided under the act of Congress of the 3d of March, 1851, to adjudicate private land claims arising under our treaty with Mexico, and the decision, as is seen from the above extract, proceeds upon the assumption that the law of 1824 and the regulations of 1828 furnished the rule of decision. Their existence is denied by counsel for the appellants, and it is upon the assumption of their nonexistence that his argument rests. Assuming, however, that the law and regulations were "not in force, we still cannot base a presumption that the governor was authorized by the supreme Executive to make the grant simply because the governor exercised the power. The difference between the act relating to Spanish titles to lands above referred to and the act of 1891 under which Mexican titles to lands have been examined by the court of private land claims and by this court is clearly recognized and enforced in *United States v. Ortiz*, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466. In that case it was held that under the provisions of the act establishing the court of private land claims (§ 13, act of March 3, 1891, chap. 539; 26 Stat. at L. 854), the burden of showing the existence of the grant was upon the person claiming under it, and that no presumption of authority on the part of the granting officer existed, as in the case of the above-mentioned territory.

This last case was approved in the *Ellder Case*, 177 U. S. 104, 44 L. ed. 690, 20 Sup. Ct. Rep. 537, where it was again held that the claimant must prove his title by a preponderance of evidence, and no presumption of authority existed.

And in *Hayes v. United States*, 170 U. S. 637, 647, 648, 42 L. ed. 1174, 1179, 18 Sup. Ct. Rep. 735, 739, 740, this difference is also pointed out by Mr. Justice White. Speaking of the act of 1891, he said:

"But in the act of 1891 the court is required to be satisfied not simply as to the regularity in form, but it is made essential before a grant can be held legally valid that it must appear that the title was 'lawfully and regularly derived,' which imports that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified." P. 648, L. ed. 1179, Sup. Ct. Rep. 740.

We are not satisfied that there was a general power on the part of the governor of a territory at any time to make a valid grant of lands in all cases and simply as the agent of the supreme Executive, such as is contended for by counsel for the appellants. No evidence that the governors legally had that power has been given, other than the fact that they sometimes exercised it. It appears, however, that for some years prior to 1845 grants of land were made not only by governors, but even by alcaldes, prefects, justices of the peace, and by judges of first instance, so that, in the language of one of the judges of the \*court below, "it was a poor officer, indeed, who did not assume to be able to dispose of the public domain belonging to the nation." Hence the reluctance to presume the validity of a power because of its exercise. It may be that in some particular period of those disturbed times, and up to 1846, the supreme Executive of the Mexican nation exercised arbitrary and irresponsible power, and granted the public lands according to his own views of what was proper and needful for the nation, and upon occasion delegated such power to a governor; but the exercise of that kind of power was in violation of the ordinary and general laws which had been adopted by the nation; and no presumption that the supreme Executive had delegated his power to a governor or political chief of a province or state can be indulged for the purpose of upholding a grant of land made by the governor in violation of the Constitution or laws which had theretofore been adopted or passed.

Counsel also urges that such power is to be found in the "Bases of 1835," the "Constitution of 1836," and the "Bases of 1843," not to speak of the "Plan of Tacubaya" and the attending laws or decrees, in which it is contended there are specific provisions plainly expressive of the intimate representative and ministerial relations which the governor and commandant general bore the supreme Executive. It might be assumed that the relations between the supreme Executive or Dictator and his governors and



commandants general were intimate and confidential, but such relations of intimacy and confidence do not take the place of an actual delegation of power to the governors to make grants of this description; nor do we find any such delegation in the various provisions contained in the Bases of 1835 or of 1843 and the Constitution above referred to. The governor does not assume to make the grant by virtue of any special or general delegation of authority to him by the supreme Executive, but he asserts in his grant above quoted that he makes it "in virtue of the power in me vested by the laws," etc.

Section 10 of the "Bases for the New Constitution," law of October 23, 1835 (Reynolds, p. 201), simply provides that the executive power of the departments shall reside in the governors \*in subordination to the supreme Executive of the nation. The same law divides the national territory into departments on the basis of population, etc., and provides that there shall be governors and departmental boards for the government of these departments. This obviously gives no authority to the governor to make a grant of the public lands within his territory according to his own unrestrained views of propriety. It does not assume to alter the general laws in relation to the disposition of the public lands or of the manner in which they shall be disposed of. The same may be said regarding the Constitution of 1836, which intrusts the interior departments to the governors in subordination to the general government. Reynolds, pp. 203, 204. The law of March 20, 1837 (Reynolds, p. 211, subd. 17, p. 215), provides that the governors shall be the usual channels of communication between the supreme powers of the nation and the departmental counsels (juntas), and between the latter and the officials of the department. This provision does not tend to show the power contended for.

In fine, looking through the provisions to which our attention has been called by counsel, and without specific reference to each one of them, we may say in regard to all of them that we find therein nothing providing in terms or by inference for the general delegation of power by the supreme Executive (assuming that he himself had it) to the various governors to make a grant like this. The appellants are therefore compelled to show some specific delegation of authority from the supreme Executive for making such a grant. If that were shown, we might say, following the case of *United States v. Castillero*, 23 How. 464, 16 L. ed. 498, the other conditions therein mentioned being fulfilled, that the grant was a valid one, and ought to have been confirmed by the court below; and within the case of *United States v. Osio*, 23 How. 273, 16 L. ed. 457, if there had been a special delegation of power, it would follow that the conditions contained in such special delegation must be fulfilled before title passed. The necessity for showing what the special power was becomes evident from these cases.

What we have already said as to the ab-

sence of all record in \*the archives, relating[117] to the grant, applies to the case as here considered.

Looked at from any point of view we do not think the appellants have borne the burden of showing the validity of their grant, either directly or by facts from which its validity could be properly inferred within the cases already decided by this court. *The judgment of the court below must therefore be affirmed.*

HENRY M. BAKER, *Petitioner*,

v.

HORACE S. CUMMINGS.

(See S. C. Reporter's ed. 117-130.)

*Judgment—dismissal of suit in equity—bar to subsequent set-off at law.*

A general dismissal on the merits, of a bill in equity, not made conditionally or without prejudice or with any saving of the right of action, will constitute a bar to the use of the cause of action there involved as a set-off in a subsequent action at law between the same parties.

[No. 207.]

*Argued March 19, 20, 1901. Decided April 15, 1901.*

ON WRIT OF CERTIORARI to the Court of Appeals of the District of Columbia to review a decision reversing a judgment for plaintiff in an action for money on an account stated. *Reversed.*

See same case below, 8 App. D. C. 515.

Statement by Mr. Justice Peckham:

The petitioner (plaintiff below) commenced this action at law in the supreme court of the District of Columbia on December 19, 1889, to recover from the defendant the sum of \$2,712.81 with interest at 6 per centum from July 31, 1889, and annexed to his declaration a bill of particulars of his demand. Plaintiff claimed in his declaration that the money was due, among other things, on an account stated between the parties. The plaintiff obtained judgment in the trial court for the amount of his claim, which was reversed by the court of appeals of the District.

A case between the same parties and growing out of the same transaction has already been before this court and decided. 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367. The question in this case involves the construction \*and effect of that decision, and[118] therefore a writ of certiorari was applied for and granted, and the case brought here.

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429, and *Southern P. & R. Co. v. United States*, 42 L. ed. U. S. 355.



Soon after the commencement of this action, and before pleading to the declaration filed therein, Cummings, the defendant, commenced a suit on the equity side of the supreme court of the District against Baker, for the purpose of enjoining him from the further prosecution of this action, and to obtain a full and complete accounting under the order and direction of the court between complainant and Baker in respect to the partnership dealings alleged and set up in the bill; and he prayed that the defendant should be decreed to pay to him the amount which should be found due him and for other relief. In his bill the complainant alleged the formation of a copartnership on January 1, 1876, between the parties, to prosecute the practice of the law in the city of Washington, terminable by mutual consent, each to share equally in all the profits and losses of the business; and it was averred that the partnership continued until September 1, 1889, when it was dissolved. It was then alleged that the terms of the dissolution were agreed upon through false and fraudulent representations of Baker as to the condition of the partnership affairs in relation to what were called "the inspector cases," made to the complainant, with the facts in regard to which the defendant was, as the complainant alleged, much more familiar than the complainant, and that, based upon the misrepresentations, terms of agreement for dissolution were arrived at, and in carrying out the same the complainant assigned by a written assignment his claims under the partnership to all moneys then due or that might thereafter become due arising from those cases, and as consideration therefor the complainant received from the defendant the sum of \$15,000; that, instead of the amount stated by the defendant to be due the partnership in relation to the cases mentioned, a very much larger amount was due, and instead of there being only a certain named amount of claims in cases where no congressional appropriation had been made, as stated by the defendant, a very much larger amount existed to his knowledge, of which the complainant was ignorant, and upon the faith of these untrue and fraudulent statements

[119] the complainant \*assigned by a written assignment all his interest in the cases for a sum largely below the amount actually belonging to him under the terms of the partnership.

The complainant then alleged the commencement of an action at law by Baker against him to recover \$2,712.81, and stated that appended to the declaration in that action was a bill of particulars of Baker's claim, and that all of the items in that bill of particulars originated in and grew out of the partnership dealings of the parties, and not otherwise, and that only by a full, proper, and complete accounting and discovery, under the order and direction of a court of equity, could a proper adjustment be had of the rights of the complainant and defendant growing out of their partnership dealings.

181 U. S. U. S., Book 45.

Complainant further alleged that the action at law was not yet at issue, but that the time for pleading thereto had nearly approached, and that the complainant could not, under the rules at law, incorporate in his plea the equitable defenses herein set forth, and which in a court of equity would avail against Baker's demand; and especially that the equitable right of the complainant to have discovery in the premises and to have the said assignment canceled and held for naught was not cognizable by a court of law; and that if the defendant (Baker) were therefore permitted to prosecute his action at law against the complainant, the latter would be deprived of his defenses to that suit which were set up in the bill; and the complainant therefore alleged that he was entitled to have the defendant enjoined from prosecuting his action at law, and to have the court order and direct a full and complete accounting between the complainant and defendant in respect to their partnership dealings. An order was thereupon issued restraining the further prosecution of this action, which order was subsequently and about February 1, 1892, dissolved.

To this bill the defendant Baker filed an answer February 10, 1890, denying all allegations of fraud in the settlement between the parties or in the procuring of the assignment, and also alleging that he furnished the complainant with all needed data, and all the data and information which existed in connection with the facts within his control, and that the settlement was \*made with full knowledge of all the facts on the part of the complainant, and that after such settlement was made he left in the possession of the complainant papers and accounts plainly showing the whole transaction and all the facts in regard to the case, an examination of which would give all necessary information about the partnership affairs. He also alleged that the complainant was endeavoring, after a lapse of more than three years and with a full knowledge of all the facts, to attack this settlement as void, and he alleged that the claim made by the complainant was old and stale, and he pleaded the statute of limitations in his behalf, and alleged that the claim did not accrue, nor was any demand made to show whether error or otherwise were made within the period of three years.

After the injunction restraining the further prosecution of this action had been dissolved, and on February 10, 1892, the defendant filed a plea to the declaration herein, in which he denied (1) that he was indebted to the plaintiff; (2) he alleged that he never promised as set up in the declaration; (3) that the plaintiff's cause of action did not accrue within three years; (4 and 5) a set-off of \$35,873.35. This set-off was alleged to have arisen out of the dealings between the parties in the partnership already mentioned.

The plaintiff Baker joined issue upon the plea on August 24, 1892. Further proceedings in this action were delayed by mutual consent until the trial of the suit in equity.



Upon that trial the complainant obtained a decree for thirty-odd thousand dollars, after deducting the amount claimed to be due the plaintiff in this action. That decree was affirmed by the court of appeals of the District, and the case was taken by appeal to this court, where the decrees of the courts below were reversed and the case remanded with instructions to the supreme court to dismiss the bill. The dismissal was general, and not "without prejudice" or any similar expression. 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367. After the entry of the decree dismissing the bill on the mandate of this court in the equity suit, Baker, the plaintiff herein, by leave of the court filed in this action a replication to the plea of set-off, setting up the commencement of the equity suit, and stating the issues involved therein and the decree made upon the [121] decision \*of this court dismissing the bill, and claimed that judgment as *res judicata* of the matters of set-off contained in the 4th and 5th counts of the defendant's plea. Then by a series of pleadings, too long and too technical for repetition, the final question was raised by demurrer as to whether the plaintiff's replication of *res judicata* to the defendant's plea of set-off was good or not. Upon the argument of the demurrer the supreme court held that the replication was good; that the merits of the whole case had been decided in the equity suit, and that the judgment in that suit was a bar to all claims of set-off on the part of the defendant Cummings in the action at law. The parties came to trial after the argument and decision upon the demurrer, and having waived a jury the following stipulation was filed:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this action to recover the sum of \$2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the supreme court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees, and opinions of the respective courts therein, both in this and the

appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively \*the identical items set [122] up, referred to, and claimed in said equity cause.

"If the court, on inspection of said record and proceedings in said equity cause and of the record and proceedings of this cause, shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of \$2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein; but if the court shall be of opinion that any of said items of set-off and counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon, and also any other remedy which they may by law be entitled to."

Upon this stipulation in connection with the record in the equity suit, the supreme court held that the defendant Cummings could not in this action set up in bar to plaintiff's action any of the items of set-off attached to his plea, and therefore judgment was rendered for the plaintiff for the amount claimed by him. On appeal to the court of appeals the judgment was reversed, and a new trial granted, Mr. Chief Justice Alvey dissenting.

**Mr. Clarence A. Brandenburg** argued the cause and filed a brief for petitioner:

After availing himself of his equitable remedy, on the distinct ground that he had no remedy at law, the defendant cannot avail himself of the same defense thereafter at law.

*Case v. Beauregard*, 101 U. S. 688, *sub nom. Case v. New Orleans & C. R. Co.* 25 L. ed. 1004.

Recourse to the opinion of the court to determine whether the decree was upon the merits may only be had where the record and decree leave the matter in doubt.

*Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

The opinion is no part of the record.

*England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; *Sargeant v. State Bank*, 12 How. 371, 13 L. ed. 1028; *Fisher v. Cockerell*, 5 Pet. 248, 8 L. ed. 114.

The plea of the statute of limitations is now regarded with the same effect as other legal defenses.

*Mackey*, Pr. & Proc. p. 29.

The defense of limitations is now regarded as a meritorious one.

*Knoedler v. Meloy*, 2 MacA. 239; *Clementson v. Williams*, 8 Cranch, 72, 3 L. ed. 491;



*Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *M'Cluny v. Silliman*, 3 Pet. 270, 7 L. ed. 676; *United States v. Wilder*, 13 Wall. 254, 20 L. ed. 681.

Statutes of limitation are now favorably considered. They are "statutes of repose."

*Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Shepherd v. Thompson*, 122 U. S. 231, 30 L. ed. 1156, 7 Sup. Ct. Rep. 1229; *Wood v. Carpenter*, 101 U. S. 139, 25 L. ed. 808.

If the second suit is between the same parties upon the same subject-matter, the first suit concludes everything which might have been litigated. If the second suit is between the same parties, but upon a different subject-matter, the first suit concludes only such matters as were in issue in the first suit.

*Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *Franklin County v. German Sav. Bank*, 142 U. S. 93, 35 L. ed. 948, 12 Sup. Ct. Rep. 147; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682; *New Orleans v. Citizens' Bank*, 167 U. S. 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

The decree of this court, and that of the supreme court of the District of Columbia, made pursuant thereto, were general decrees of dismissal without words of qualification. We submit that the decree therefore is conclusively presumed to be upon the merits.

*Durant v. Essex Co.* 7 Wall. 107, 19 L. ed. 154; *Case v. Beauregard*, 101 U. S. 688, *sub nom. Case v. New Orleans & O. R. Co.* 25 L. ed. 1004; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; 21 Am. & Eng. Enc. Law, p. 273, note 1; *Tankersly v. Pettis*, 71 Ala. 179; *Footte v. Gibbs*, 1 Gray, 413; *Bigelow v. Winsor*, 1 Gray, 301; *New Orleans, M. & C. R. Co. v. New Orleans*, 14 Fed. 373.

Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this is rather in obedience to the statute of limitations than in analogy.

*Goddon v. Kimmell*, 99 U. S. 202, 25 L. ed. 431; *Wagner v. Baird*, 7 How. 234, 12 L. ed. 681.

Defendant failed in the equity suit to recover the self-same items now claimed in the set-off, because the assignment was not vacated. How, then, can he in this suit, but two years later, recover any of these items when he is prevented from questioning the validity of the assignment.

*Martin v. Evans*, 85 Md. 8, 36 L. R. A. 218, 36 Atl. 258.

Mr. Holmes Conrad argued the cause, and, with Mr. Franklin H. Mackey, filed a brief for defendant:

The dismissal of the bill in equity was not such an adjudication of the case as will support the plea of *res judicata* to the action at law, or to the counter action under the plea of set-off.

*Walden v. Bodley*, 14 Pet. 156, 10 L. ed. 181 U. S.

398; *Hughes v. United States*, 4 Wall. 233, 18 L. ed. 303.

\*Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

A perusal of the record in this case demonstrates at least how conservative Congress has heretofore been in relation to the adoption of any amendment of the law relating to pleading \*and procedure in the District of Columbia. The last of the series of pleadings herein by which the question of the validity of the defense of *res judicata* was finally brought before the court is denominated "defendant's joinder of issue on plaintiff's second surrejoinder to defendant's fourth rejoinder to plaintiff's third replication." Replications, rejoinders, surrejoinders, rebutters, surrebutters, and demurrers abound; and they all seem to have been regarded as properly filed for the purpose of presenting the question whether the decree in the equity case was *res judicata* or not. In reading these pleadings we seem to be transported back to the days when the practice of the special pleader had become a science by itself. In spite of the pleadings, however, the question before us is a simple one.

The plaintiff brought this action to recover from the defendant a certain amount of money alleged to be due on an account stated between the parties. The defendant, before pleading in the action, commenced a suit in equity for an accounting between himself as complainant and the defendant in the equity suit in relation to all partnership matters, and, as a part of the relief, prayed the cancellation of a written assignment made by complainant of his interest in the inspector cases of the partnership to the defendant, procured, as complainant alleged, by fraud. It was alleged that the items of the claim of Baker, the plaintiff in this action, arose out of the partnership transactions, and they were included in the issue made in the equity suit. There was a full hearing in that suit in regard to all the matters between the parties, including those arising in this action. At the end of the hearing the trial court entered a decree in favor of the complainant for over \$30,000, after deducting the amount claimed against him by the plaintiff herein. That decree was affirmed by the court of appeals, but upon appeal here both decrees were reversed and the cause remanded to the lower court with instructions to dismiss the bill. The court, upon the receipt of the mandate, did dismiss the bill with costs. The plaintiff in this action then proceeded with his case, and set up, by leave of the court, the decree in the equity suit as an adjudication of all the matters relating to the validity of the defendant's set-off to his demand, and the question is, Shall the adjudication betreated as conclusive upon those matters, or shall the inquiry be again entered upon as to the facts upon which the set-off rests?

Stated generally and without detail, the theory of the law is that matters which have



once been fully investigated between the parties and determined by the court shall not be again contested, and that the judgment of the court upon matters thus determined shall be conclusive on the parties, and never subject to further inquiry. The whole doctrine has been lately gone over in this court in *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; and the law in regard to it is so well settled that other citations are not required. The question is not what the doctrine is, but, Does it apply to the particular case?

We have to inquire, therefore, whether the decree in the equity suit did cover and conclude the matters in difference, regarding the defendant's set-off in this action. If it did, that decree must be treated as conclusive, and the judgment of the court below refusing to give that character to it must be reversed.

It appears by the stipulation between the parties that the several items of account set forth in the defendant's plea of set-off in this action are respectively the identical items set up, referred to, and claimed by complainant in the equity cause. The record in the equity cause is made a part of the record herein, and the facts upon which the complainant proceeded are set forth in the report of that case in this court already referred to. The mandate from this court in that case, which by stipulation of counsel has been included in the record herein, sets forth our decree, which reversed the decree of the court of appeals with costs, and ordered that the cause be remanded to that court with directions to set aside the decree of the supreme court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. There was added the usual formula directing that such further proceedings be had in the cause in conformity with the opinion and decree of this court as ought to be had, etc. The proceedings, however, which were thus directed to be taken, were simply to reverse the judgment of the lower court and to dismiss the bill. \*It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. *Walden v. Bodley*, 14 Pet. 156, 161, 10 L. ed. 398, 400; *Hughes v. United States*, 4 Wall. 232, 237, 18 L. ed. 303, 305; *Durant v. Essex Co.* 7 Wall. 107, 19 L. ed. 154; *Bigelow v. Winsor*, 1 Gray, 299, 301; *Foot v. Gibbs*, 1 Gray, 413; *Coop. Eq. Pl.* 270; 1 Herman on Estoppel, §§ 151, 152.

It cannot be disputed that if the bill had been dismissed upon the merits it would be conclusive against the right of the defendant in this action to set up in bar of plaintiff's recovery any of the items of set-off and counterclaim pleaded by defendant. He contends, however, that for the purpose of determining the ground upon which the bill was dismissed it is proper to resort to the opinion of the court, even though the record show an absolute dismissal, and that the

opinion in this case shows the bill was not dismissed upon the merits, but only because of his (complainant's) laches in seeking the aid of a court of equity to set aside and cancel the written assignment made by the defendant herein to the plaintiff, and which, as the defendant alleges, was procured by fraud; that when relief was denied on the ground of such laches, the only effect of the denial and the consequent dismissal of the bill was to leave the complainant at full liberty to fight out the issue of fraud in this action.

We do not think this is a correct statement of the case. Assuming that defendant is right in his contention that he can look at the opinion for the ground of dismissal, we think it appears therefrom that the bill was in truth dismissed upon its merits. The court really went into an elaborate examination of the status of the complainant in the equity case, with reference to his claim of right to avail himself of the alleged fraud, not only in respect to his laches technically so called, but also with regard to his affirmative treatment of the defendant after he had, as this court decided, acquired full knowledge of all the facts which constituted what he claimed to be the fraud in the case. After he had acquired such knowledge, the complainant deliberately decided to, and did, procure the defendant's check \*for \$15,000 or (126) substitutes therefor which he had himself taken (the consideration given complainant for the sale) to be cashed, and complainant used the money for his own purposes. Not only laches on the part of the complainant formed the bar to the maintenance of the equity suit, but, as the court held, it was his whole conduct relative to the transaction after it had been completed, and his affirmation of the contract, that precluded any right on his part to recover for any alleged fraud. His right to recover at all, upon the facts as found by the court from the evidence, was passed upon and decided.

Some expressions may be found in the opinion tending to show that the court was proceeding upon the ground merely of the complainant's laches in failing to resort early enough to the court for relief. But an examination of the whole of the opinion will show that the court was not confining itself to any such narrow ground, and on the contrary was examining the whole conduct of complainant, both his omissions and his affirmative and positive acts, for the purpose of determining whether the complainant had any cause of action against the defendant. For the purpose of such examination we make copious extracts from that opinion. After a full statement of the case the opinion, as reported in 169 U. S. at p. 196, 42 L. ed. 715, 18 Sup. Ct. Rep. 369, proceeds as follows:

"The controverted issue arising from the foregoing unquestioned facts is this:

"Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated; while Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full



knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve partnership, not only establishes the want of foundation for Cummings's assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred. "It results from the foregoing that the facts as to the controverted matters are embraced in a narrow compass, and that \*the whole case really resolves itself into two issues: 1st. Does the proof establish that the purchase and sale in question was as claimed by Cummings, or as asserted by Baker? In that question is necessarily embraced the further one of whether Cummings at the time of the sale had actual knowledge of the fraudulent representations claimed to have been made by Baker. This is in terms included, because it would be impossible in reason to declare that one had been deluded or deceived by misrepresentations into entering into a contract if he had actual knowledge when the contract was made that the alleged inducing representations were false. 2d. Conceding that Cummings was misled by the fraudulent representations of Baker as alleged, did he, immediately after the sale, and before the collection by him of the cash consideration of the sale, discover that the representations were untrue, and thereby become aware that he had been grossly deceived and defrauded, and did he, with such knowledge, say nothing about the matter, collect the cash consideration, remain silent, and continue in partnership with Baker, occupying the same office for years, and only assert that he had been deceived when a dissolution of the partnership was threatened, and he was pressed to pay a sum which Baker claimed Cummings owed him? This latter inquiry assumes a twofold aspect, for although in the bill, in the opinions below, and in the argument at bar, the efficient misrepresentation, which it is asserted rendered the assignment void, was the fraudulent statement as to the sum of the fees on the claims then allowed and appropriated for, nevertheless it is also, as we have seen, asserted in the bill and contended in argument that there was a misrepresentation as to the pending claims not yet acted upon by the department, and which were then unappropriated for by Congress.

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that if there was fraud and misrepresentation, Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration because if it be found that such was the case, the question whether the fraud originally existed will become immaterial, [126] in view of the defenses of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order

stated; that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims from which further fees were expected. Here also it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it results that the discovery of the falsity of *any* material and fraudulent representation by which the sale had been induced gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course."

And again on p. 296, L. ed. 718, Sup. Ct. Rep. 373:

"Our conclusion is that the evidence not only clearly, but beyond all question or dispute, overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings. And, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings discovered the falsity of the alleged representations as to the amount of pending claims. . . . That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the statute of limitations of Maryland of 1715, chap. 23, § 2, in force in the District of Columbia. 1 Kilty's Statutes, 111; Comp. Laws D. C. chap. 42, § 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity.

"Apart however from the bar of the statute of limitations, \*the facts as to the full [129] knowledge of the fraud, if any existed, by Cummings, more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

"There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been in a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of



the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor, not only in the cases in which he was successful, but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud, if it existed, was brought home to him in the most pointed and unequivocal way."

And the court winds up the opinion with the following remark:

"Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings."

[130] From this last extract it seems to be clear that the court had in fact examined the evidence as to the alleged fraud, and had concluded it was not proved. The result of the whole opinion is to say in substance that while we have read the evidence in the case, and do not think there is even a preponderance of it in favor of a finding of fraud, yet notwithstanding that fact we will place our judgment upon the ground that the evidence shows the complainant has himself so acted in the case, both by his neglect and, among other things, by his drawing the money \*on the check, that he has affirmed the contract after he knew all the facts upon which he now founds his allegation of fraud; that he has waived the fraud and all benefit that he might otherwise have urged by reason of it. A waiver of all right to question the validity of a contract may be founded upon the claiming and acceptance of a benefit under it after full knowledge of all the facts. 2 Pom. Eq. Juris. 2d ed. § 897, and cases cited in note 1. From all this we think no other conclusion is accurate than to say the decision of this court was based upon the merits of the case within the meaning of that expression when used to distinguish a decision of the court upon the merits from a decision based upon a lack of jurisdiction or defect of parties or anything of that nature. Here there was no lack of jurisdiction, the parties were before the court, and full power to grant relief entirely commensurate with the plaintiff's rights existed in the court. It is therefore incorrect to say that by the dismissal of the complainant's bill he has simply been remitted to his less effective remedy at law. This is to ignore the weight and effect of the opinion upon the matters just discussed and to open for another contention a subject which we think the decree in the equity case has closed for all time. It cannot be that after the determination of an investigation such as has been had in the equity case, and the entry of a decree thereon dismissing the bill, that the matter can again be opened for contest in this action at law.

For these reasons we think the judgment

of the Court of Appeals of the District of Columbia should be reversed and the case remanded to that court with instructions to reinstate the judgment of the Supreme Court of the District in favor of the plaintiff.

So ordered.

Mr. Justice **Brewer** did not hear the argument, and took no part in the decision of this case.

\*FRANK X. WERLING *et al.*, *Plffs. in Err.*, [131]  
v.

EMILY E. INGERSOLL *et al.*

(See S. C. Reporter's ed. 131-142.)

*Public lands—grant for canal purposes—act superseded by later act.*

The act of Congress of March 30, 1822, reserving from sale and giving the use forever for canal purposes only, of 90 feet of land each side of the proposed canal, reserving to the United States the right to resume it if survey and map should not be made within three years, or if the canal should not be completed in twelve years, or if the land should ever cease to be used for canal purposes, did not constitute a grant of the title of such land to the state of Illinois; and before the conditions of this act were complied with by adopting a route and filing a map the act was superseded by the act of March 2, 1827, making a grant to the state of one half of five sections in width on each side of said canal, reserving each alternate section to the United States.

[No. 168.]

*Argued and Submitted March 6, 1901. Decided April 15, 1901.*

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment in favor of plaintiffs in an action of trespass involving title to land. *Affirmed.*

See same case below, 182 Ill. 25, 54 N. E. 1008.

Statement by Mr. Justice **Peckham**:

The plaintiffs in error have brought this case here to review the final judgment of the supreme court of the state of Illinois affirming the judgment of the circuit court of La Salle county in favor of the defendants in error (plaintiffs below) in an action of trespass involving the title to lands in that county on the south side of the Illinois and Michigan canal. The action was brought for the purpose of testing the title, and was tried by the court upon an agreed statement of facts, a jury being waived. It appears from this statement that the plaintiffs in error are the agents of the state of Illinois, and acted as such in taking down and removing the fence hereinafter spoken of. The Illinois and Michigan canal is owned by the state of Illinois, and runs in



a direction northeast and southwest through section 10, township 33 north, range 3 east, in La Salle county, Illinois. The lands in question are in this section, which was one of the sections of land reserved to the United States under the act of Congress approved March 2, 1827, hereinafter mentioned.

[132] The plaintiffs in error claim that the state of Illinois owns a strip of land through that section on the south side of the canal, 90 feet in width, contiguous to such south side. The defendants in error claim that the land which is owned by the state south of the canal is bounded on the south by a line 17 instead of 90 feet south of the canal line; or, in other words, they claim that the north line of their land runs up to within 17 feet of the south side of the canal. The ownership of the land between these points from 17 to 90 feet south of the canal is disputed, the plaintiffs in error claiming it for the state, and the defendants in error claiming it for Mrs. Ingersoll, one of the defendants in error, who has had possession of the land for more than twenty years prior to November, 1897, and had prior to that time erected a fence on the line she claimed as her north line. This 17-foot strip it would seem has been occupied by the towpath.

In order to test the question of title, the plaintiffs in error, acting for the state, removed this fence, and thereupon the defendants in error, sued them in trespass claiming the fence was on their line and was their property. The question depends upon the construction of two acts of Congress in connection with the action of the state authorities in relation thereto. They are (1) the act of March 30, 1822, chap. 14; and (2) the act of March 2, 1827, chap. 51. They are, so far as material, set forth in the margin.†

[133] \*The plaintiffs in error claim that the title to the strip of land 90 feet wide through section 10 passed to the state by virtue of the act of 1822, while the defendants in error claim that the act of 1827

takes the place of the act of 1822, as to the grant of lands, and that under the act of 1827 every alternate section of the land along the line of the canal was reserved to the United States, and it is agreed that section 10 was among the sections so reserved.

\*After the passage of the act of Congress [134] of 1822 the general assembly of the state of Illinois on February 14, 1823, passed an act in which provision was made for the appointment of a board of commissioners to consider, devise, and adopt such measures as might be requisite to effect a connection by a canal and locks between the navigable waters of Illinois river and Lake Michigan. It was made the duty of these commissioners to cause that part of the territory of the state which may lie open or contiguous to the probable courses and ranges of the canal to be explored and examined for the purpose of fixing and determining the most proper and eligible route for the same, and to cause all necessary surveys, etc., to be made, and to make calculations and estimates of the cost, and to make a plain and comprehensive report of all their proceedings under the act to the general assembly of the state at the commencement of the next session.

On January 13, 1825, the general assembly of the state amended a prior act, and appropriated about \$2,000 for the payment of the actual expenditures made and liabilities incurred by the canal commissioners appointed under the act of 1823. On January 17, 1825, the general assembly incorporated the Illinois and Michigan Canal Company, and provided that the officers should obtain subscriptions to the stock, which should amount to \$1,000,000, and in a convenient time thereafter, and after 10 per centum of the capital stock should have been paid in, the commissioners should proceed to construct a canal to connect the waters of the Illinois river and Lake Michigan; and the corporation was directed to proceed as rapidly to the completion of that object as might be deemed practicable and expedi-

†Act of March 30, 1822. Chap. 14, 3 Stat. at L. 659.

An Act to Authorize the State of Illinois to Open a Canal Through the Public Lands, to Connect the Illinois River with Lake Michigan.

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the state of Illinois be, and is hereby, authorized to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and 90 feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be, and the same is hereby, vested in the said state for a canal, and for no other purpose whatever; on condition, however, that if the said state does not survey and direct by law said canal to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passing of this act; or if the said canal be not completed, suitable for navigation, within*

twelve years thereafter; or if said ground shall ever cease to be occupied by, and used for, a canal, suitable for navigation; the reservation and grant hereby made shall be void and of none effect.

Sec. 2. *And be it further enacted, That every section of land through which said canal route may pass shall be, and the same is hereby, reserved from future sale, until hereafter specially directed by law; and the said state is hereby authorized, and permitted, without waste, to use any materials on the public lands adjacent to said canal, that may be necessary for its construction.*

Act of March 2, 1827. Chap. 51; 4 Stat. at L. 234.

An Act to Grant a Quantity of Land to the State of Illinois, for the Purpose of Aiding in Opening a Canal to Connect the Waters of the Illinois River With Those of Lake Michigan.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the state of Illinois, for the purpose of aiding the said state in opening*



(135) ent, having in view the ultimate permanency of the work and the facility and safety of the communications. The size of the canal which the state had in contemplation is shown by reference to § 5 of the act, wherein it is provided that the canal shall be of a width of 40 feet at the summit, 28 at the bottom, and of sufficient depth to contain water at least 4 feet deep. There is nothing in the record to show that these dimensions \*were ever altered, although the act was repealed the next year, January 20, 1826.

In the preamble of the repealing act it was stated that the corporation had not performed any act by which the right of the general assembly to repeal its charter could be taken away, and it was stated that it was believed that the highly important object of the act referred to could be promoted with greater advantage to the public by having the contemplated canal constructed under the direction of the state, and therefore the act of incorporation was repealed.

The governor of the state was directed by § 2 of the repealing act to endeavor to ascertain the best terms on which loans could be obtained on behalf of the state for the purpose of constructing the canal and to report the same to the general assembly at its next session.

Pursuant to such direction, and on December 5, 1826, the governor reported that capitalists were reluctant to commit themselves to any specific terms on which they would be willing to make a loan, but from the best information which he had received it was confidently believed that if Congress would make a liberal grant of land, there would be no difficulty on the part of the state in obtaining a loan at 6 per centum; and the governor suggested the propriety of adopting measures at that session to commence the work, predicated upon a liberal grant of land by Congress, which it was expected that body would make. The general assembly at the same session adopted a memorial to Congress, in which it asked for a grant of land belonging to the United States for the purpose of aiding the construction of the canal, and in this memorial the following language was used:

"Your memorialists have caused the route to be explored and estimates to be made of the probable expense of the work; from which it appears that the cost of constructing the canal will not be less than \$600,000,

a canal to unite the waters of the Illinois river with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of the said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said state, for the purpose aforesaid, and no other.

Sec. 2. *And be it further enacted*, That, so soon as the route of the said canal shall be located and agreed on by the said state, it shall be the duty of the governor thereof, or such

and may possibly amount to \$700,000. To the end, therefore, that your memorialists may be enabled to commence and complete this great and useful work, we pray your honorable body to grant to this state the respective townships of land through which the contemplated \*canal may pass, the avails [136] of which to be appropriated exclusively to the construction of said canal upon such terms and conditions as to your honorable body may seem proper."

Congress on March 2, 1827, passed the act already set forth. On January 22, 1829, the general assembly passed an act providing for the construction of the Illinois and Michigan canal, and for the appointment of commissioners to effect that object. By § 5 the canal commissioners were directed to cause "those parts of the territory of this state which is upon or contiguous to the probable course or range of said canal to be explored and examined for the purpose of fixing and determining the most proper and eligible route for the same; . . . and, as soon thereafter as they may be able to command sufficient funds and deem it expedient, shall commence the work of opening a canal, and constructing locks, aqueducts, and dams, and embankments, to effect a navigable communication between Lake Michigan and the Illinois river."

By the 6th section the canal commissioners were directed, as soon as practicable and in conjunction with the authorities of the government, to select alternate sections of land granted to the state by the act of Congress of 1827, and when the selection was made, it was provided by § 7 that the commissioners should proceed to sell the lands thus selected and to make returns of the proceeds of such sale to the auditor of public accounts.

On September 23, 1829, the canal commissioners obtained from the secretary of state of the state of Illinois a map of the proposed route of the canal which had been made by J. Post and R. Paul, in the years 1823 and 1824, when proceeding under the act of Congress of 1822 and the state statute of 1823. This map was obtained for the purpose of using the same in aid of their work of examining and locating the canal route from Lake Michigan to the Illinois river, but the duty of determining and adopting a route rested with the commissioners appointed under this state act of

other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which the said state will be entitled under the provisions of this act, and report the same to the Secretary of the Treasury of the United States.

Sec. 3. *And be it further enacted*, That the said state under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor to whomsoever shall purchase the whole or any part thereof.



1829, no route having up to that time been adopted.

[137] During the years 1823 and 1824 the state, through its above-named engineers, Post and Paul, had surveyed and marked through the public lands of the United States the route of the "canal connecting the Illinois river with the southern bend of Lake Michigan," though it did not return a map thereof to the Treasury Department within three years from March 30, 1822; but some time between December 25 and the end of the year 1829 the state did return to the Treasury Department of the United States "a complete map of the route of the canal connecting the Illinois river with Lake Michigan." The map filed in 1829 is known as the Thompson map, and is the first and only one, so far as the record shows, ever filed with the Treasury Department. It was filed in December, 1829, under the provisions of the act of 1827. This fact appears from the certificate of the Commissioner of the General Land Office, and also from that of the secretary of the canal commissioners of the state. Both officials assert that the map was filed "under the provisions of the act of Congress approved March 2, 1827." The general route is said to agree in substance with that laid down on the map made by Messrs. Paul and Post.

The state commenced the construction of the canal in the year 1837, and completed it in 1847, upon the route as shown by the Thompson map filed in the Treasury Department.

Mr. Howard M. Snapp argued the cause and filed a brief for plaintiffs in error:

The words, "and the use thereof forever shall be and the same is hereby vested in the state," employed in the act of March 30, 1822, are words of absolute donation, and import an immediate transfer of title, though subsequent proceedings are required to give precision to the title and attach it to specific lands.

*St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 742, 26 L. ed. 457; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Rutherford v. Greene*, 2 Wheat. 196, 4 L. ed. 218; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741, 23 L. ed. 637; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 594, 36 L. ed. 1097, 13 Sup. Ct. Rep. 152; *Wilkinson v. Northern P. R. Co.* 5 Mont. 538, 6 Pac. 349; *Johnson v. Ballou*, 28 Mich. 379; *Swann v. Larnore*, 70 Ala. 561; *Burlington & M. River R. Co. v. Lawson*, 58 Iowa, 145, 12 N. W. 229.

The act of Congress of March 30, 1822, vested in the state *eo instanti* the title to a 90-foot strip of land on each side of a canal connecting the Illinois river with Lake Michigan, to be thereafter located. Until the ca-

nal was located, the title did not attach to any specific 90-foot strip, but was a float. When the route of the canal was surveyed and determined, the location of the 90-foot strip became certain, and the title acquired precision and attached to it as of the date of the grant.

*Hannibal & St. J. R. Co. v. Smith*, 9 Wall. 95, 19 L. ed. 599; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741, 23 L. ed. 637; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 5, 35 L. ed. 79, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Rutherford v. Greene*, 2 Wheat. 196, 4 L. ed. 218; *Lessieur v. Price*, 12 How. 59, 13 L. ed. 893; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 497, 24 L. ed. 1097; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Western P. R. Co. v. Tevis*, 41 Cal. 489; *Cass County v. Morrison*, 28 Minn. 257, 9 N. W. 761; *Courtright v. Cedar Rapids & M. River R. Co.* 35 Iowa, 386; *Keller v. Brickey*, 78 Ill. 135; *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572; *Wabash, St. L. & P. R. Co. v. McDougal*, 113 Ill. 607; *Illinois C. R. Co. v. Union County*, 94 Ill. 71.

Upon the return of the map to the Treasury Department of the United States, in the year 1829, the route of the canal became definitely fixed, and the state's title attached specifically to the 90-foot strip on each side thereof.

*Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Southern P. R. Co. v. United States*, 168 U. S. 61, 42 L. ed. 381, 18 Sup. Ct. Rep. 18; *Walden v. Knevals*, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898.

The conditions prescribed in the act of 1822, that the state should survey and direct by law the canal to be opened, and return a complete map thereof to the Treasury Department within three years, and complete the canal within twelve years, or the grant should be void, were conditions subsequent, the nonperformance of which did not divest the state of its title to the 90-foot strip.

*Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Atlantic & P. R. Co. v. Mingus*, 165 U. S. 431, 41 L. ed. 777, 17 Sup. Ct. Rep. 348; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Whceler v. Chicago*, 68 Fed. 526; *Keller v. Brickey*, 78 Ill. 135; *Wabash, St. L. & P. R. Co. v. McDougal*, 113 Ill. 607; *Gilbreath v. Dilday*, 152 Ill. 210, 38 N. E. 572.

The conditions prescribed in the act of 1822 being conditions subsequent, the government only was concerned in their performance. No individual could take advantage of their nonperformance. The government could only reinvest itself by judicial proceedings declaring a forfeiture, or by some legislative assertion of ownership.

*Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 473, 29 L. ed. 448, 6 Sup. Ct. Rep. 123; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Van Wyck v. Knevals*, 106 U. S. 368, 27 L. ed. 203, 1 Sup. Ct. Rep. 336; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Atchison, T. & S. F. R. Co. v. Mecklim*, 23 Kan. 167; *Northern P. R. Co. v. Majors*, 5 Mont. 111, 2 Pac. 322; *Hooper v. Cummings*, 45 Me. 359.

The act of Congress of March 2, 1827, was passed to aid the state in opening and constructing the canal provided for by the act of March 30, 1822, and to extend the time for completing the same. The act of the general assembly of the state of Illinois of February 14, 1823, and the proceedings taken thereunder, the return of the map of the route of the canal to the Treasury Department in 1829, and the completion of said canal in 1847, constituted an acceptance by the state of the grant of 1822.

*Wheeler v. Chicago*, 68 Fed. 526; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 497, 24 L. ed. 1097.

Grants of this character should be construed liberally and so as to carry out as fully as possible the intention of Congress.

*Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 497, 24 L. ed. 1097; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 625, 28 L. ed. 1111, 5 Sup. Ct. Rep. 606; *United States v. Southern P. R. Co.* 146 U. S. 598, 36 L. ed. 1098, 13 Sup. Ct. Rep. 152; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 55, 40 L. ed. 74, 15 Sup. Ct. Rep. 1020.

When appellees' grantors entered and acquired title to the northwest quarter of section 10 in 1835, they took the same subject to the right of way of the canal, and to the grants previously made by the acts of Congress of 1822 and 1827.

*St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Van Wyck v. Knevals*, 106 U. S. 365, 27 L. ed. 202, 1 Sup. Ct. Rep. 336; *Missouri, K. & T. R. Co. v. Cook*, 163 U. S. 497, 41 L. ed. 241, 16 Sup. Ct. Rep. 1093; *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 423, 2 N. W. 648; *Rider v. Burlington & M. River R. Co.* 14 Neb. 122, 15 N. W. 371; *Burlington & M. River R. Co. v. Lawson*, 58 Iowa, 148, 12 N. W. 229; *Vance v. Burlington & M. River R. Co.* 12 Neb. 285, 11 N. W. 334; *Bullard v. Des Moines & Ft. D. R. Co.* 62 Iowa, 382, 17 N. W. 609; *Northern P. R. Co. v. Peronto*, 3 Dak. 233, 14 N. W. 103.

Appellees could acquire no right or title to the 90-foot strip by possession or prescription. The statute of limitations does not run against the state.

*Gibson v. Chouteau*, 13 Wall. 100, 20 L. ed. 536; *Catlett v. People ex rel. State's Attorney*, 151 Ill. 23, 37 N. E. 855.

Mr. William M. Springer submitted the cause for defendants in error.

\*Mr. Justice Peckham, after making the above statement of fact, delivered the opinion of the court:

The plaintiffs in error claim that upon the passage of the above-mentioned act of Congress of 1822 the state of Illinois immediately became vested with the title to a strip of land 90 feet wide on each side of the route of the canal through the public lands of the United States from Lake Michigan to the Illinois river, and that the act of Congress of March 2, 1827, did not alter or in any way affect the provisions of the act of 1822, or take away the title which they claim had already vested in the state upon the passage of that act; that although the title \*to any specific portion of land under the act of 1822 was in the nature of a float until the route of the canal was surveyed and adopted and a map thereof made and filed in the Treasury Department, yet, when that was done, the title to the 90 feet on each side of the canal was vested in the state as of the date of the passage of the act. [138]

The various land grants made by Congress to railroads are cited for the purpose of showing that the act of 1822 constituted a grant of lands *in presenti* and absolute in character, although to be thereafter identified by future action. *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 741, 23 L. ed. 634, 637; *St. Joseph & D. City R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The language of the act of 1822, it will be observed, is somewhat peculiar, and differs from that generally used in the land grants to railroads, which usually contain the expression that "there be and is hereby granted" to the railroad companies the lands mentioned, or words of similar import. In this act it is provided that "90 feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in the said state for a canal, and for no other purpose whatever; on condition, . . . if said ground shall ever cease to be occupied by and used for a canal suitable for navigation, the reservation and grant hereby made shall be void and of none effect. . . ."

By this language the strict technical title is not conveyed to or vested in the state. It is simply a provision withdrawing from sale this strip of land and vesting the use of it for a canal, and for no other purpose whatever, in the state, with a condition that if not so used the reservation and grant are to be void. If proceedings had in fact been taken under this act, the route surveyed and a map thereof made and filed in the Treasury Department in compliance with the provisions of the act, then the use of the land designated on the map so filed, for the purpose mentioned in the act of 1822, would



[139] very likely have vested in the state as of the date of such act. The action of the authorities \*on the part of the state, after the passage of the act of 1827 and up to the filing of the map in 1829, shows, however, that it was the act of 1827, and not that of 1822, which was in their contemplation when the map was filed in the Treasury Department.

During 1823 and 1824 a route was surveyed and marked through the public lands of the United States for a canal connecting the Illinois river "*with the southern bend of Lake Michigan*," but it does not appear that the route was ever adopted, or that a map of such route was ever filed. The map which was filed in 1829 purported to show the route of a canal connecting the Illinois river with Lake Michigan, omitting the expression "*with the southern bend of Lake Michigan*," which latter description, it is said, would, if closely and technically followed, have taken the canal into the state of Indiana. The route of the canal laid out on the map filed did connect the canal with the waters of Lake Michigan in the state of Illinois, but not in terms with the *southern bend* of that lake. It is claimed, however, that the two descriptions, "the southern bend of Lake Michigan" and "the waters of Lake Michigan," are substantially identical, and that the route of the canal as marked on the map of 1829 is in all material matters the same as that surveyed under the act of 1822. However this may be, it cannot be denied that between 1822 and the passage of the act of Congress in 1827 no route had been adopted for the canal and no work of construction had been commenced thereon, although, as already stated, a route had been surveyed and marked; yet none had been adopted, and none was adopted until after the passage of the state act of January 22, 1829. This appears by § 5 of that act, in which the canal commissioners were authorized to explore, examine, and determine, and fix upon the most proper and eligible route for a canal, and to cause maps, surveys, profiles, etc., to be made, and thereafter, when they deemed it expedient and funds could be secured, they were authorized to commence the work of constructing the canal. The 6th section of the same act had special reference to the selection of the land granted by the congressional act of 1827.

[140] The filing of a map with reference only to the act of 1827, \*specifying both the sections reserved to the United States and those granted to the state under that act, would not thereby fix and identify lands which had been mentioned, but not identified, in a different and prior act, and which were not referred to in any way in the map filed under the act of 1827. No lines showing the boundary of a strip 90 feet wide on each side of the canal were ever placed on the map which was filed in the Treasury Department in 1829,—the only map which was ever filed there. That map showed the proposed route and also the sections granted to the state and those reserved to the United

States; and the right of way along the route would be taken to be for a canal of the proposed width as stated in the acts of the general assembly, and which width was accepted and acquiesced in by Congress and the government.

It was not until 1848,—eleven years after the work of construction was commenced and a year after the completion of the canal, as is stated by counsel for plaintiffs in error in his brief,—that a survey was made of the 90-foot strip on each side of the canal from one end to the other, and the lines of that survey marked on maps under the directions of the canal commissioners, and the maps and profiles of the survey filed in the office of the state canal commissioners, but not with the Commissioner of the General Land Office or in the Treasury Department at Washington. This action of the canal commissioners was a mere *ex parte* assertion made by state officials upon their own maps, nearly twenty years after the filing of the map in the Treasury Department, indicating a possible claim of right on behalf of the state, but never laid down on any map filed in Washington.

The differences between the two acts in question and their inconsistent provisions are noticeable. That of 1822 provides for the use of land through the whole of the public domain 90 feet wide on each side of the canal. That of the act of 1827 grants a quantity of land equal to one half of five sections in width on each side of such canal, and reserves each alternate section to the United States, etc. In the sections reserved, therefore, no title to or use of the 90 feet on each side of \*the canal is given, while in the [141] alternate sections not reserved to the United States the whole title is granted to the state. The 3d section of the act of 1827 gives power to sell and give title in fee to the land granted, while the act of 1822 grants no title, and provides for resuming possession of the land if at any time the same is not used for a canal. The filing of a map under the act of 1827 would clearly not be a fulfilment of the provisions as to the filing made in the act of 1822.

The congressional act of 1827, nevertheless, implies by its language and subject-matter the consent of Congress to a right of way through the public lands, and the subsequent state act of 1829, in the 11th section, showed the width of the canal contemplated, which was the same as the prior and repealed act of 1825 provides for. Of course a towpath would be added. These two acts show the intention of the parties to proceed thereafter with reference to the act of 1827, and not under that of 1822. Work was not in fact commenced until in 1837.

When Congress under the act of 1827 granted the alternate sections to the state throughout the whole length of the public domain, in aid of the construction of the canal, it also granted by a plain implication the right of way through the reserved sections, for it cannot be presumed the government was granting all these alternate sections to the state for the purpose avowed.

and yet meant to withhold the right to pass through the sections reserved to the United States along the route of the proposed canal. But the implication would not extend to the 90 feet on each side. It would extend to the land necessary to be used for the canal of the width contemplated, and that had been asserted in an act of the general assembly in 1825, and was subsequently reiterated in another act of that body (1829).

Upon all the facts in the case it is plain that the act of 1822 was mutually abandoned by the parties so far as concerned the land grant after the passage of the act of 1827, and that the right of way through the reserved sections was treated and regarded as impliedly granted by the latter act, under which the larger grant was made, and that the map was filed under that act, and none was ever filed under the act of 1822.

[142] The state \*never took title to the strip of land 90 feet wide on each side of the route of the canal through the public lands, so far as related to the sections reserved to the United States by the act of 1827, of which § 10 herein involved was one.

It is not a question of forfeiture of the grant under the act of 1822. There was no forfeiture; it was a mutual abandonment of that act for the act of 1827. Taking all the facts into consideration, the state never acquired an absolute title to the 90-foot strip, as by the language of the act of 1822 the use only was granted, and it required a subsequent filing of a map as provided for in that act before the right to the use was acquired and made definite and fixed as to any particular land; and before that time arrived the act of 1827 was passed, which was to a certain extent inconsistent with the former act, and the state in fact thenceforth proceeded under the later act, and filed its map thereunder and constructed the canal with reference thereto.

We think the judgment of the Supreme Court of Illinois was right, and it is therefore affirmed.

ST. PAUL GASLIGHT COMPANY, *Plff. in*  
*Err.,*  
*v.*  
CITY OF ST. PAUL.

(See S. C. Reporter's ed. 142-151.)

*Contracts—impairment of obligation—ordinance denying liability—dismissal of writ of error.*

1. An ordinance commanding the removal of gas street-lamp posts which are no longer in use because the streets are lighted by electricity instead of gas, and declaring that no interest will thereafter be paid to the gas

company on account of such posts, does not impair the obligation of a contract under which the gas company erected such posts and the city agreed to pay interest on their cost, since, if the city is still liable under the contract after the substitution of electricity for gaslights, that obligation will not be affected by this ordinance, and the declaration that payment will not be made will be ineffectual.

2. The fact that a comptroller is precluded from auditing the claims of a gas company as a prerequisite to the appropriation of money to pay them, by the passage of an ordinance declaring that no money will be paid on account of them, does not impair the obligation of a contract under which the claims arose, where the auditing by the comptroller would be, at the most, merely advisory, and would not authorize payment without the passage of an appropriation by the city council.
3. A claim that the obligation of a contract is impaired by an ordinance the enforcement of which could not constitute such an impairment, although it denies liability on the contract, does not present a Federal question for review by the Supreme Court of the United States on writ of error to a state court.

[No. 183.]

*Argued March 21, 1901. Decided April 15, 1901.*

IN ERROR to the Supreme Court of the State of Minnesota to review a decision reversing a judgment in favor of a gas company against a city. *Dismissed.*

See same case below, 78 Minn. 39, 80 N. W. 774, 877.

Statement by Mr. Justice White:

\*The charter of the St. Paul Gaslight Com-[143]pany was granted in 1856, and it expires in 1907. The corporation was empowered to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas. It may be assumed, for the purposes of the question arising on this record, that the corporation discharged its duties properly under its charter, and that from the time the charter became operative the company has lighted the city in accordance with the contracts made for that purpose from time to time with the municipal authorities. The charter did not purport to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one. It may also be assumed for the purposes of this case that the rights which the corporation asserts on this record were not foreclosed by

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 12.

As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



any of the contracts which it made, at different periods, with the city. The question which here arises concerns only § 9 of the charter, which is as follows:

"Sec. 9. That it shall be the duty of the St. Paul Gaslight Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: *Provided*, That whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up, and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of 8 per cent per annum on the amount of the sum of the original cost [144] of said street \*lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gaslight would not be sufficient to defray the expenses of furnishing the same."

Under the foregoing section the gas company, by direction of the city, constructed street lamps, and up to January 1, 1897, they numbered 3,362. The interest on the cost of these lamps, at the rate fixed by § 9, was regularly paid by the city up to January 1, 1897. About or shortly after that date, in certain portions of the city, the use of electricity for lighting the streets was by direction of the municipality substituted for gas, and hence the street gas lamps in those portions of the city which were lighted by electricity were no longer used. It is fairly to be deduced from the record that either by its original charter or by amendments thereto the gas company was empowered to supply electricity as well as gas, and in virtue of this power, it constructed an electrical plant and contracted with the city to supply the electric lights in those portions of the city where the use of gas had been dispensed with. The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps. As the result of this disagreement the city, in 1897, passed the following ordinance:

"Resolved, That the St. Paul Gaslight Company be and it is hereby required forthwith to remove the gas street-lamp posts in that portion of the city now lighted by electric light under contract with said company, 181 U. S.

and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street-lamp posts not now in service in said electric-light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light \*Company on account of the [145] cost of the purchase and equipment of said gas street-lamp posts."

Thereupon the gas company commenced this suit to recover the interest on the cost of the construction of the lamps referred to in the ordinance. Without going into unnecessary detail it is adequate to say that the complaint alleged that the city was obliged by § 9 of the charter of the company to pay the interest on the cost of the lamps, although they were no longer in use for lighting purposes. The ordinance of the city which we have reproduced was expressly referred to in the complaint, and it was therein alleged that the ordinance in legal purview amounted to action by the state impairing the obligations of the contract embodied in § 9 of the charter, and was hence void because repugnant to the Constitution of the United States. After answer and due proceedings the case was decided by the trial court in favor of the gas company. On appeal the judgment of the trial court was reversed by the supreme court of Minnesota, and a final judgment was ordered against the gas company. 78 Minn. 39, 80 N. W. 774, 877. To this judgment of the supreme court of the state this writ of error is prosecuted.

Mr. F. W. M. Cutcheon argued the cause, and, with Mr. George C. Squires, filed a brief for plaintiff in error:

It is too late for the contention that a municipal ordinance or resolution may not be a law of a state within the meaning of the Constitution, to be seriously urged. The reports of this court contain many decisions to the contrary effect.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. See also *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

If the decision of the highest court of a state results in confirming and perpetuating a situation into which the parties have been brought by a law of the state that in the state court was assailed by one of them as impairing the obligation of a contract upon which the attacking party relies, such decision is in favor of the validity of the law, regardless of the party by whom the subsequent law was brought to the attention of the court.



*Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 688, 29 L. ed. 513, 6 Sup. Ct. Rep. 265; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *Chapman v. Goodnow*, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Huntington v. Attrill*, 146 U. S. 658, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *Minneapolis & St. L. R. Co. v. Gardner*, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. Rep. 656.

If this court were to hold that it can take jurisdiction only of those cases in which the party that is in fact deriving advantage from the subsequent law chooses to justify under the law, it would in so doing, not only arbitrarily limit its own jurisdiction as established by statute, but disable itself to perform in important cases one of its most solemn duties.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

The connection between the law and the action complained of may be deduced from the circumstances.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

The certificate of the chief justice of the supreme court of Minnesota may properly be referred to for the purpose of rendering clear and more certain anything that appears too indefinitely by the record.

*Parmelee v. Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Caperton v. Bowyer*, 14 Wall. 216, 20 L. ed. 882; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

The decision of the state court gave effect to the resolution.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

*Mr. James E. Markham*, argued the cause and filed a brief for defendant in error:

The certificate of the presiding judge of the state court as to the existence of grounds upon which the interposition of this court

might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

*Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

It must appear from the record itself, by clear and necessary intendment, that the Federal question was directly involved, so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record, before the state court can be held to have disposed of such Federal question by its decision.

*Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decision of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

It is true that any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the state court.

*United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825.

But in adopting the ordinance in question, directing these disused lamp posts to be removed, and directing that no interest should be paid upon the original cost of the lamps so removed, the city was not acting in the exercise of any legislative power conferred upon it by the state.

*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Day v. Green*, 4 Cush. 433.

This court is not authorized by the judiciary act to review the judgments of the state courts because their judgment refuses to give effect to valid contracts, or because in their effects, they impair the obligations of contracts.

*Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.



[145] \*Mr. Justice White, after stating the case, delivered the opinion of the court:

The supreme court of Minnesota held that the charter of the gas company did not impose on the city the obligation to pay the interest on the cost of constructing the lamps not used. Construing the whole charter, the court decided that as it provided for contracts between the parties from time to time for the supply of lights, the sole obligation imposed was that the interest on the cost of the construction of the lamps should be paid by the city only during the time it was agreed that the lamps should be used, and not during the life of the charter. We excerpt \*in the margin an extract from the opinion of the supreme court of Minnesota which more fully expresses the reasoning by which the court sustained the construction of the contract which was expounded.†

[147] \*Because the supreme court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligation of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case the state court has decided that there was no impairment either because the contract had never existed, or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired never arose. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a

contract, and if yes, what obligations arose from it? and, Has there been state legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation. As, however, the authority to review the judgment of the supreme court of Minnesota in this case, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, we will first consider whether, under any view which may be taken of the contract, there is shown on this record any act of state legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, we propose first to consider, even although it be conceded *arguendo* that the supreme court of the state of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any state legislation impairing the obligation of such contract. While it is not pretended that there is any law of the state of Minnesota by which the obligation of the contract was \*impaired, it is asserted that [148] such consequence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may prop-

†"It seems to us that it would be unreasonable to hold that if, at the inception of the fifty years which this charter was to run, the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets which expired at the end of that time, and then, on account of some such contingency, had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes and meters for forty years more, and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under § 9, compel the gas company to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street-lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than 8 per cent per annum, during such use, on the cost of erecting the same.

"But we are of the opinion that § 9 does not give the council the right in its discretion to compel the erection of street lamps regardless of how long the city may use them, and without protecting the gas company by stipulating a length of time during which the city shall use them.

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"Section 9 provides that whenever the city shall 'by resolution of the board of aldermen direct lamps to be erected and lighted in the streets of the city,' the gas company shall erect the same and keep them in repair. But, as we have seen, the city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract the gas company can refuse to contract for lighting any street lamps except those already erected; and before the city can compel the erection of more lamps it must first make a contract for lighting them. In making such a contract, the gas company can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the 8 per cent per annum to be paid during that time will remunerate the gas company for erecting the lamps. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use.

"This, in our opinion, is the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same and abandoned the use of gas in lighting its streets."



erly be considered as a law, within the meaning of this article of the Constitution of the United States." *New Orleans Waterworks v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741, 748; *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Referring to the ordinance in question, from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to: the first, a command by the city to the gas company to "forthwith remove the gas street-lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;" and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If, then, there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas-lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove [149] the unused lamp posts \*cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision

of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error.

It is argued, however, that as under the charter of the city of St. Paul the comptroller of the city was empowered to audit the claims of the gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, therefore the ordinance, to the extent that it deprived the comptroller of the power to audit, divested him \*of an attribute which he [150] could otherwise have exercised on behalf of the claim if he favored its payment, and hence the ordinance impaired the contract obligations. But it is not pretended that the effect of the auditing by the comptroller would have been to authorize the payment of the claim, or indeed that it was anything but advisory; since even after he had audited, the payment could not have been procured without the passage of an appropriation by the council for that purpose. A large number of cases were cited in the argument at bar, under the assumption that they sustain the proposition that wherever a mere denial of contract liability is made by a municipality such denial is an impairment of the obligations of the contract, since it is a refusal to comply with the contract and hence is a disregard of the obligations which the contract created. We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. However, we briefly advert to a few of the cases to show how inapposite they are to the proposition which they are cited to maintain. Thus, in *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, the decision which was under review had given effect to an ordinance of the city of Charleston deducting a sum of taxation from the bonds held by the complainant. In *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, the decision of the state court gave effect to a municipal ordinance which provided for the construction by the city of a new waterworks plant which was to become a competitor with the contracting company. In *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134, it was expressly held, although the state court had rested its decision on the ground that there was no contract, in view of the previous decisions of this court and



[151] of the state court, relating to the contract which was under consideration, that the necessary effect of the ruling was in substance to give effect to an act of the legislature of Virginia, passed subsequent to the contract, and which impaired its obligations. In *Houston & T. C. R. Co. v. Texas*, 177 U. S. 74, 44 L. ed. 679, 20 Sup. Ct. Rep. 548, this court, after noticing the fact that the state court had decided the case "without reference to the act of 1870 which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings," said: "We think the judgment of the court did give effect to that act." And the soundness of this conclusion the opinion then proceeded to demonstrate, it being apparent that the legislative act of impairment which the court found had been given effect to by the state decision was not a mere denial of liability, but amounted to an impairment of the substantial rights conferred by the contract.

As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court.

*Dismissed for want of jurisdiction.*

JOHN E. CODLIN, Chairman, and Manuel M. Salazar, Clerk, of the Board of County Commissioners of Colfax County, *Appts.*,  
v.

CHARLES B. KOHLHAUSEN, Christopher N. Blackwell, Alfred C. Price, and Timothy F. McAuliffe.

(See S. C. Reporter's ed. 151, 152.)

*Appeal—dismissal—command of writ fully performed.*

An appeal from a judgment awarding a mandamus commanding officers to sign and execute bonds and deliver them for sale will be dismissed where, in obedience to the writ, the bonds have been executed and sold, and the proceeds applied to the intended use, and the defendants have gone out of office.

[No. 234.]

*Argued and Submitted April 11, 1901. Decided April 15, 1901.*

**A** PPEAL from the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment awarding a mandamus. *Dismissed.*

See same case below, 9 N. M. 565, 58 Pac. 499.

The facts are stated in the opinion.

Mr. R. E. Twitchell submitted the cause for appellants.

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Mr. Andrieus A. Jones argued the cause and filed a brief for appellees:

When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.

*Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132.

The fact that there is no controversy between parties to the record ought, in the interest of a pure administration of justice, to be allowed to be shown at any time before the decision of the case. Any other rule would put it in the power of designing persons to bring up a feigned issue in order to obtain a decision of this court upon a question involving the rights of others who have no opportunity to be heard.

*Little v. Bowers*, 134 U. S. 558, 33 L. ed. 1020, 10 Sup. Ct. Rep. 620.

\*THE CHIEF JUSTICE: This was a petition [152] filed by appellees in the district court for Colfax county, New Mexico, praying for a writ of mandamus directed to Codlin, chairman, and Salazar, clerk, of the board of county commissioners of the county of Colfax, commanding them to officially sign and execute certain bonds and deliver them to the designated agent of the county for sale, for the construction of a courthouse and jail.

The alternative writ of mandamus was issued and due return made, whereupon, and after hearing, the district court ordered the peremptory writ to issue, which was done, and the writ served, October 23, 1897.

The case was carried on error to the supreme court of the territory in June, 1898, and it appears from an affidavit in that court that the mandate of the district court was obeyed and the bonds issued and sold; and from an affidavit in this court, that the proceeds were used in the construction of the courthouse and jail, which were completed on or about January 1, 1899. That affidavit also states that Codlin ceased to be chairman or a member of the board of county commissioners in January, 1899, and that Salazar ceased to be clerk during or prior to March, 1899.

The territorial supreme court affirmed the judgment of the district court August 28, 1899. 9 N. M. 565, 58 Pac. 499. An appeal from the judgment of affirmance to this court was allowed January 2, 1900, and the record filed here March 28.

We think the cause comes within the rule applied in *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, and cases cited, and the order must be—

*Appeal dismissed without costs to either party.*

[153] \*CITY OF NEW ORLEANS, *Appt.*,  
v.  
ALPHONSE EMSHEIMER.

(See S. C. Reporter's ed. 153, 154.)

*Appeal—of defendant from decree dismissing bill.*

An appeal from a circuit court of the United States to the Supreme Court, solely for a review of a decision sustaining the jurisdiction of the circuit court, will be dismissed when that court has rendered a decree for the defendant sustaining a demurrer to the bill "for want of equity, with full reservation of complainant's right to sue and proceed at law," since this decree does not injure the defendant, but sustains its contention, and cannot be reversed at defendant's instance because put upon one, rather than another, of the grounds which defendant alleged.

[No. 337.]

*Submitted December 10, 1900. Decided April 15, 1901.*

**A** PPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree dismissing a bill on demurrer, but sustaining the jurisdiction of the court. *Dismissed.*

The facts are stated in the opinion.

**Messrs. Samuel L. Gilmore, Frank B. Thomas, and Branch K. Miller** submitted the cause for appellant:

A party has the right to have a judgment in his favor corrected in any respect as to which he deems himself injured, or in respect to which he has been denied his full rights.

*United States v. Dashiell*, 3 Wall. 701, 18 L. ed. 269; *Teal v. Russell*, 3 Ill. 319; *Hartman v. Belleville & O. R. Co.* 64 Ill. 24.

**Messrs. J. D. Rouse and William Grant** submitted the cause for appellee:

The right of appeal is given to one who is aggrieved by the decree made; not to one who has obtained all the relief prayed for. The appellant complains of the reasons given by the court for its decree; but these reasons form no part of the decree.

*Corning v. Troy Iron & Nail Factory*, 15 How. 465, 14 L. ed. 774.

The court properly held that as between the parties it had jurisdiction, but dismissed the bill for want of equity. The complainants appealed to the court of appeals, where alone the ground upon which the decree was made can be reviewed.

*Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

[153] \*THE CHIEF JUSTICE: Emsheimer filed his bill against the city of New Orleans, on behalf of himself and others similarly situated, in the circuit court for the eastern district of Louisiana, seeking to collect certain certificates of indebtedness issued by the board of metropolitan police of New Orleans through an accounting; to which the city demurred on the grounds that the circuit court had no jurisdiction as such for want of proper averments of diverse citizenship; that necessary parties were lacking;

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and that the remedy was at law, and not in equity.

The circuit court held, that the averments in respect of citizenship were sufficient, but sustained the demurrer on the \*ground that [154] there was no equity in the bill, and dismissed the bill "for want of equity with full reservation of complainant's right to sue and proceed at law."

Subsequently an appeal was granted to this court, on application of the city, "for the sole and exclusive purpose of having a review of the finding, decision, and decree of the court overruling the said first ground of the said demurrer, by which the jurisdiction of this court and the sufficiency of the averments of the bill purporting to show the same are put at issue."

Defendant below sought no affirmative relief but simply to defeat the suit. In this it succeeded, and the decree is a bar to another suit in equity on this cause of action so long as it stands unreversed.

The decree did not injure defendant but sustained its contention, and defendant is in no position to complain that it is aggrieved by its own success. The decree cannot be reversed at its instance because put on one of the grounds it urged rather than another.

If complainant brings an action at law, and the question of Federal jurisdiction is in issue, or if this decree should be hereafter reversed and Federal and equity jurisdiction sustained, it will be time enough if final judgment or decree passes against defendant in the circuit court for the question of jurisdiction to be certified. *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

*Appeal dismissed.*

\*PETER LEE ATHERTON, *Plff. in Err.*, [155]  
v.

MARY G. ATHERTON.

(See S. C. Reporter's ed. 155-175)

*Husband and wife—divorce—sufficiency of notice to nonresident defendant—conclusiveness of decree in other states.*

NOTE.—On the validity of a decree of divorce obtained on publication or service out of the state, where the defendant did not appear—see *Butler v. Washington* (La.) 19 L. R. A. 814, and note.

On the conclusiveness of judgment of divorce under conflict of laws—see note to *Thompson v. Thompson* (Ala.) 11 L. R. A. 445.

As to full faith and credit to be given to judicial proceedings in courts of a sister state—see notes to *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79; *Cumlington v. Belchertown* (Mass.) 4 L. R. A. 131; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 578; *Rand v. Hanson* (Mass.) 12 L. R. A. 574, and *Milis v. Duryc*, 3 L. ed. U. S. 411.

As to what service of process is sufficient to constitute due process of law—see *Pinney v. Providence Loan & Invest. Co.* (Wis.) 50 L. R. A. 577, and note.

On the domicile of wife for purpose of divorce suit—see *Loker v. Gerald* (Mass.) 16 L. R. A. 497, and note. And see note to *Cheever v. Wilson*, 19 L. ed. U. S. 604.

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1. Actual notice of proceedings for divorce in a court of a state which has always been the domicile of the plaintiff and the only matrimonial domicile need not be given a nonresident defendant, to bind her by the decree, if reasonable efforts to give her actual notice are required by the statutes of the state, and are actually made.
2. The mailing of a letter to a nonresident defendant in a suit for divorce brought in Kentucky by an attorney appointed, pursuant to the requirements of Ky. Code Civ. Prac. 1876, tit. 4, chap. 2, art. 2, to represent her, fully advising her of the nature of the suit, addressed to her at her residence as truly stated on oath in the petition, with a printed direction on the envelope to return it to him if not delivered in ten days, is such an effort to give her actual notice of the suit in Kentucky which has always been the domicile of her husband and the only matrimonial domicile, as will make the decree granting a divorce for abandonment as binding on her in a court of the state where she resides as though she had been served with notice in Kentucky, or had voluntarily appeared in the suit.

[No. 17.]

*Argued December 15, 1899. Decided April 15, 1901.*

**I**N ERROR to the Supreme Court of New York to review a judgment for plaintiff affirmed by the General Term of the Supreme Court of New York and by the Court of Appeals of that state. *Reversed.*

See same case in courts below, 82 Hun, 179, 31 N. Y. Supp. 977, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933.

**Statement by Mr. Justice Gray:**

This was a suit brought January 11, 1893, in the supreme court of the state of New York, by Mary G. Atherton against Peter Lee Atherton, for a divorce from bed and board, for the custody of the child of the parties, and for the support of the plaintiff and the child, on the ground of cruel and abusive treatment of the plaintiff by the defendant. The defendant appeared in the case; and at a trial by the court without a jury at June term, 1893, the court found the following facts:

[156] On October 17, 1888, the parties were married at Clinton, Oneida county, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant's parents, had a child born to them on January 8, 1890, and there continued to reside as husband and wife until October 3, 1891. Then, owing \*to his cruel and abusive treatment, without fault on her part, she left him, taking the child with her, and in a few days thereafter returned to her mother at Clinton, and has ever since resided there with her mother, and is a resident of and domiciled in the state of New York, and has not lived or cohabited with the defendant. When she so left him and went to Clinton, she did so with the purpose and intention of not

returning to the state of Kentucky, but of permanently residing in the state of New York; and this purpose and intention were understood by the defendant at the time, and were contemplated and evidenced by an agreement entered into, at Louisville, October 10, 1891, by the parties and one Henry P. Goodenow, under advice of counsel, which is copied in the margin.† The defendant continued \*to reside in Louisville, and is a [157] resident of the state of Kentucky.

The defendant, in his answer, besides denying the cruelty charged, set up a decree of divorce from the bond of matrimony, obtained by him against his wife March 14, 1893, in a court of Jefferson county, in the state of Kentucky, empowered to grant divorces, by which "this action having come on to be heard upon the pleadings, report of attorney for the absent defendant, and the evidence, and the court being advised, it is considered \*by the court that the plaintiff, [158] Peter Lee Atherton, has resided in Jefferson county, Kentucky, continuously for ten years last past; and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson county, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson county, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff,

†The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education, and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicile of the child is to be the state of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893, and 1894 the grandmother is to have the child and control its abode, travel, and custody from January 1st to the 1st week in May; and the mother from the 1st week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton \$500 in instalments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. During the rest of each year, he is to himself at his sole expense provide for the



abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this state for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved."

[159] By the record of that decree, duly verified, the following appeared: On December 28, 1892, the plaintiff filed a petition under oath, containing the same statements as the decree, and also stating "that the said defendant may be found in Clinton, state of New York, and that in said Clinton is kept the postoffice which is nearest to the place where the defendant may be found." On the same day, pursuant to the requirements of the statutes of Kentucky, the clerk made an order warning the defendant to appear within sixty days and answer the petition, and \*appointing John C. Walker, an attorney of the court, to defend for her and in her behalf, and to inform her of the nature and pendency of the suit. On February 6, 1893, Walker filed his report, in which he stated: "On this, the 5th day of January, 1893, I wrote to said defendant, Mary G. Atherton, at Clinton, in the state of New York, fully advising her of the objects and purposes of this action, stating therein a substantial copy of the petition, etc., plainly directed said letter to her at said place, paid the postage, had printed on the envelope inclos-

ing it, 'If not delivered in ten days return to Jno. C. Walker, attorney at law, No. 516 West Jefferson street, Louisville, Ky.' Said letter has not been returned to me. I have received no answer thereto from said defendant or anyone else for her, and do not know, nor am I advised, of any defense to make for her, and make none, only that which the law in such cases makes for nonresident defendants." The agreement of October 10, 1891, before mentioned, and certain depositions, set forth in full, taken at various dates from February 23 to March 3, 1893, were filed in the cause in Kentucky before the hearing.

It was agreed that either party might refer to any statute of the state of Kentucky or decision of its courts.

The supreme court of New York found that the wife "was not personally served with process within the state of Kentucky, or at all; nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding;" and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky, and had become and was a resident of the state of New York, domiciled and residing in Clinton, with her child.

The court decided that the decree in Kentucky was inoperative and void as against the wife, and no bar to this action; and gave judgment in her favor for a divorce from bed and board, and for the custody of the child, and for the support of herself and the child.

That judgment was affirmed by the general term of the supreme court of New York, and by the court of appeals of the state. 82 Hun, 179, 31 N. Y. Supp. 977, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933.

support of the child. The expense of conveying the child, with a proper attendant in the journey, to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense, on the journey back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support \$125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement, and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

a. This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner terminate at her death.

b. This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and, in any event, on the 8th day of January, 1904.

c. If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall

choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

d. A successor to said successor may under similar circumstances be in like manner chosen.

e. If, during the existence of this agreement, Mary G. Atherton being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

f. If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

g. If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and, so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

Witness the signatures of all the parties this October 10th, 1891.

Henry P. Goodenow.  
Mary G. Atherton.  
Peter Lee Atherton.



[160] \*The defendant sued out this writ of error, on the ground that the judgment did not give full faith and credit to the decree of the court in Kentucky, as required by the Constitution and laws of the United States.

**Mr. Alexander Pope Humphrey** argued the cause, and, with **Mr. George M. Davie**, filed a brief for plaintiff in error:

The effect to be given in one state to the judgment of a court of another state is the same as the effect given by the courts of the state where such judgment was rendered, to that judgment.

*Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

Process need not be personally served in order that a court may acquire jurisdiction to render a personal judgment.

*Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 61, 22 L. ed. 72; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 297, 34 L. ed. 672, 11 Sup. Ct. Rep. 92; *Biesenthal v. Williams*, 1 Duv. 331, 85 Am. Dec. 629; *Beard v. Beard*, 21 Ind. 321; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

The rule of international comity, or the provision of the Constitution and the laws of the United States in reference to the effect of a judgment in one state pleaded in another, applies to divorce cases.

*Barber v. Barber*, 21 How. 583, 16 L. ed. 226; *Cheever v. Wilson*, 9 Wall. 123, 19 L. ed. 608; *Laing v. Rigney*, 160 U. S. 532, 40 L. ed. 526, 16 Sup. Ct. Rep. 366.

Jurisdiction of the *res* being present, a judgment of a state court affecting the *res* is as much entitled to full faith and credit as a judgment where the court acquires jurisdiction of the person and renders a personal judgment.

*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

In Kentucky the judgment we plead suffices entirely to destroy the bond of matrimony which theretofore existed between the parties to this cause.

*Rhym v. Rhym*, 7 Bush, 316; *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483; *Perzel v. Perzel*, 91 Ky. 634, 15 S. W. 658.

The adjudication of the Kentucky court that the abandonment of the husband by the wife was without the husband's fault must be held to determine this question conclusively.

*Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; *Hood v. Hood*, 11 Allen, 196, 87 Am. Dec. 709.

The relation of the husband and wife is a status which is within the control of the state wherein either party to the relation is domiciled, and capable of being dissolved either by direct legislative action, or by judicial proceeding that is effective even though the notice be not given by the service of process within the territorial jurisdiction of the sovereignty.

*Cheever v. Wilson*, 9 Wall. 123, 19 L. ed. 608; *Pennoyer v. Neff*, 95 U. S. 734, 24 L. ed. 572; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 572; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 572.

L. ed. 298, 4 Sup. Ct. Rep. 328; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Maynard v. Hill*, 125 U. S. 191, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; 2 Bishop, Marr. & Div. § 152; 1 Greenl. Ev. § 525; 2 Freeman, Judgm. 585; 2 Black, Judgm. §§ 925, 926, 928, 931, 932; *Lolley's Case*, 2 Russ. & R. C. C. 237; *Shaw v. Gould*, L. R. 3 H. L. 55; *Warrender v. Warrender*, 2 Clark & F. 488; *Harvey v. Farnie*, L. R. 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, (1895) A. C. 517; *Thompson v. State*, 28 Ala. 13; *Re James*, 99 Cal. 374, 33 Pac. 1122; *Dunham v. Dunham*, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; *Tolen v. Tolen*, 2 Blackf. 407, 21 Am. Dec. 742; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35, 24 N. W. 579; *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779; *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248; *Gregory v. Gregory*, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *People v. Dawell*, 25 Mich. 261, 12 Am. Rep. 260; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Gould v. Crow*, 57 Mo. 201; *Felt v. Felt*, 57 N. J. Eq. 101, 40 Atl. 436; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415; *Dorsey v. Dorsey*, 7 Watts, 349, 32 Am. Dec. 767; *Hull v. Hull*, 2 Strobh. Eq. 178; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983; *Ditson v. Ditson*, 4 R. I. 87.

Outside the territorial jurisdiction of the court, service by newspaper, by letter carrier, and by a sheriff are all equally good if they conform to the statute prescribing the method of constructive service, and if the method is one free from fraud.

2 Bishop, Marr. & Div. §§ 140, 144, 554; *Trubner v. Trubner*, L. R. 15 Prob. Div. 24.

There can be no doubt of the validity of a divorce in a case where one spouse left the matrimonial domicile, and the other spouse obtained a divorce from a court of the matrimonial domicile.

*Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Hood v. Hood*, 11 Allen, 196, 87 Am. Dec. 709, 110 Mass. 463; *Burlen v. Shannon*, 115 Mass. 447, 96 Am. Dec. 733; *Loker v. Gerald*, 157 Mass. 42, 16 L. R. A. 497, 31 N. E. 709; *Shaw v. Shaw*, 98 Mass. 158.

The case at bar is not only at war with the authorities everywhere else, but is an extension of the New York doctrine not warranted even by the preceding cases in that state.

*Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Re Morrison*, 117 N. Y. 638, 22 N. E. 1130; *Re Degaramo*, 86 Hun, 390, 33 N. Y. Supp. 502; *Campbell v. Campbell*, 90 Hun, 233, 35 N. Y. Supp. 280, 693; *Re Denick*, 92 Hun, 161, 36 N. Y. Supp. 518; *Bell v. Bell*, 4 App. Div. 797



527, 40 N. Y. Supp. 443; *McGown v. McGown*, 19 App. Div. 368, 46 N. Y. Supp. 285.

*Mr. William Kernan* argued the cause and filed a brief for defendant in error:

A wife may acquire a residence and domicile separate and apart from that of her husband whenever it is necessary and proper for her to do so. Certainly it was eminently necessary and proper for Mrs. Atherton to leave her husband and his residence in Kentucky, and go to and make her residence in the state of New York.

2 Bishop, Marr. & Div. §§ 124-128; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Mellen v. Mellen*, 10 Abb. N. C. 329, and note; *Shaw v. Shaw*, 98 Mass. 158.

The question was one of fact, to be decided upon all the evidence and circumstances, and was correctly decided.

*Dupuy v. Wurtz*, 53 N. Y. 556; *De Meli v. De Meli*, 120 N. Y. 486, 24 N. E. 996; *Phelps v. New York, N. H. & H. R. Co.* 17 App. Div. 392, 45 N. Y. Supp. 178.

Neither the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. Want of jurisdiction may be shown either as to the subject-matter or the person.

*Boswell v. Otis*, 9 How. 336, 13 L. ed. 164; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98.

The only judgments obtained in state courts, which are valid and binding upon nonresidents who were citizens and residents of other states, are judgments rendered in actions *in rem*, and in actions *in personam* where the process was personally served on the defendant in the state where the action was brought, or where he voluntarily appeared in such action.

*Boswell v. Otis*, 9 How. 348, 13 L. ed. 169; *Kilburn v. Woodworth*, 5 Johns. 37, 4 Am. Dec. 321; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931.

The required personal service of process upon the defendant must be made upon him personally within the state where the action is brought. Personal service outside of such state is not sufficient.

*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

A personal judgment is without any validity if it be rendered by a state court in an action upon a money demand against a nonresident of the state who was served by publication of the summons, but upon whom no personal service of process within the state was made, and who did not appear.

*Ibid.*; *Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180.

The rule that a judgment in an action for divorce is valid as against a nonresident upon whom substituted service of process only was made, though adopted in some states, has been totally repudiated in others, and has not been adopted in England or Scotland as to judgments of divorce in foreign countries obtained in that manner.

Brown, Jurisdiction of Courts, § 77.

This painful disregard of the most vital principles of international jurisprudence has not been adopted or countenanced in those states whose decisions are most regarded as authority both at home and abroad.

Story, Conf. L. 7th ed. § 230*d*, and cases cited in note.

A judgment of divorce rendered in an action in one state, in favor of a resident of such state against a nonresident of such state and a resident and citizen of another state, upon substituted service of process and where there was no personal service of process upon the defendant within the state where the action was brought, and where the defendant did not appear in such action,—was and is void and inoperative and of no force or effect against the defendant.

*Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996; *Degaramo v. Johnson*, 86 Hun. 390, 33 N. Y. Supp. 502; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98; *People v. Karlsioe*, 1 App. Div. 571, 37 N. Y. Supp. 481; *Bell v. Bell*, 4 App. Div. 527, 40 N. Y. Supp. 443.

The following are some of the decisions of the courts of some of the other states to the same effect:

*Barber v. Root*, 10 Mass. 260; *Lyon v. Lyon*, 2 Gray, 367; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669; *Maguire v. Maguire*, 7 Dana, 181; *Irby v. Wilson*, 21 N. C. (1 Dev. & B. Eq.) 568; *Arrington v. Arrington*, 102 N. C. 502, 9 S. E. 200; *McCree v. Davis*, 44 S. C. 195, 28 L. R. A. 655, 22 S. E. 178; *Beard v. Beard*, 21 Ind. 321; *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443; *Wright v. Wright*, 24 Mich. 180; *Garner v. Garner*, 56 Md. 128; *Cox v. Cox*, 19 Ohio St. 502.

Due process of law required personal service of process upon Mrs. Atherton in Kentucky, or her appearance in the action.

*Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.



[160] \*Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

The 1st section of the 4th article of the Constitution of the United States is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." This section was intended to give the same conclusive effect to the judgment of all the states, so as to promote certainty and uniformity in the rule among them. And Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any state may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Rev. Stat. § 905, re-enacting act of May 26, 1790, chap. 11, 1 Stat. at L. 122; *Huntington v. Attrill* (1892) 146 U. S. 657, 684, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

By the General Statutes of Kentucky of 1873, chap. 52, art. 3, courts of equity may grant a divorce for abandonment by one party of the other for one year; petitions for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the state; if not, then in the county of the husband's residence; and [161] shall not be taken for confessed, \*or be sustained by confessions of the defendant alone, but must be supported by other proofs.

By the Civil Code of Practice of Kentucky of 1876, title 4, chap. 2, art. 2, if a defendant has been absent from the state four months, and the plaintiff files an affidavit stating in what country the defendant resides or may be found, and the name of the place wherein a postoffice is kept nearest to the place where the defendant resides or may be found, the clerk may make an order warning the defendant to defend the action within sixty days; and shall at the same time appoint, as attorney for the defendant, a regular practising attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made and for whom an attorney is appointed is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891; and that she had been absent from the state for more than four months, and might be found at Clinton, in the state of New York; and that

in Clinton was kept the postoffice nearest the place where she might be found; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 5, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof, in a letter addressed to her by mail at that place, and having printed on the envelope a direction to return it to him, if not delivered within ten days. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, including an agreement made by the parties in Kentucky, October 10, 1891, as to the domicile, custody, and support \*of their child, [162] granted to the husband an absolute divorce for his wife's abandonment of him.

There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the state of Kentucky. The court of appeals of that state has held that, under its statutes, a wife residing in the state was entitled to obtain a decree of divorce against a husband who had left the state, or who had never been within it; and Chief Justice Robertson said: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the state, deprive his abandoned wife of a power of obtaining a divorce at home." *Rhymys v. Rhymys* (1870) 7 Bush, 316; *Perzel v. Perzel* (1891) 91 Ky. 634, 15 S. W. 658. That court has recognized that the regulation of divorce belongs to the legislature of the domicile of the parties. *Maguire v. Maguire* (1838) 7 Dana, 181, 185-187. And the same court, where husband and wife had lived together in Kentucky, and she abandoned him, and he became a bona fide citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that state, by proceedings on constructive service and according to the laws of that state, determined the status of the parties in Kentucky. *Hawkins v. Ragsdale* (1882) 80 Ky. 353, 44 Am. Rep. 483.

There is a weight of authority in accord with the views maintained by the court of appeals of Kentucky, although there are some decisions of learned courts to the contrary.

The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

The rule as to the notice necessary to give full effect to a \*decree of divorce is different [163]



from that which is required in suits *in personam*.

In *Pennoyer v. Neff* (1877) 95 U. S. 714, 734, 24 L. ed. 565, 572, this court, speaking by Mr. Justice Field, while deciding that a judgment of a state court on a debt could not be supported without personal service on the defendant within the state or his appearance in the cause, took occasion to say: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a nonresident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop, Marr. & Div. § 156."

In *Cheely v. Clayton* (1884) 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328, which involved the validity of a decree of divorce obtained in Colorado by a husband domiciled there against his wife for unjustifiably refusing to live with him, this court said: "The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. \*Story, Conf. L. § 230a; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Harvey v. Farnie*, L. R. 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that state. *Burlen v. Shannon*, 115 Mass. 438, 96 Am. Dec. 733; *Hunt v. Hunt*, 72 N. Y. 218, 28 Am. Rep. 129. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared

in the suit, have been such notice to her as the law of the first state requires." 110 U. S. 705, 28 L. ed. 299, 4 Sup. Ct. Rep. 330. In that case the decree of divorce was held void, because the notice required by the laws of the state had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the state of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicile in another state; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce. 110 U. S. 709, 28 L. ed. 301, 4 Sup. Ct. Rep. 332.

In *Harding v. Alden* (1832) 9 Me. 140, 23 Am. Dec. 549, the husband and wife lived together in Maine. He deserted her, and took up a residence in North Carolina, and there married and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed a libel in the supreme judicial court for an absolute divorce against him for his desertion and adultery; and the court, after service of a citation on him, and two continuances of the cause, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterwards married another man. The supreme judicial court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the bond of marriage between the parties; and said: "If we refuse to give full faith[165] and credit to the decree of the supreme judicial court of Rhode Island, because the party libeled had his domicile in another state, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defense. This shows a due regard to that principle of justice which gives to the party accused the right to be heard. The decree was rendered by the highest judicial tribunal in that state. As it belongs to that tribunal to declare, authoritatively and definitively, what the law of the state is, we are bound to infer that by that law the bonds of matrimony previously existing between the libellant and her former husband were thereby dissolved; and that such is the effect of the decree within the state of Rhode Island." 9 Me. 148, 23 Am. Dec. 553. "There would be great inconvenience in holding that a divorce decreed in the state where the injured party resided might not be held valid through the Union, where the right of citi-



zenship is common, where the party accused had established his domicile in another state, and there committed adultery. And this is the only objection to the efficacy of the decree in question; it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this state. It would require that the wife, abandoned and dishonored, should seek the new domicile of the guilty husband, *animo manendi*, before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood that the grounds upon which we place our decision is limited to the dissolution of the marriage. In the libel alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her [166] a gross sum, or a weekly \*or an annual allowance, to be paid by the husband, and the courts of this or any other state had been resorted to to enforce it, a different question would be presented." 9 Me. 151, 23 Am. Dec. 556.

Chancellor Kent, in his Commentaries, says of that case that it was there held "that a decree of divorce did not fall within the rule that a judgment rendered against one not within the state, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another state; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband." And the Chancellor adds, "This is an important and valuable decision." 2 Kent, Com. 110, note.

In *Ditson v. Ditson* (1856) 4 R. I. 87 (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits), the supreme court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge, so far as its own citizens or subjects are concerned, and should be so deemed by other civilized and especially sister states; that a state cannot be deprived, directly or indirectly, of [167] its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that status; and in such a matter has a right, under the general law, \*judicial-ly to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether a *mensa et thoro* or a *vinculo matrimonii*, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because nonresidents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but, upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 R. I. 105, 106.

The statutes of Massachusetts provided as follows: "When an inhabitant of this state goes into another state or country to obtain a divorce for any cause occurring here and while the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state. In all other cases, a divorce decreed in any other state or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state." That provision made no change in the law, but, in the words of the commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." Gen. Stat. 1860, chap. 107, §§ 54, 55; Rev. Stat. 1836, chap. 76, §§ 39, 40, and note of commissioners; *Ross v. Ross*, 129 Mass. 243, 248, 37 Am. Rep. 321.

In *Hood v. Hood* (1865) 11 Allen, 196, 87 Am. Dec. 709, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, "under circumstances as to which there was no evidence," and afterwards the husband, "came back to Massachusetts, and, while they were living there in his brother-in-law's house for a few weeks, he signed an agreement reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts; and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the supreme judicial court of Massachusetts, in [168]



an opinion delivered by Mr. Justice Hoar, that both parties had their domicile in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois; and it was not competent for the wife to contradict it on a libel afterwards filed by her in Massachusetts; and her libel was dismissed. And in *Hood v. Hood* (1872) 110 Mass. 463, it appearing that such dismissal was upon the ground of the validity of the previous decree of divorce in Illinois, it was adjudged that that decree could not be impeached by the wife in a writ of dower by her against third persons, the court saying: "The decree in favor of her husband, dismissing her libel, was then forever conclusive against her, as between themselves. It severed the relation between them; or rather estopped her from averring anything to the contrary of the decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world."

The like view has been affirmed by courts of other states. *Thompson v. State* (1856) 28 Ala. 13; *Leith v. Leith* (1859) 39 N. H. 20, 39-43; *Shafer v. Bushnell* (1869) 24 Wis. 372; *Gould v. Crow* (1874) 57 Mo. 200; *Van Orsdal v. Van Orsdal* (1885) 67 Iowa, 35, 24 N. W. 579; *Smith v. Smith* (1891) 43 La. Ann. 1140, 10 So. 248; *Re James* (1893) 99 Cal. 374, 33 Pac. 1122; *Dunham v. Dunham* (1896) 162 Ill. 589, 607-610, 35 L. R. A. 70, 44 N. E. 841.

[169] \*In *Shaw v. Shaw* (1867) 98 Mass. 158, the husband and wife, domiciled in Massachusetts, left the state to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to Massachusetts, and continued to reside there. It was held that while they were in Pennsylvania the domicile of both parties remained in Massachusetts; and that the wife might maintain a libel in Massachusetts for the cause occurring in Pennsylvania, although the husband, before it occurred, had left Massachusetts with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in Massachusetts.

In a very recent case, the court of errors and appeals of New Jersey maintained the validity of a divorce obtained in the state of Utah by a husband having his bona fide domicile there, against a wife whose domicile was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defense, if she wished to do so. Mr. Justice Gummere, speaking for

the court of errors and appeals, said that, at least "interstate comity requires that a decree of divorce, pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce." *Felt v. Felt* (1899) 59 N. J. Eq. —, 47 L. R. A. 546, 45 Atl. 105.

In New York, North Carolina, and South Carolina, the opposite view has prevailed, either upon the ground that the rule \*as to [170] notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libellee from the bond of matrimony. *People v. Baker* (1879) 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea* (1885) 101 N. Y. 23, 4 N. E. 110; *Re Kimball* (1898) 155 N. Y. 62, 49 N. E. 331; *Irby v. Wilson* (1837) 1 Dev. & B. Eq. 568; *McCreery v. Davis* (1894) 44 S. C. 195, 28 L. R. A. 655, 22 S. E. 178.

In *People v. Baker*, 76 N. Y. 78, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the state of Ohio; they afterwards lived together in the state of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the court of appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another state, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?" The court admitted that "if one party to a proceeding is domiciled in a state, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed in accordance with the laws of that state;" but held that, without personal appearance or actual notice, the decree could not affect



the matrimonial relation of the defendant in another state. The court recognized that the law was settled otherwise in some states, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it."

(171) The authorities above cited show the wide diversity of opinion \*existing upon this important subject, and admonish us to confine our decision to the exact case before us.

This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

The husband always had his domicile in Kentucky, and the matrimonial domicile of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton in the state of New York, and that at Clinton was the postoffice nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him, if not delivered in ten days. There is a presumption of fact, though not of law, that a letter put into the postoffice, and properly addressed, is received by the person to whom it is addressed. *Rosenthal v. Walker* (1884) 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

(172) The court of New York has indeed found that the wife "was \*not personally served with process within the state of Kentucky, or at all." It may be doubted whether this negatives her having received or had knowl-

edge of the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice as to bind her by the decree in the state of the domicile.

The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the state of Kentucky, but of permanently residing in the state of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but "without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party if such status shall continue." The agreement contains no mention of the domicile of either husband or wife, but declares that the domicile of the child is to be the state of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother and the other half with the paternal grandmother, and with providing for the support and custody of the child in various future contingencies, including the divorce and second marriage of the husband or of the wife.

We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, \*as binding on her as if she (173) had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the state in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicile (which he de-



nied), and would disprove his own ground of action, that she had abandoned him in Kentucky.

The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore their—

*Judgments must be reversed*, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion.

Mr. Justice **Peckham** dissenting:

I think this case was rightly decided by the court of appeals of New York, and I therefore dissent from the judgment and the opinion of the court herein.

I think if the husband had, at his domicile in Kentucky, been guilty of such misconduct and cruelty towards his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicile, even in another state. If, under such circumstances, she did leave him, and did acquire a separate domicile in New York state, the Kentucky court did not obtain jurisdiction over her as an absent defendant, by publication of process or sending a copy thereof through the mail to her address in New York.

[174] \*It has long been held that the wife upon such facts could acquire a separate domicile. In *Cheever v. Wilson*, 9 Wall. 108, 123, 124, 19 L. ed. 604, 608, it was so decided; and the case of *Ditson v. Ditson*, 4 R. I. 87, was therein cited with approval upon that proposition. It was said in the Rhode Island case that, "although, as a general doctrine, the domicile of the husband is by law that of the wife, yet, when he commits an offense, or is guilty of such dereliction of duty in the relation as entitles her to have it [the marriage] either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted, or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own." This is also held in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, where many of the authorities are collected.

By the statute of New York in force at the time the parties were therein married, the court had jurisdiction to grant a limited divorce on the complaint of a married woman, where the marriage had been solemnized in the state, and the wife was an actual resident therein at the time of exhibiting her complaint. By virtue of this statute and of the wife's residence in New York at the time of exhibiting her complaint (if such residence were legally acquired, as already stated), the court in that state had jurisdiction of an action for divorce against her husband, and jurisdiction

over the husband was complete when he appeared in the suit. Having the right to acquire a residence in the state, it was open to her to prove in the divorce case which she instituted in New York the facts which justified her leaving her husband's home in Kentucky and in acquiring a separate domicile in New York; and the decision of the Kentucky court that it had jurisdiction over her in her husband's suit was not conclusive against her upon that question. The New York court entered upon the inquiry and found the fact that she was justified by her husband's acts in leaving his home and in acquiring a new domicile for herself, and that the Kentucky court "therefore obtained" [175] no jurisdiction over her. It also found the facts necessary to warrant it in granting to her a divorce under the laws of New York, and it granted one accordingly. This I think the New York court had jurisdiction to do, and it did not thereby refuse the constitutional full faith to the Kentucky judgment.

That a husband can drive his wife from his home by conduct which entitles her to a divorce, and thus force her to find another domicile, and then commence proceedings in a court of his own domicile for a divorce, which court obtains jurisdiction over her only by a service of process in the state of her new domicile, through the mail, and that on such service he can obtain a judgment of divorce which shall be conclusive against her in her action in the court of her own domicile, seems to me to be at war with sound principle and the adjudged cases. The doctrine of status, even as announced in the opinion of the court, does not reach the case of a husband, by his misconduct, rendering it necessary for the wife to leave him. I therefore dissent.

I am authorized to state that the Chief Justice concurs in this dissent.

FREDERICK A. BELL, *Plff. in Err.*,  
v.

MARY G. BELL.

(See S. C. Reporter's ed. 175-179.)

*Husband and wife—divorce—jurisdiction—constructive service—contradiction of jurisdictional facts—bona fide domicile.*

1. No valid divorce can be decreed on construc-

NOTE.—On the validity of a decree of divorce obtained on publication or service out of the state, where the defendant did not appear—see *Butler v. Washington* (La.) 19 L. R. A. 814, and note.

As to conclusiveness of record as to jurisdiction in suit on judgment of another state—see note to *Christmas v. Russell*, 18 L. ed. U. S. 475.

On the conclusiveness of judgment of divorce under conflict of laws—see note to *Thompson v. Thompson* (Ala.) 11 L. R. A. 445.

On the domicile of wife for purpose of divorce suit—see *Loker v. Gerald* (Mass.) 16 L. R. A. 497, and note. And see note to *Cheever v. Wilson*, 19 L. ed. U. S. 604.

As to entry of judgment *nunc pro tunc*—see *O'Sullivan v. People* (Ill.) 20 L. R. A. 143, and note.



tive service, by courts of a state in which neither party is domiciled.

2. The recital in proceedings for divorce, of the facts necessary to give jurisdiction, may be contradicted in a suit between the same parties in another state.
3. A Pennsylvania court has no jurisdiction of a suit for divorce against a resident of the state of New York by a party who is not a bona fide resident of Pennsylvania.
4. A judgment of the United States Supreme Court affirming a judgment of the court below for a divorce and for alimony and costs, rendered after appearance and answer of the husband, may be entered *nunc pro tunc* as of the date of argument, where the husband has died since the argument of the cause.

[No. 39.]

Argued April 25, 26, 1900. Decided April 15, 1901.

IN ERROR to the Supreme Court of the 1 state of New York to review a judgment for plaintiff affirmed by the General Term of the Supreme Court of New York and by the Court of Appeals of that state. Affirmed.

See same case in courts below, 4 App. Div. 527, 40 N. Y. Supp. 443, 157 N. Y. 719, 53 N. E. 1123.

Statement by Mr. Justice Gray:

This was an action brought December 22, 1894, in the supreme court for the county of Erie and state of New York, by Mary G. Bell against Frederick A. Bell, for a divorce from the bond of matrimony, for his adultery at Buffalo, in the county of Erie, in April and May, 1890, and for alimony.

[176] \*The defendant appeared in the case, and pleaded a decree of divorce from the bond of matrimony, obtained by him January 8, 1895, in the court of common pleas for Jefferson county, in the state of Pennsylvania, for her desertion.

The plaintiff replied, denying that the court in Pennsylvania had any jurisdiction to grant the decree, and alleging that no process in the suit there was ever served on her, and that neither she nor her husband ever was or became a resident or citizen of the state of Pennsylvania.

The present action was referred to a referee, who found the following facts: The parties were married at Bloomington, in the state of Illinois, on January 24, 1878, and thereafter lived together as husband and wife at Rochester, and afterwards at Buffalo, in the state of New York. In August, 1882, the plaintiff went to Bloomington on a visit to her mother. In her absence, the defendant packed up her wearing apparel and other property in trunks, and had them put in the stable, preparatory to sending them to her at Bloomington. In September, 1882, the plaintiff, accompanied by her mother, returned to the defendant's house, stayed there three or four days, and then left, with her mother, for Bloomington; and since then the plaintiff and defendant have not lived together, and she has always claimed her residence as being at Buffalo.

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On January 8, 1895, the court of common pleas of Jefferson county, in the state of Pennsylvania, granted to the husband, on his petition filed April 9, 1894, alleging that he was and had been for a year a citizen of that state and a resident of that county, a decree of divorce from the bond of matrimony for her desertion, which, under the laws of Pennsylvania, was a ground for dissolving marriage. The subpoena in that action was not served upon the wife, but she was served by publication according to the laws of Pennsylvania, and she received through the mail a copy of the subpoena and of a notice of the examiner that he would attend to the duties of his appointment on December 14, 1894, at his office in Brookville in Jefferson county. She did not appear in person or by attorney, and judgment was rendered against her by default.

At the time of the beginning of that action and of the rendering \*of that decree the wife [177] was a resident of the state of New York, and the husband was not a bona fide resident of the state of Pennsylvania. On January 31, 1894, the husband and his sister presented a petition, upon oath, to the surrogate of Erie county, for the probate of the will of their mother, in which he was described as residing at Buffalo, in the county of Erie and state of New York. No evidence was offered to show that he actually changed his domicile from New York to Pennsylvania.

The referee also found the husband's adultery as alleged, and reported that the wife should have judgment for a divorce from the bond of matrimony, and for alimony in the sum of \$3,000 during her life, from the commencement of this action, payable quarterly, and for costs. The court confirmed his report, and rendered judgment accordingly for a divorce, alimony, and costs. That judgment was affirmed by the general term and by the court of appeals. 4 App. Div. 527, 40 N. Y. Supp. 443, 157 N. Y. 719, 53 N. E. 1123.

The defendant sued out this writ of error upon the ground that the judgment below did not give full faith and credit to the judgment in Pennsylvania, as required by the Constitution and laws of the United States.

After the argument of the case in this court, the defendant died; and the plaintiff moved that judgment be entered *nunc pro tunc*.

Mr. Henry H. Seymour argued the cause and filed a brief for plaintiff in error:

As regards the validity, in New York, of the decree of a court of competent jurisdiction in a sister state, the status of the parties within that state, and the question whether they, or any of them, were residents of that state for the purposes of such decree, are to be determined by that court, and that determination cannot be questioned collaterally in New York.

Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

Jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally ques-



tioned, is to be held conclusive of the rights of the parties unless impeached for fraud.

*Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

Mr. Bell had a nominal residence in Pennsylvania, and the jurisdiction of the Pennsylvania court over him cannot, therefore, be questioned.

*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

Residence and domicil are two perfectly distinct things.

*People v. Platt*, 50 Hun, 460, 3 N. Y. Supp. 367.

Mr. Charles B. Wheeler argued the cause and filed a brief for defendant in error:

This court must accept, and cannot review, the findings of fact of the trial court.

*St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Runckle v. Burnham*, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837; *Laing v. Rigney*, 160 U. S. 536, 40 L. ed. 527, 16 Sup. Ct. Rep. 366.

Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 61, 22 L. ed. 72; *Reynolds v. Stockton*, 140 U. S. 265, 35 L. ed. 467, 11 Sup. Ct. Rep. 773; *Kilbourn v. Thompson*, 103 U. S. 198, 26 L. ed. 389; *Hill v. Mendenhall*, 21 Wall. 454, 22 L. ed. 616; *Hall v. Lanning*, 91 U. S. 165, 23 L. ed. 273; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Brooklyn v. Aetna L. Ins. Co.* 99 U. S. 370, 25 L. ed. 418; *Pana v. Bowler*, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 802; *Kerr v. Kerr*, 41 N. Y. 272; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Price v. Schaeffer*, 161 Pa. 530, 25 L. R. A. 699, 29 Atl. 279; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Van Fleet, Collateral Attack*, 388, 389.

The recitals of facts in a decree may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 61, 22 L. ed. 72; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Shannon v. Shannon*, 4 Allen, 134; *Leith v. Leith*, 39 N. H. 20; *Gregory v. Gregory*, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *Kerr v. Kerr*, 41 N. Y. 272; *People v. Dawell*, 25 Mich. 247, 22 Am. Rep. 260; *Reed v. Reed*, 52 Mich. 121, 50 Am. Rep. 247, 17 N. W. 720; *Chaney v. Bryan*, 15 Lea, 589.

It appearing therefore, from the facts found, that neither Mr. Bell nor Mrs. Bell was a resident of the state of Pennsylvania, the courts of Pennsylvania had no jurisdiction to grant any divorce whatever, and the divorce is therefore absolutely void.

*Schouler, Husb. & W.* § 574; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *People v. Dawell*, 25 Mich. 247, 22 Am. Rep. 260.

If a party goes to a jurisdiction other than that of his domicil, for the purpose of procuring a divorce, and has a residence there for that purpose only, such residence is not bona fide, and does not confer upon the courts of that state or county jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.

*Cooley, Const. Lim.* p. 401; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Kimball v. Kimball*, 13 N. H. 225; *Batchelder v. Batchelder*, 14 N. H. 380; *Payson v. Payson*, 34 N. H. 518; *Hopkins v. Hopkins*, 35 N. H. 474.

Even the presence, within its territory, of the inhabitants of other states, gives it no authority to grant a divorce and thus change their marriage status.

*Gregory v. Gregory*, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; *Foss v. Foss*, 58 N. H. 283; *Leith v. Leith*, 39 N. H. 20; *Lane v. Lane*, 2 Mass. 167; *Squire v. Squire*, 3 Mass. 184; *Choate v. Choate*, 3 Mass. 391; *Barber v. Root*, 10 Mass. 260; *Kimball v. Kimball*, 63 N. H. 598, 4 Atl. 702; *Dutcher v. Dutcher*, 39 Wis. 658.

The death of Mr. Bell has abated none of the rights of Mrs. Bell determined by the judgment in her favor.

*Carr v. Rischer*, 119 N. Y. 124, 23 N. E. 296; *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137.

Notwithstanding the death of a party in an action for divorce, an appeal from the judgment may still be prosecuted by the representatives or successors of the defeated party, where the decree of divorce affects property rights.

*Danforth v. Danforth*, 111 Ill. 236; *Mead v. Mead*, 1 Mo. App. 247; *Downer v. Howard*, 44 Wis. 82; *Thomas v. Thomas*, 57 Md. 506; *Shafer v. Shafer*, 30 Mich. 163; *Wren v. Moss*, 7 Ill. 72; *Israel v. Arthur*, 6 Colo. 85.

If the legal representatives of a defeated party have the right to prosecute an appeal from a decree in an action for divorce because the decree affects property rights, then certainly the converse of the proposition must be true, and the successful party has the right to insist on the affirmance notwithstanding the death of the appellant.

*Seibly v. Person*, 105 Mich. 584, 63 N. W. 528; *Thomas v. Thomas*, 57 Md. 506; *Danforth v. Danforth*, 111 Ill. 236; *Mead v. Mead*, 1 Mo. App. 247.

The judgment for alimony in favor of Mrs. Bell must stand. The death of Mr. Bell could not in any way impair the force and effect of that judgment, if it be free from attack on other grounds.



*Carr v. Rischer*, 119 N. Y. 124, 23 N. E. 296; *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137.

The question whether a cause of action survives or abates is not a question of procedure, but of right, and, when the cause of action does not arise under a law of the United States, depends on the law of the state in which the suit is brought.

*Martin v. Baltimore & O. R. Co.* 151 U. S. 674, 38 L. ed. 312, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387.

The right of Mrs. Bell to dower in the real estate of Mr. Bell is also involved, because under the law of the state of New York a woman who had obtained a decree for a divorce *a vinculo matrimonii* for the adultery of her husband is, notwithstanding such divorce, entitled after his death to dower in his estate.

*Wait v. Wait*, 4 N. Y. 95; *Van Voorhis v. Brintnall*, 23 Hun, 260; *Forrest v. Forrest*, 3 Abb. Pr. 144.

Where cases have been once argued and submitted to a court for its disposition, it is the proper practice, in the event of the death of a party while the case is under advisement, to enter judgment as of the date of submission.

*Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369; *Borer v. Chapman*, 119 U. S. 596, 30 L. ed. 535, 7 Sup. Ct. Rep. 342; *Danforth v. Danforth*, 111 Ill. 236; *Mead v. Mead*, 1 Mo. App. 247.

[177] \*Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. And by the law of Pennsylvania every petitioner for

[178] divorce \*must have had a bona fide residence within the state for one year next before the filing of the petition. Penn. Stats. March 13, 1815, chap. 109, § 11; May 5, 1854, chap. 629, § 2; *Hollister v. Hollister*, 6 Pa. 449. The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897. The referee in this case has not only found generally that at the time of those proceedings the wife was a resident of the state of New York, and the husband was not a bona fide resident of Pennsylvania, but has also found that on January 31, 1894, some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie county, in the state of New York, as a resident of that county, and that no evidence was offered that he actually changed his domicile from New York to Pennsylvania. Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce 181 U. S.

was entitled to no faith and credit in New York or in any other state. *Leith v. Leith* (1859) 39 N. H. 20; *People v. Davell* (1872) 25 Mich. 247; *Sewall v. Scwall* (1877) 122 Mass. 156, 23 Am. Rep. 299; *Litowitch v. Litowitch* (1878) 19 Kan. 451, 27 Am. Rep. 145; *Van Fossen v. State* (1881) 37 Ohio St. 317, 41 Am. Rep. 507; *Gregory v. Gregory* (1886) 78 Me. 187, 57 Am. Rep. 792; *Dunham v. Dunham* (1896) 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; *Thelen v. Thelen* (1899) 75 Minn. 433, 78 N. W. 108; *Magowan v. Magowan* (1899) 57 N. J. Eq. 322, 42 Atl. 330.

The death of the husband since this case was argued of itself terminates the marriage relation, and, if nothing more had been involved in the judgment below, would have abated the writ of error, because the whole subject of litigation would be at an end, and no power can dissolve a marriage which has already been dissolved by act of God. *Stanhope v. Stanhope* (1886) L. R. 11 Prob. Div. 103, 111. But the judgment below, rendered after appearance and answer of the husband, is not only for a divorce, but for a large sum of alimony, and for costs. The wife's rights to such alimony and costs, though depending on the same grounds as the divorce, are not impaired by the husband's death, should not be affected by the delay in entering judgment here \*while this court has held the case under advisement, and may be preserved by entering judgment *nunc pro tunc* as of the day when it was argued. *Downer v. Howard* (1878) 44 Wis. 82; *Francis v. Francis* (1879) 31 Gratt. 283; *Danforth v. Danforth* (1884) 111 Ill. 236; *Mitchell v. Overman* (1880) 103 U. S. 62, 26 L. ed. 369. [179]

Judgment affirmed, *nunc pro tunc*, as of April 26, 1900.

AUGUST STREITWOLF, Plff. in Err.,  
v.

ELIZABETH STREITWOLF.

(See S. C. Reporter's ed. 179-183.)

Husband and wife—divorce—jurisdiction  
—bona fide domicil.

1. A husband had no bona fide domicil for ninety days in North Dakota, as required by the law of that state as a prerequisite to jurisdiction of a suit for divorce, where, during the pendency of a similar suit instituted by his wife in the state of their matrimonial domicil, he went to North Dakota without informing anyone where he was going or that he intended to change his residence, and commenced his suit three months after the date of his first arrival, his stay in that state being interrupted by a trip to Yellowstone Park and a visit to New York, in which place, in an interview with his son, he stated that he was going to Germany to secure a legacy, neither the son nor any other person, so far as it appears, having had any idea that he had been away from his home with a view to changing his residence.

2. Injunction may issue against setting up a

pretended judgment fraudulently obtained in another state, in bar of a divorce proceeding.

[No. 109.]

*Argued and Submitted November 14, 15, 1900. Decided April 15, 1901.*

**I**N ERROR to the Court of Errors and Appeals of the state of New Jersey to review a decision affirming a decree enjoining defendant from setting up a judgment of divorce of a district court of North Dakota. *Affirmed.*

See same case below, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683.

Statement by Mr. Justice Gray:

August Streitwolf and Elizabeth Streitwolf were married at New Brunswick, in New Jersey, on June 3, 1877, and lived there as husband and wife until August 3, 1896. On August 17, 1896, the wife filed against the husband in the court of chancery in the state of New Jersey a bill for divorce for his extreme cruelty, and for alimony; a subpoena returnable August 29, 1896, was served upon the husband personally in New Jersey; and in November, 1896, after a hearing, an order was made for the payment of alimony *pendente lite*.

On August 9, 1897, the husband filed against the wife in the district court of the sixth judicial district of the state of North Dakota a suit for a divorce from the bond of matrimony for her extreme cruelty and habitual intemperance, and caused to be personally served on her in New Jersey on August 17, 1897, a copy of the summons and complaint therein, directing her to answer within thirty days after service of the summons upon her, or be defaulted.

On August 19, 1897, the husband filed in the suit in New Jersey an answer denying the allegations of the wife's bill, but saying nothing of the suit in North Dakota.

On September 7, 1897, the wife filed in the suit in New Jersey a petition, supported by affidavits, for an injunction against the suit in North Dakota, denying the husband's allegations in that suit, alleging that the domicile of both parties was still in New Jersey, and that his pretended residence in North Dakota was wholly fictitious and fraudulent, and intended only to give a colorable jurisdiction to the court of North Dakota for the purpose of the suit therein; and further alleging that the wife had not in anywise appeared in that suit, and that a decree against her in that suit would be a bar to her suit in New Jersey, and that the practical effect, and doubtless the object, of the proceeding, would be to withdraw the adjudication and settlement of her marital rights from the court of New Jersey and transfer the same to the court of North Dakota. On September 8, 1897, a temporary injunction was issued accordingly, to continue until the husband should have fully answered the bill and until the further order of the court.

On October 7, 1897, the husband submitted to the judge of the court in North Dakota

his own *ex parte* deposition and the *ex parte* depositions of other witnesses taken in the city of New York on October 4, 1897, and obtained from that court a decree of divorce from the bond of matrimony for his wife's cruelty and habitual intemperance, which recited that "the plaintiff now is and for more than ninety days prior to the commencement of this action has been in good faith a resident of the state of North Dakota," and that "the court has full power and jurisdiction, both of the subject-matter of the action and the parties plaintiff and defendant therein."

On January 11, 1898, the wife filed against the husband in the court of chancery of New Jersey a supplemental bill repeating the allegations of her petition for an injunction and alleging the granting of the injunction and its service upon the husband's counsel in New Jersey and in North Dakota on the 13th and 15th \*of September, 1897, and that the decree in North Dakota was void for want of jurisdiction of the subject-matter and of the wife as a party, and was procured by fraud and in contempt of the court of chancery of New Jersey.

In April, 1898, the husband filed an answer to the supplemental bill, alleging that at and for more than ninety days preceding the commencement of his suit in North Dakota, he was a resident and citizen and domiciled in good faith in that state; setting forth §§ 2737, 2742, 2743, 2755-2757 of the Civil Code of North Dakota of 1895; and insisting that the decree in North Dakota was a valid judgment, rendered with full jurisdiction over the subject-matter and the parties, and was entitled to full faith and credit under the Constitution and laws of the United States.

The wife filed a general replication to the answer. The evidence tended to show, and the court of chancery of New Jersey found, the following facts:

In November, 1896, the husband sold out his business in New Brunswick, rented the building and furniture to the grantee of the business, and went to New York and boarded there for awhile, and then went to Europe on a pleasure tour, and returned to New York in the following March, and remained there until May 5, 1897. In April, 1897, negotiations were going on between him and his wife for a settlement of their difficulties, which entirely failed before the 1st of May. About that time he became acquainted with a firm of lawyers, Hoggatt & Caruthers, who had an office in New York, and were attorneys engaged in the business of procuring divorces; and he talked with them, and found that they had an office and a representative in Mandan, North Dakota. Streitwolf had never been in Mandan, knew nobody there, and had no connections, directly or indirectly, with Mandan, or with anybody in North Dakota. On May 6, 1897, without informing anybody where he was going, or that he intended to change his residence, he left New York and went to Mandan; arrived there on Sunday morning, May 9, and in the afternoon of the same day



was introduced by a traveling companion to one Voss, who represented Hoggatt & Caruthers in Mandan. He took board at a [182]boarding-house, stayed \*there a few weeks, and then went to the Yellowstone Park. He wrote to nobody that he was at Mandan, dated no letters there, and gave no notice to anybody of his residence there. But while in the Yellowstone Park he wrote to his son that he was taking a trip through that country. In July he came back to New York, and was there a week or more, and sought and obtained an interview with his son, who was then living with his mother in Jersey City and working in New York city; and in that interview stated that he was going to Germany to get a legacy that had been left to him, and invited his son to go with him and his son promised to give him an answer on the evening of July 30. The son went to the rendezvous on that evening, and his father was not there. About that time Streitwolf went to Mandan, and neither his son nor any other person, as far as appears, had the slightest idea that he had been away from home with a view of changing his residence or adopting a new home. He arrived at Mandan in August, and on August 9, three days from his arrival, commenced his suit against his wife for divorce, and took measures to have the papers served upon her in New Jersey.

The court held that the husband had no bona fide domicile in North Dakota, that the judgment there was obtained by fraud and imposition on the court, and that the court there had no jurisdiction; and issued a perpetual injunction against setting up that judgment.

The decree was affirmed by the court of errors and appeals of the state of New Jersey. 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683. The husband sued out this writ of error.

**Messrs. Willard P. Voorhees and Robert Adrain** submitted the cause for plaintiff in error:

The provision of the Federal Constitution, that full faith and credit shall be given in each state to the judicial proceedings of every other state, puts the judgments of sister states upon a higher plane than that of comity. The effect to be given is the same as that given by the courts of the state rendering the judgment.

*Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

Such judgments cannot be questioned on their merits, nor are they impeachable for fraud in obtaining them.

*Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564.

Such a judgment or decree cannot be questioned in collateral proceedings. If erroneous, it can only be avoided by an appeal.

*Union Trust Co. v. Southern Inland Nav.* 181 U. S. U. S. Book 45.

& *Improv. Co.* 130 U. S. 565, 32 L. ed. 1043, 9 Sup. Ct. Rep. 606.

Jurisdiction having once attached, the judgment cannot be avoided by showing that it was obtained by fraud.

*Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475.

Decrees of divorce are within the constitutional provision and the Federal statute.

*Barber v. Barber*, 21 How. 583, 16 L. ed. 226; *Cheever v. Wilson*, 9 Wall. 123, 19 L. ed. 608; *Laing v. Rigney*, 160 U. S. 532, 40 L. ed. 526, 16 Sup. Ct. Rep. 366.

Residence and domicile of the plaintiff in a divorce case is not a jurisdictional question.

*Wanzer v. Howland*, 10 Wis. 8.

Where the jurisdiction of a court depends upon a fact which it is required to ascertain and determine by its decision, its finding of that fact, showing it has jurisdiction, is conclusive on collateral attack.

*Works, Courts and Their Jurisdiction*, p. 127; *Wells, Jurisdiction of Courts*, § 61; *Freeman, Judgm.* § 522.

The action of the court in ascertaining and deciding the fact necessary to give it jurisdiction is itself an exercise of jurisdiction, and therefore its decision upon this point, like any other, is conclusive against a collateral attack.

*Plume v. Howard Sav. Inst.* 46 N. J. L. 211.

Jurisdiction depends upon the allegations, and not upon the facts. The truth of the allegations does not constitute jurisdiction.

*Cooke v. Bangs*, 31 Fed. 640; *Van Vleet, Collateral Attack*, § 60, pp. 73 *et seq.*; *Crepps v. Durden*, 1 Smith Lead. Cas. 6th Am. ed. 1001.

After an allegation of domicile, the court in which it is made is clothed with jurisdiction to try the fact, as any other fact in issue is tried; and its conclusion thereon is final because made by a tribunal having jurisdiction, and such determination is unimpeachable on collateral attack.

*People v. McCaffrey*, 75 Mich. 115, 42 N. W. 681; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Magowan v. Magowan*, 57 N. J. Eq. 322, 42 Atl. 330; *Van Vleet, Collateral Attack*, p. 377, § 389.

If the findings of fact are properly part of the face of the proceedings, the want of jurisdiction not only does not appear, but the contrary.

*Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655.

The court duly decided in this case the domicile of the defendant to be in North Dakota. Residence, in the statutes of that state, means domicile as construed by the courts of that state.

*Smith v. Smith*, 7 N. D. 404, 75 N. W. 783; *Graham v. Graham*, 9 N. D. 88, 81 N. W. 44.

Where jurisdiction of the court depends upon a fact which such court is required to ascertain and determine from evidence outside of its records, its finding of such fact is conclusive as against a collateral attack, not only in the state where the judgment is rendered, but in every other state.

*Works, Courts and Their Jurisdiction*, p. 144.

Judgments rendered in one state of the Union when proved in the courts of another differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the case and of the parties.

*Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Union Trust Co. v. Southern Inland Nav. & Improv. Co.* 130 U. S. 565, 32 L. ed. 1043, 9 Sup. Ct. Rep. 606.

The judgments of the courts of a sister state are not impeachable for fraud in obtaining them.

*Magowan v. Magowan*, 57 N. J. Eq. 195, 39 Atl. 364.

Mr. **Alan H. Strong** argued the cause and filed a brief for defendant in error:

The court of chancery of New Jersey, and the court of errors and appeals on appeal, might properly declare void the North Dakota decree if there was either lack of jurisdiction or fraud in its procurement.

*Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Simmmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

The question of residence (domicil) is not concluded by the recitals in the North Dakota decree.

2 Black, Judgm. § 930; 1 Freeman, Judgm. § 580; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720.

Such recital is only conclusive when defendant has been regularly served with process within the state where the decree is rendered, or has appeared.

*Fairchild v. Fairchild*, 53 N. J. Eq. 679, 34 Atl. 10; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 147; *Nichols v. Nichols*, 25 N. J. Eq. 63; *Kinnier v. Kinnier*, 45 N. Y. 540, 6 Am. Rep. 132.

A judgment of a court of another state may be impeached by a bill in equity for fraud.

*Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

Although fraud cannot be set up by plea or as a defense to an action on the judgment.

*Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475.

The fact that a man abandons his wife, and goes into another state, and there applies for a divorce soon after he is able to do so, warrants the inference that he goes there for that purpose.

*Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091; *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 Gray, 157; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299.

The domicil must be complete and full, in distinction from a quasi-domicil. It must be adequate for any purpose.

2 Bishop, Mar. Div. & Sep. § 97.

There must be a fixed abode, with an intention to remain at least for a time for business or other reasons not solely connected with bringing suit for divorce.

1 Nelson, Div. & Sep. § 41.

It has lately been held in the very state of North Dakota itself, that the courts of that state have no jurisdiction to grant a divorce to one who "has no honest purpose of establishing a domicil, and cherishes the purpose of quitting the state as soon as the divorce case is decided."

*Smith v. Smith*, 7 N. D. 404, 75 N. W. 783. See also 2 Black, Judgm. § 929; *Cadwalader v. Howell*, 18 N. J. L. 138; *Winship v. Winship*, 16 N. J. Eq. 107; *Coddington v. Coddington*, 20 N. J. Eq. 263; *Firth v. Firth*, 50 N. J. Eq. 137, 24 Atl. 916; *Fosdick v. Fosdick*, 15 R. I. 130, 23 Atl. 140.

The evidence of change of domicil must be free from suspicion, and the statement of the party as to his intention is not sufficient unless some reasonable motive is disclosed unconnected with procuring a divorce.

1 Nelson, Div. & Sep. § 43.

Mr. Justice **Gray**, after stating the case as above, delivered the opinion of the court:

This case must follow *Bell v. Bell*, 181 U. S. 175, ante, 804, 21 Sup. Ct. Rep. 551. The law of \*North Dakota requires a domicil in good faith of the libellant for ninety days as a prerequisite to jurisdiction of a case of divorce. *Smith v. Smith*, 7 N. D. 404, 413, 75 N. W. 783. The facts in evidence warranted, and indeed required, the finding that the husband had no bona fide domicil in the state of North Dakota, when he obtained a divorce there; and it is not pretended that the wife had an independent domicil in North Dakota, or was ever in that state. The court of that state therefore had no jurisdiction. [183]

*Judgment affirmed.*

CHARLES W. LYNDE, Plff. in Err.,  
v.

MARY W. LYNDE.

MARY W. LYNDE, Plff. in Err.,  
v.

CHARLES W. LYNDE.

(See S. C. Reporter's ed. 183-187.)

*Error to state court—judgment of other state—decree for alimony—Federal question.*

1. A decision of a state court in favor of the full faith and credit claimed for a decree by a court of another state cannot be reviewed on writ of error by the Supreme Court of the United States.

2. There is no color for a contention that a

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On effect of appearance by nonresident to give jurisdiction of divorce case—see *Ellis's Appeal* (Minn.) 23 L. R. A. 287, and note.

That the judgment of tribunals cannot, as a



man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard.

3. A writ of error to a state court will be dismissed if there is nothing to support it except a contention of a Federal right for which there is no color,—especially when such contention was not made in the state courts.
4. A judgment for alimony based on a decree of a court in another state is properly restricted to the fixed sum already due, excluding provision for future alimony, which is subject to the discretion of the court in the other state, which may at any time alter it.
5. Provisions for bond, sequestration, receiver, and injunction made in a decree for alimony, being in the nature of execution, and not of judgment, can have no extraterritorial operation, but the action of the courts of another state in these respects depends on the local statutes and practice of that state, and involves no Federal question.

[Nos. 305 and 369.]

*Submitted November 5, 1900. Decided April 15, 1901.*

**I**N ERROR to the Supreme Court of the State of New York to review a decision affirming a judgment for alimony based on a decree of a court in another state. *Affirmed.*

See same case in courts below, 41 App. Div. 280, 58 N. Y. Supp. 567, 162 N. Y. 405, 48 L. R. A. 679, 56 N. E. 979.

**Statement by Mr. Justice Gray:**

This was an action brought May 26, 1898, in the supreme court for the county and state of New York, on a decree of the court of chancery of New Jersey, of December 28, 1897, by which it was ordered that the plaintiff was entitled to recover of the defendant the sum of \$7,840 for alimony at the rate of \$80 per week from February 11, 1896, to the date of the decree, and the further sum of \$80 per week permanent alimony from the date of the decree, the said weekly payments to be valid liens on the defendant's real estate; that the defendant give bond to the plaintiff in the sum of \$100,000 to secure the [184] payment of the sums of money directed to be paid; and to pay costs, taxed at \$136.07, and a counsel fee of \$1,000; and that on his default to pay any of the "foregoing sums of money" or to give bond, application might be made for the issue of a writ of sequestration against him, or for an order appointing a receiver of his property, and enjoining his transfer thereof. The record showed the following material facts:

On November 18, 1892, the plaintiff in this action filed her bill for a divorce in the court of chancery of New Jersey, setting forth her

marriage with the present defendant on March 25, 1884, in New Jersey, where she has since resided; and praying for a divorce from the bond of matrimony for desertion for two years, and for reasonable alimony. The defendant was not served with process other than by publication, and did not appear or answer the bill. On August 7, 1893, a decree of divorce was entered not mentioning alimony.

On February 10, 1896, the plaintiff, alleging that this decree was incomplete through the neglect of her counsel, filed a petition in that court, praying for an opening and amendment of the decree by allowing reasonable alimony. Upon this petition a rule to show cause was entered, and it was ordered that copies of the petition and affidavits accompanying it be served on the defendant.

In answer to the rule the defendant appeared generally, and filed an affidavit declaring that he was a resident of New York; "that this defendant was by the decree of this court divorced from said petitioner" on August 7, 1893, "and since that time has been married again to another woman;" "that the decree for divorce in said cause was purposely drawn without providing for or reserving any alimony;" and "that he is financially unable to pay alimony."

On October 26, 1896, the court of chancery of New Jersey amended the decree of August 7, 1893, by ordering that the petitioner "have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and for such other relief in the premises touching alimony as may be equitable and just; and this court reserves the power to make such order or decree as may be necessary to allow and \*compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony." 54 N. J. Eq. 473, 35 Atl. 641. On appeal this order was affirmed by the New Jersey court of errors and appeals. 55 N. J. Eq. 591, 39 Atl. 1114. Thereupon an order of reference, based on all prior proceedings and on notice to the solicitor for the defendant, was made by the court of chancery to a master to find the amount of alimony, if any, due to the plaintiff. Neither the defendant nor his solicitor appeared at the hearing before the master; and on December 28, 1897, the court of chancery, confirming the master's report, made the decree now sued on. [185]

That court on its being made to appear that a certified copy of this decree was personally served on the defendant, and that he refused to comply with said decree, ordered that a receiver be appointed to take possession of all the defendant's real and personal property in New Jersey, to apply it to the payment of the plaintiff's claim.

*general rule, operate beyond the territorial limits of the government or nation to which such tribunals belong—see note to Darby v. Mayer, 6 L. ed. U. S. 367.*

*As to what constitutes due process of law—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; Re Gannon (R. I.) 5 L. R. A. 359, 181 U. S.*

and note; Uiman v. Baltimore (Md.) 11 L. R. A. 224, and note; Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 258; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina *ex rel.* Caldwell, 42 L. ed. U. S. 865.

The receiver, however, was "unable to obtain possession of any property or assets of said defendant in the state of New Jersey;" nor had the defendant "complied with said decree in any respect."

The supreme court of New York decreed that the plaintiff was "entitled to a judgment against the defendant, enforcing against said defendant the decree of the court of chancery of New Jersey, dated December 28, 1897," and the order appointing a receiver, and enjoining the defendant from transferring his property; also that the plaintiff was entitled to judgment that the defendant pay her \$8,976.07, "being alimony, counsel fee, and costs, due under said decree," and interest thereon from its date; also the "sum \$4,400, being the amount of weekly alimony which has accrued since said decree in accordance with the terms thereof," and interest thereon; also \$80 a week from the date of this decision, "as and for permanent alimony," bearing interest until paid; that he give bond "in the sum of \$100,000 to secure payment of the several sums of money aforesaid;" and that, if the defendant fail to comply with this decision, "a receiver be appointed, ancillary to the receiver heretofore appointed by the [186] court of chancery of New Jersey \*as aforesaid, of the real and personal property of the defendant within the state of New York."

On appeal by the defendant to the appellate division, the decree was modified so as to allow the plaintiff to recover only \$8,840 alimony, the amount declared by the New Jersey court as due and payable at the date of its decree. Thus modified, the judgment of the supreme court was affirmed. 41 App. Div. 280, 58 N. Y. Supp. 567.

From the judgment of the appellate division both parties appealed to the court of appeals, which affirmed the judgment of the appellate division. 162 N. Y. 405, 48 L. R. A. 679, 56 N. E. 979. Each party sued out a writ of error from this court.

**Mr. George S. Ingraham** submitted the cause for Charles W. Lynde:

To prove that herein United States constitutional questions were raised, we may refer to the opinions of the New York courts.

*O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

This court leaves to the state court authority to prescribe in what manner constitutional defenses, or any other defenses, are to be pleaded.

*Commercial Bank v. Rochester*, 15 Wall. 639, 21 L. ed. 117; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616; *Hardy v. Johnson*, 1 Wall. 371, 17 L. ed. 502.

By his answer Mr. Lynde pleaded facts which showed that the provisions of an instrument of which the courts of that state

take judicial notice had been violated. It is the rule in New York, as it is elsewhere, if you plead the facts it is not necessary to plead the law.

*Springer v. Dwyer*, 50 N. Y. 19; *Van Brunt v. Day*, 81 N. Y. 251; *Abbott, Trial Brief on the Facts*, § 384; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

As the only question in the case was a question under the United States Constitution, and as the lower courts must of necessity, in order to reach the judgment they did reach, pass on a provision of that instrument, the right to review that judgment resides in this court.

*Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 68, 43 L. ed. 368, 19 Sup. Ct. Rep. 97. To the same effect see *Boughton v. American Exch. Nat. Bank*, 104 U. S. 427, 26 L. ed. 765; *Dugger v. Bockock*, 104 U. S. 603, 26 L. ed. 848; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Curtis, Jurisdiction of U. S. Courts*, pp. 35, 40, 58; *Foster. Fed. Pr.* 2d ed. p. 1003; *Phillips, Practice of U. S. Supreme Court*, p. 179; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

To ascertain whether the lower courts had jurisdiction, this court may review the lower judgment to the full extent.

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

Appearing after a default, and making an ineffectual motion to set aside the judgment, will not operate as a waiver of defective service. Nor will an appearance and contest of the amount of damages after a default operate as such waiver. It is only where he desires to defend the action that it is necessary for the defendant to appear specially and object to the jurisdiction.

*Works, Courts and Their Jurisdiction*, p. 105.

To enter a decree in this manner is not due process of law.

*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The test of a valid appearance is whether or not the party has had an opportunity to try all the issues, and not whether he happened to have, in some form, appeared before a supplemental decree was entered.

*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; 1 Freeman, *Judgm.* § 118; *Lang v. People*, 14 Mich. 439; *Hibbard v. People*, 4 Mich. 126; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Ames v. Port Huron Log Driving & Boom Co.* 11 Mich. 139, 83 Am. Dec. 731; *Price v. Hopkin*, 13 Mich. 318; *Groesbeck v. Seeley*, 13 Mich. 329; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180.

The presumption by the New York courts



that, because Mr. Lynde put in a so-called general appearance, he deserted his wife, is not due process of law.

*Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72.

Even if in this action the jurisdictional objection was not raised, it is submitted that the alimony decree herein would not be binding. It is the duty of the moving party to afford the other side an opportunity to be heard on all the issues.

*Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410. See also *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

A general appearance has been defined as "a simple and absolute submission to the jurisdiction of the court."

1 Bouvier, Law Dict. p. 128, title *Appearance*.

When Mr. Lynde's jurisdictional objection to the effect that he had no opportunity for a hearing on the merits was overruled, he thereafter contested Mrs. Lynde's right to the amendatory decree on the merits of that proceeding. Mr. Lynde was not heard on the merits of the action. Such contest did not invalidate the jurisdictional objection, as he was not bound to "desert the case and leave Mrs. Lynde to take judgment by default."

*Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237.

The pleadings herein required Mrs. Lynde to show all essential jurisdictional facts which would make the alimony decree valid.

Abbott, Trial Brief on Pleadings, §§ 559, 758, 991; *Crasto v. White*, 52 Hun. 473, 5 N. Y. Supp. 718; Pom. Code Rem. 3d ed. §§ 624-628.

*Nul tiel record* and *nil debet* are common-law forms of pleading which in all actions, including actions on judgments of other states, have no place in the system of pleading now in vogue in New York.

Pom. Code Rem. 3d ed. § 682; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; Abbott, Trial Brief on Pleadings, §§ 611, 614.

The court allows the state court to apply its new method of pleading to actions on foreign judgments or decrees.

*Commercial Bank v. Rochester*, 15 Wall. 639, 21 L. ed. 117; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616; *Hardy v. Johnson*, 1 Wall. 371, 17 L. ed. 502; *Judkins v. Union Mut. F. Ins. Co.* 37 N. H. 470.

Mr. James Westervelt submitted the cause for Mary W. Lynde. Mr. Matthew O. Fleming was with him on the brief:

The title, right, privilege, or immunity claimed under the Constitution must be specially set up in the state court. The intention to invoke the right must be declared in some unmistakable manner. This, Charles W. Lynde, the defendant in the courts below, did not attempt to do.

*Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; 181 U. S.

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

Mrs. Lynde alone is aggrieved by the decision of the court of appeals, and she alone can review that decision here.

*Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385.

It has been held that the United States Supreme Court will dismiss a writ of error to a state court for want of jurisdiction, if it appears that no Federal question was raised on the trial of the case, but that it was made for the first time in the appellate court of the state.

*Sugg v. Thornton*, 132 U. S. 524, 33 L. ed. 447, 10 Sup. Ct. Rep. 163.

Neither the petition for a writ of error, the certificate of the chief justice of the state, nor the arguments of counsel in the state court, can be resorted to for the purpose of showing that a Federal question was raised in the state court.

*Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Butler v. Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.

Furthermore, even if a claim of right under the Constitution had been made, it is nevertheless clear that the decision complained of was so clearly right as not to require argument. The writ should therefore be dismissed.

*Twitchell v. Pennsylvania*, 7 Wall. 324, 19 L. ed. 223; *Spies v. Illinois*, 123 U. S. 131, sub nom. *Re Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

On error to a state court, in both law and equity cases, where the facts are found by the court below, the Supreme Court of the United States is concluded by such findings.

*Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

This court has no jurisdiction to review a decision of a state court upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided.

*Dower v. Richards*, 151 U. S. 668, 38 L. ed. 309, 14 Sup. Ct. Rep. 452.

Where a state court has obtained jurisdiction of the subject-matter and of defendant's person, any error arising thereafter is an irregularity, and can be taken advantage of only by way of motion or by appeal. Such irregularity cannot be used to impeach the judgment, in an action brought in another state to enforce it.

*Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366. See also *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Cornett v. Williams*, 20 Wall. 226, sub nom.



*Nash v. Williams*, 22 L. ed. 254; *Taylor v. Turner*, 16 Wall. 366, 21 L. ed. 287; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Dunstan v. Higgins*, 138 N. Y. 70, 20 L. R. A. 668, 33 N. E. 729.

The Constitution of the United States requires that full faith and credit be given to the decree of the New Jersey court. As that court had jurisdiction of the parties and of the subject-matter, the courts of New York are bound to give to that decree the same binding force and effect in New York that it has in New Jersey.

U. S. Const. art. 4; U. S. Rev. Stat. § 905; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628.

It is proper to file a bill in equity to enforce in all its parts a chancery decree of a sister state.

*Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

[186] \*Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

The husband, as the record shows, having appeared generally in answer to the petition for alimony in the court of chancery in New Jersey, the decree of that court for alimony was binding upon him. *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366. The court of New York having so ruled, thereby deciding in favor of the full faith and credit claimed for that decree under the Constitution and laws of the United States, its judgment on that question cannot be reviewed by this court on writ of error. *Gordon v. Caldwell*, 3 Cranch. 268, 2 L. ed. 436; *Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385. The husband having appeared and been heard in the proceeding for alimony, there is no color for his present contention that he was deprived of his property without due process of law. Nor does he appear to have made any such contention in the courts of the state. His writ of error therefore must be dismissed.

[187] By the Constitution and the act of Congress requiring the faith and credit to be given to a judgment of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit." *M'Elmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. ed. 177; *Thompson v. Whitman*, 18 Wall. 457, 463, 21 L. ed. 897, 814

899; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 292, 32 L. ed. 239, 244, 8 Sup. Ct. Rep. 1370; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435, and 52 N. J. Eq. 561, 27 L. R. A. 213, 30 Atl. 676.

The decree of the court of chancery of New Jersey, on which this suit is brought, provides, first, for the payment of \$7,840 for alimony already due, and \$1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of \$80 per week; and, third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the state, and involved no Federal question.

On the writ of error of the wife, therefore,

*The judgment is affirmed.*

\*L. J. BRYAN, as Marshal, for the Use of [188]  
Creditors, *Petitioner*,

v.

LOUIS BERNHEIMER.

(See S. C. Reporter's ed. 188-198.)

*Bankruptcy—assignment for creditors—rights of purchaser from assignee.*

1. Property of a bankrupt in the hands of third persons is included within the provision of the bankrupt act of 1898, § 2, cl. 3, giving the court of bankruptcy authority to appoint receivers or the marshals to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified, when that is absolutely necessary for the preservation of estates.
2. A purchaser from an assignee in insolvency who holds the property under a general assignment which is itself an act of bankruptcy, when the sale is made before any trustee has been appointed, but after and with knowledge of a petition in bankruptcy, has no title superior to the title of the bankrupt's estate: but his equities in respect to the goods, or to the money that he has paid for them, may depend upon many circumstances, and can be settled in the district court as a court of bankruptcy, which has authority under the bankrupt act of 1898, § 2, cl. 6, to bring in the assignee for creditors if necessary for the complete determination of the matter.



*Submitted October 31, 1900. Decided April 15, 1901.*

**ON WRIT OF CERTIORARI** to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision reversing a decree of the District Court in a bankruptcy case. *Reversed.*

See same case below, 35 C. C. A. 592, 93 Fed. Rep. 767.

Statement by Mr. Justice **Gray**:

This was a summary petition to the district court of the United States for the middle district of Alabama, sitting in bankruptcy, for an order to Bryan, the marshal of the district, to take immediate possession of property of David Abraham, a bankrupt, in the hands of Louis Bernheimer. The material facts, as appearing by the record, were as follows:

[189] On October 29, 1898, Abraham made a general assignment of all his property, consisting of his stock of goods and book accounts, in a storehouse numbered 106, Dexter avenue, in Montgomery, Alabama, for the equal benefit of all his creditors, to one H. C. Davidson, who had the assignment recorded, and caused to be filed an inventory, and an appraisalment of the \*property at the sum of \$7,900, in a court of Alabama, according to the laws of the state (Civil Code of Alabama of 1896, chap. 113), and forthwith took possession of the property.

On November 7, 1898, certain creditors of Abraham filed in the district court of the United States, sitting in bankruptcy, a petition alleging that said assignment was an act of bankruptcy, and praying that he might be adjudged a bankrupt.

On December 12, 1898, Abraham, after due notice to him, was adjudged a bankrupt. On the same day the petitioning creditors presented to the district court a petition alleging the assignment to Davidson and the adjudication in bankruptcy, and that upon the filing of the petition for that adjudication the court obtained jurisdiction over Abraham's estate, and it was the duty of Davidson, as his assignee, to hold all his property subject to the orders of the court; but that Davidson, disregarding the authority and jurisdiction of the court, had sold and disposed of the property at much less than the aforesaid appraisalment, and the purchasers had been in possession of the property for several days, selling and disposing thereof at retail and at bankrupt prices; and that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged and their dividends out of the estate greatly lessened; and praying for an order to the marshal of the district to take possession of, and to hold until further order of the court, all the property owned by Abraham at the time of his assignment to Davidson, wherever the same might be found, and all property sold by Davidson to Louis Bernheimer or to anyone else, and being in the storehouse numbered 106, Dexter avenue, in Montgom-

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ery, and to hold it until the further order of the court. On the filing of this petition, the district court made the order therein prayed for, reciting, "It further appearing from said petition that it is necessary to the interest of the creditors of the said Abraham that this court take possession of all the property and effects of said Abraham." And on the same day the marshal, pursuant to that order, seized the stock of goods in Bernheimer's possession.

On December 13, 1898, the district court, on a petition of \*the marshal for instructions concerning the goods seized by him, ordered that notice be given to Bernheimer to appear in ten days, and to propound any claim that he had to the goods so seized, or, on failing to do so, be decreed to have no claim or right to them; and directed the marshal to retain possession of the goods until the further order of the court.

On December 17, 1898, the petitioning creditors presented another petition to the district court, further alleging that on or about November 17, 1898, after the filing of the petition in bankruptcy against Abraham, and in disregard of the proceedings thereon pending, Davidson turned over and delivered to Bernheimer the whole stock of goods, then worth about \$10,000; and Bernheimer, with knowledge of the pending proceedings in bankruptcy, took possession of the goods, sold large quantities thereof, and received large sums of money therefor, before the rest was taken by order of the court into the hands of the marshal; and praying for an order that Bernheimer file with the referee in bankruptcy an account of the moneys so received by him.

On December 22, 1898, Bernheimer, in obedience to the order of December 13, came into the district court and propounded a claim to the stock of goods. The claim stated the assignment to Davidson and the petition for an adjudication of bankruptcy, and that the petitioning creditors afterwards filed a petition in the court of bankruptcy, praying that Davidson be required to appear and show cause why he should not be restrained from selling the goods so assigned to him; that, in obedience to a rule issued on that petition, Davidson appeared and showed cause satisfactory to the court; and that the court, on the ground that the petition was not sworn to nor any bond given, discharged the rule against him, declined to grant the restraining order, and dismissed the petition without prejudice. The claim further stated that Davidson thereupon proceeded to sell the goods by public auction, and the claimant, acting in good faith and under the advice of counsel, bought the goods from Davidson at the sale by public auction for the sum of \$3,500, which was a fair and reasonable price, and paid the price in cash to Davidson, and took and kept possession of the goods \*until deprived thereof by the [191] marshal; that the claimant never intended to interfere in any way with the process of the court, or with any property of the bankrupt; that if he was deprived of these goods, and Davidson was allowed to keep the money



paid him by the claimant as their price, the claimant's position would be one of great hardship and loss; that Davidson, under the terms of the assignment to him, would be compelled to pay that money to Abraham's creditors, and the goods purchased in good faith by the claimant would also be held and sold again for the benefit of those creditors. Bernheimer's claim concluded as follows: "Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises, and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also that, in default of such order, or if he is mistaken in the relief prayed for, your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant, as purchase money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24 Bernheimer, in answer to the petition of December 17, filed an account as therein requested, showing that he had received from sales of the goods sums amounting to \$2,768.40; that at the time of his purchase from Davidson he also bought the exemptions allowed to the bankrupt under the laws of Alabama and the bankrupt act of 1898, amounting to the sum of \$1,000; and that, deducting that sum and necessary expenses, he had a net balance in his hands of \$1,434.80.

[192] On the same 24th of December the petitioning creditors demurred to the claim of Bernheimer, because it showed no title in Bernheimer good as against their rights; because the alleged sale by Davidson to Bernheimer was made with knowledge by both of the filing of the petition in bankruptcy, and after the court of bankruptcy had acquired jurisdiction of the property; because the deed of assignment to Davidson was an act of bankruptcy, \*void as against the petitioning creditors; and because Bernheimer asked the court to settle and decide questions between him and Davidson which it had no jurisdiction to try and determine.

On the same day the district court sustained the demurrer, and, Bernheimer declining to plead further, adjudged and decreed "that the said Louis Bernheimer acquired no title to the said goods or to the proceeds of the sales thereof made by him, under the purchase of said goods from H. C. Davidson as assignee of said bankrupt, superior to the title of said bankrupt estate;" and that Bernheimer pay over to the marshal, to await the further order of the court, all the proceeds, to be ascertained by a referee in bankruptcy, of the sales made by him of those goods.

Bernheimer appealed to the circuit court of appeals, which, considering the case as if before it on a petition for revision of the decree of the district court, reversed that de-

cree, and ordered the cause to be remanded to that court, with instructions to dismiss the petition against Bernheimer, to vacate all orders made thereon, and to restore to him the goods taken from his possession; and further ordered that all costs, counsel fees, expenses, and damages occasioned to him by the marshal's seizure and detention of the property be fixed and allowed by the court of bankruptcy, and paid by the petitioning creditors. 35 C. C. A. 592, 93 Fed. Rep. 767.

The marshal, in behalf of the petitioning creditors, thereupon obtained a writ of certiorari from this court. 175 U. S. 724, 44 L. ed. 338, 20 Sup. Ct. Rep. 1031.

**Messrs. John D. Rouse and William Grant** submitted the cause for petitioner. **Mr. Gustave F. Mertins** was with them on the brief:

A deed of assignment for the benefit of creditors alone is made by the bankruptcy act sufficient to justify an adjudication in involuntary bankruptcy against the debtor.

*George M. West Co. v. Lea Bros.* 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836.

A deed of assignment made within four months before the filing of an involuntary petition in bankruptcy is void as against the petitioning creditors.

*Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325.

The filing of an involuntary petition in bankruptcy is a proceeding *in rem*, in which the *res* or estate is *in custodia legis*.

*Re Anderson*, 23 Fed. 482; *Carter v. Hobbs*, 92 Fed. 597.

The property of the bankrupt may be taken away from the assignee of a bankrupt, where the bankrupt has made a general assignment.

*Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325.

The district court under § 2 of the bankruptcy act had full power to try and determine Bernheimer's title to the property, and original jurisdiction was given it.

*Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *International Bank v. Sherman*, 101 U. S. 403, 25 L. ed. 866; *Re Sievers*, 91 Fed. 366; *Re Brooks*, 91 Fed. 508; *Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325; *Carter v. Hobbs*, 92 Fed. 595; *Re Richard*, 94 Fed. 635; *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637; *Murray v. Beal*, 97 Fed. 569; *Re Newberry*, 97 Fed. 24; *Re Woodbury*, 98 Fed. 833; *Re Murphy*, 2 N. B. N. Rep. 393; *Norcross v. Nathan*, 99 Fed. 414; *Cox v. Wall*, 99 Fed. 546; *Re Hammond*, 98 Fed. 845.

The petitioning creditors had the right to require Bernheimer to prove in the district court that he had a good title to the property.

*Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289.



Congress has not the power, if it had the will, to confer jurisdiction on any state court.

*Dudley v. Mayhew*, 3 N. Y. 9; *Valarino v. Thompson*, 7 N. Y. 576; *Martin v. Hunter*, 1 Wheat. 334, 4 L. ed. 104.

This cause of action is one which was created entirely by Congress, and although the state courts might have concurrent jurisdiction with the Federal court, and might take cognizance of causes of action born through Federal legislation, yet Congress cannot compel them to do so, as they are not in any sense inferior courts under the Constitution, and are not ordained by Congress.

*Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341.

Congress cannot prescribe rules of evidence for the state courts.

*People ex rel. Barbour v. Gates*, 43 N. Y. 40; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *Carpenter v. Snelling*, 97 Mass. 452.

Congress has the right to pass uniform bankruptcy laws, but the state courts are not obliged to assist in administering them.

*Shearman v. Bingham*, 7 Nat. Bankr. Reg. 500, Fed. Cas. No. 12,762.

Mr. Robert E. Steiner submitted the cause for respondent. Mr. Gordon Macdonald was with him on the brief:

The district court of the United States sitting as a bankrupt court is a purely statutory tribunal. Courts created by statute can have no jurisdiction but such as the statute confers.

*Sheldon v. Sill*, 8 How. 441, 12 L. ed. 1147.

The present bankrupt act was passed with the knowledge of this court's decisions on former statutes of like character.

*Smith v. Mason*, 14 Wall. 419, 20 L. ed. 748; *Lathrop v. Drake*, 91 U. S. 516, 23 L. ed. 414; *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481; *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542; *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

The bankrupt court had no jurisdiction to seize the property purchased by Bernheimer, and to undertake to try his title thereto in the summary manner adopted in this case.

*Smith v. Mason*, 14 Wall. 419, 20 L. ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481.

The Alabama statutes which provide for the filing with the register in chancery of an appraisal of property assigned for the benefit of creditors were not suspended by the bankrupt act.

*Boese v. King*, 108 U. S. 379, 27 L. ed. 760, 2 Sup. Ct. Rep. 765.

Even the insolvent laws of a state are not suspended by a national bankrupt act, except in so far as they may conflict with the acts of Congress.

*Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653; *Pugh v. Bussel*, 2 Blackf. 400.

A general assignment for the benefit of creditors is not void as against the bankrupt laws, but, at most, is voidable only.

*Mayer v. Hellman*, 91 U. S. 496, 23 L. ed. 377.

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The court will not impute a covinous intent to one who makes a conveyance of all his property for the equal benefit of all his creditors.

*Ibid.*; *Reed v. McIntyre*, 98 U. S. 510, 25 L. ed. 172.

Any construction is preferable to one which seeks to vest a despotic and irresponsible power in a litigant to use the processes of a Federal court to seize, without trial, the property held by an adverse claimant.

*Re Romanow*, 92 Fed. 510; *Re Sievers*, 91 Fed. 366.

In summary proceedings, where a court exercises extraordinary power under a special statute which prescribes its course, that course must be strictly pursued, and the facts which give jurisdiction ought to appear on the face of the record; otherwise the proceedings are absolutely void.

*Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221; *Ferguson v. Jones*, 17 Or. 204, 3 L. R. A. 620, 20 Pac. 842.

All the courts of the United States except the Supreme Court are statutory courts.

*United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259.

Where a court of general jurisdiction has summary powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are not part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction.

1 Black, Judgm. § 279, and authorities cited in note; *Bush v. Hanson*, 70 Ill. 480; *Ferguson v. Jones*, 17 Or. 204, 3 L. R. A. 620, 20 Pac. 842.

Not only the pleadings, but the judgment, in a summary proceeding, must show all the requisite jurisdictional facts, and the judgment must show a finding of these facts.

*Graham v. Reynolds*, 45 Ala. 578; *Haynes v. Gates*, 2 Head, 598; *Crockett v. Parkison*, 3 Coldw. 219; *Smith v. Branch Bank*, 5 Ala. 26; *Andrews v. Branch Bank*, 10 Ala. 375; *Barelay v. Barelay*, 42 Ala. 345; *Babyschall v. Oppenheimer*, 4 Wash. C. C. 482, Fed. Cas. No. 1,592; *Chandler v. Nash*, 5 Mich. 409; *Clark v. Norton*, 6 Minn. 412, Gil. 277; *Perrine v. Farr*, 22 N. J. L. 356; *People v. Mallon*, 39 How. Pr. 454; *Connolly v. Alabama & T. Rivers R. Co.* 29 Ala. 373; *Cowdrey v. Caneadea*, 16 Fed. 532; *Eaton v. St. Charles County*, 76 Mo. 492.

The principles expressed in these cases is that in such proceedings, even where the defendant appears, every other fact except that of notice to him must be proved and appear in the judgment entry.

See also 1 Black, Judgm. § 280.

In most respects the proceedings in a bankrupt court are for the same purpose and governed by the same principles which control courts of equity in dealing with a trust estate committed to its charge, or in cases of a general creditor's bill in chancery. So far as not varied by the statute, the practice should be the same.

Black, Bankruptcy, p. 8; *Re Anderson*, 23 Fed. 482.

A court of equity having jurisdiction of the parties—plenary jurisdiction so far as these petitioning creditors are concerned—and of the subject-matter, will make its jurisdiction effectual for complete relief.

*Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829.

*Mr. Thomas H. Clark* also filed a brief for respondent.

[192] \**Mr. Justice Gray*, after stating the case as above, delivered the opinion of the court:

The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made \*him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent. Bankrupt act of July 1, 1898, chap. 541, § 3 [30 Stat. at L. 545]; *George M. West Co. v. Lea Bros.* 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836.

Nine days after this assignment certain creditors of Abraham filed a petition in the district court of the United States to have him adjudged a bankrupt, alleging this assignment as an act of bankruptcy. After the filing of that petition Davidson sold the property to Bernheimer, and the district court, after the adjudication of bankruptcy, and on petition of the same creditors alleging that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged and their dividends out of the estate greatly lessened, and praying for an order to the marshal to take possession of the property, ordered the marshal to do so; and on his petition for instructions as to the property so seized, ordered notice to Bernheimer to appear in ten days, and to propound any claim that he had to the property, or, on failing to do so, be decreed to have no right to it. In obedience to that order Bernheimer came into court, and propounded a claim to the property under the sale by Davidson to him, alleging that if he was deprived of it, and Davidson was allowed also to keep the price paid, his position would be one of great hardship; submitting his claim to the court, and asking it to make such orders as might be necessary for his protection; and praying that the creditors be remitted to their claim against Davidson for such price, or, if the claimant was mistaken in the relief he prayed for, for an order that such price be paid by Davidson into court and paid over to the claimant, who thereupon offered to rescind the purchase and to waive all further claim to the property.

The district court sustained a demurrer of the petitioning creditors to this claim, and decreed that Bernheimer had no title superior to the title of the bankrupt estate. On his appeal from that decree, the circuit court of appeals reversed it, and ordered the property to be restored to him, with costs, counsel fees, expenses, and damages occasioned to him by the seizure. \*The marshal, in be-

half of the petitioning creditors, thereupon obtained this writ of certiorari.

The case, as the opinion of the circuit court of appeals states, presents this question: "Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods, and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him, to appear before that court within ten days and propound any claim he had to the goods or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?"

The bankrupt act of 1898, § 2, invests the courts of bankruptcy "with such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms;" to make adjudications of bankruptcy; and, among other things "(3), appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed; and determine controversies in relation thereto, except as herein otherwise provided." The exception refers to the provisions of § 23, by virtue of which, as adjudged at the last term of this court, the district court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006.

The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself.

\*Nor is it a petition under § 3e or § 69 of [195] the bankrupt act of 1898, each of which relates to applications to take charge of and hold property of a bankrupt after the petition and before the adjudication in bankruptcy. The provisions of those sections requiring the applicants to give bond for damages have no application to a case where there has been an adjudication of bankruptcy, and the property thereby brought within the jurisdiction of the court of bankruptcy.

But it is a petition filed after an adjudication of bankruptcy and before the appointment of a trustee, and must rest on the authority given to the court of bankruptcy by clause 3 of § 2, to "appoint receivers or the



marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Does this include property of the bankrupt in the hands of third persons?

The bankrupt act of March 2, 1867, chap. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of, his property, the court might issue a warrant to the marshal commanding him "forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." 14 Stat. at L. 536; Rev. Stat. § 5024. It was held by the court of appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle v. Sharpe*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion said:

[196] The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee a considerable time often passes. During that time the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed \*beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods, or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt, and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purpose of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found, so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession

until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee when appointed, as a sufficient reason for failing to take possession of it. *Sharpe v. Doyle*, 102 U. S. 686, 689, 690, 26 L. ed. 277, 279. A like decision was made in *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289.

These considerations are equally applicable to an application, after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal under clause 3 of § 2 of the bankrupt act of 1898, to take charge of "the property" of the bankrupt "after the filing of the petition and until it is dismissed or the trustee is qualified." It is true that under this provision the appointment is only to be made "in case the courts shall find it absolutely necessary for \*the preservation of estates." But [197] that condition of things is shown in the present case by the allegation of the application and the finding of the court of bankruptcy, that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property.

In the opinion in *Bardes v. First Nat. Bank*, 178 U. S. 524, 538, 44 L. ed. 1175, 1182, 20 Sup. Ct. Rep. 1000, 1006, it was indeed said: "The powers conferred on the courts of bankruptcy by clause 3 of § 2, and by § 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him." But the remark, "can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant," was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment.

Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding, is shown by the terms of his claim, in which, not protesting against the jurisdiction of the court of bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection.

Considering that the property was not held by Davidson under any claim of right in himself, but under a general assignment which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; and that Bernheimer consented to the form of proceeding,—we are of opinion that Bernheimer had no title superior to the title of the bankrupt's estate; that the district court, as a court of bankruptcy, was

authorized so to decide in this proceeding; and that the decree of the circuit court of appeals, directing the goods to be restored to Bernheimer, must be reversed.

[198] \*The question remains, What further order should be made? It is manifestly inequitable that Bernheimer should lose both the goods themselves and the price which he had paid to Davidson for them. His equities in that respect, and the rightful claim of the bankrupt's creditors against him, may depend upon many circumstances, and can be best settled in the district court, which has authority, under clause 6 of § 2 of the bankrupt act of 1898, to bring in Davidson, if necessary for the complete determination of the matter.

*Judgment of the Circuit Court of Appeals reversed, and case remanded to District Court for further proceedings in conformity with this opinion.*

R. RASMUSSEN, Plff. in Err.,

v.

STATE OF IDAHO.

(See S. C. Reporter's ed. 198-202.)

*Error to state court—question under state Constitution—sheep quarantine law—effect on interstate commerce.*

1. A decision of the supreme court of a state declaring that there is no conflict between a statute and the Constitution of the state is conclusive of that fact in the Supreme Court of the United States.
2. The Idaho sheep quarantine act of March 13, 1899, authorizing the governor, when he has reason to believe that there is an epidemic infectious disease of sheep in localities outside the state, to investigate the matter, and, if he finds that the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper,—is within the police power of the state, and is not in violation of the Federal Constitution as a regulation of interstate commerce.

[No. 215.]

*Submitted March 18, 1901. Decided April 22, 1901.*

IN ERROR to the Supreme Court of the State of Idaho to review a decision affirming a conviction for unlawfully bringing sheep into the state from an infected district. *Affirmed.*

See same case below, 59 Pac. 933.

NOTE.—On the construction and effect of state laws and constitutions, and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to when the United States Supreme Court follows decisions of state courts—see note to *Forcpaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

Statement by Mr. Justice **Brewer**:

On March 13, 1899, the legislature of Idaho passed an act the 1st section of which contains the following:

"Whenever the governor of the state of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities, and prohibit the importation from them of any sheep into the state, except under such restrictions as, after \*consultation[199] with the state sheep inspector, he may deem proper." Session Laws Idaho, 1899, p. 452.

Subsequent provisions of the statute prescribed penalties for its violation. On April 12, 1899, the governor of Idaho issued the following proclamation:

#### PROCLAMATION.

*Scheduling Certain Localities on Account of Scab or Scabbies.*

State of Idaho, Executive Office.

Whereas, I have received statements from reliable wool growers and stock raisers of the state of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, viz., in the county of Cache, state of Utah, the county of Box Elder, in the state of Utah, and the county of Elko, in the state of Nevada; and,

Whereas, it is known that sheep from said districts are annually moved, driven, or imported into the state of Idaho, and if so moved would thereby spread infection and disease on the ranges and among the sheep of this state, which act would result in great disaster:

Now, therefore, I, Frank Steunenberg, governor of the state of Idaho, by virtue of authority in me vested, and after due consultation with the state sheep inspector, do hereby prohibit the importation, driving, or moving into the state of Idaho of all sheep now being held, herded, or ranged within said infected districts, viz., the county of Cache, in the state of Utah, the county of Box Elder, in the state of Utah, and the county of Elko, in the state of Nevada, or which may hereafter be held, herded, or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation; after the termination of said sixty days sheep can be moved into this state only upon compliance with the laws of the state of Idaho regarding the inspection and dipping of sheep.

On what constitutes a regulation or restraint upon interstate commerce—see note to *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

That police regulations are not regulations of commerce—see notes to *People v. Budd* (N. Y.) 5 L. R. A. 560; *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* (Ind.) 6 L. R. A. 579.

On quarantine regulations by health authorities—see *Hurst v. Warner* (Mich.) 26 L. R. A. 484, and note.



Under this statute and the accompanying proclamation the plaintiff in error was arrested, tried, and convicted in the district court of the fifth judicial district sitting in [200] and for the county of Oneida, state of Idaho. His conviction was sustained by the supreme court of the state (59 Pac. 933), and to reverse such judgment of conviction this writ of error was sued out.

Messrs. Arthur Brown and Henry P. Henderson submitted the cause for plaintiff in error:

No state can prevent by any kind of legislation, direct or indirect, the commerce between the states in healthy stock.

*Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543.

The courts will not permit any regulation, ostensibly or under the guise of providing for the health of stock or men, to prevent or hamper the introduction of property into other states.

*Re Rebman*, 41 Fed. 868, 3 Inters. Com. Rep. 126; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

Even the introduction of intoxicating liquor in its original packages cannot be regulated by state legislation unless authorized by the statutes of the United States.

*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; U. S. Rev. Stat. 1 Supp. p. 779; *Vance v. W. A. Vandercook Co.* 170 U. S. 444, 42 L. ed. 1103, 18 Sup. Ct. Rep. 674.

Mr. Samuel H. Hays submitted the cause for defendant in error. Mr. Frank Martin was with him on the brief:

A state may pass a reasonable quarantine law for the protection of domestic animals.

*Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

Animals which are infected with, or which are, from the circumstances of their situation, likely to convey, disease, are not merchantable or marketable, and are not a proper subject of commerce.

*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *License Cases*, 5 How. 576, 12 L. ed. 288; *Gibbons v. Ogden*, 9 Wheat. 235, 6 L. ed. 79.

Health officers are justified in taking the greatest care for the prevention of disease.

*Seavey v. Preble*, 64 Me. 120.

All quarantine laws worthy of the name provide for the exclusion of persons, merchandise, and animals coming from infected districts.

chandise, or animals coming from infected districts.

Parker & W. Public Health & Safety, § 28.

Statutory provisions of this kind have been upheld by the courts.

See *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484, 60 N. W. 440; *Minneapolis, St. P. & S. S. M. R. Co. v. Milner*, 57 Fed. 276; *St. Louis & S. W. R. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627; *Compagnie Francaise de Nav. a Vapeur v. State Bd. of Health*, 51 La. Ann. 645, 25 So. 591; *Young v. Flower*, 3 Misc. 34, 22 N. Y. Supp. 332.

The disinfection of an entire class of goods may be required, whether actually infected or not.

*Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

Compulsory vaccination has been required.

*Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850; *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 56 N. E. 89.

The exclusion of all sheep coming from the infected district for a period of sixty days was a reasonable quarantine regulation.

*St. Louis v. Boffinger*, 19 Mo. 13.

\*Mr. Justice Brewer delivered the opinion [200] of the court:

The judgment of the supreme court of Idaho establishes that there is no conflict between this legislation and the Constitution of the state, and it is not within the province of this court to review that question. *Merchants' & Mfrs. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited in the opinion.

The single question, therefore, for our consideration, is whether this legislation conflicts with the Federal Constitution. Plaintiff in error relies largely on *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. In that case the validity of an act of the state of Missouri was presented. The act provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year by any person or persons whatsoever." It was held to be in conflict with the constitutional grant of power to Congress to regulate commerce between the states. In the opinion the police power of the state, the power by which the state prevents the introduction into its midst of noxious articles, was fully recognized, but attention was called to the fact that there was an absolute prohibition of the bringing in of Texas, Mexican, or Indian cattle during eight months of the year, without reference to the actual condition of the cattle; and it was said:

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transporta-



tion companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December [November] 1 in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the state or not. . . . Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure." p. 473, L. ed. 531.

It will be perceived that the act was an absolute prohibition operative during eight months of each year. It was an act continuous in its force; provided for no inspection; and was predicated on the assumption that the state had the right to exclude for two thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the state as shall seem to him, after conference with the state sheep inspector, to be necessary. The executive acted on the authority thus conferred, and, after consultation with the state sheep inspector and examination of the matter, found that the scab was epidemic in certain localities in Utah and Nevada, and that if sheep from those localities were moved therefrom into Idaho they would spread infection and disease among the sheep of the state, and thereupon forbade the introduction of sheep from such localities for the space of sixty days. It will be perceived that this is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the state before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act\* of the state of Idaho, contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other states as in the judgment of the state was absolutely necessary to prevent the spread of disease. The act therefore is very different from the one presented in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor. There being no other Federal question in the case, the judgment of the Supreme Court of Idaho is affirmed.

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GEORGE H. SCOTT, *Plff. in Err.*,

v.

PARRY L. DEWEESE, (substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri.

(See S. C. Reporter's ed. 202-218.)

*National banks—liability of shareholder—fraud of officers of bank or of government.*

A holder of certificates of stock in a national banking association cannot escape liability as a stockholder to creditors under U. S. Rev. Stat. § 5151, on the ground that the shares of stock which he holds are part of an increase which was made without compliance with the conditions of the act of May 1, 1886 (24 Stat. at L. 18, chap. 73), which prohibits the increase of capital until the whole amount of such increase is paid in and the Comptroller has certified to that fact, even if he has been induced to take such shares by fraud of the officers of the bank and of the Comptroller.

[No. 148.]

*Argued January 24, 25, 1901. Decided April 15, 1901.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment establishing the liability of a shareholder in a national bank. *Affirmed.*

See same case below, 33 C. C. A. 1, 14, 60 U. S. App. 720, 743, 89 Fed. Rep. 843, 856.

The facts are stated in the opinion.

Mr. Hiram F. Stevens argued the cause, and Messrs. Stevens, O'Brien, Cole, and Albrecht filed a brief for plaintiff in error:

U. S. Rev. Stat. § 5142, was intended to secure actual payment for the stock subscribed, and to prevent what is called watering of stock.

*Aspinwall v. Butler*, 133 U. S. 595, 33 L. ed. 779, 10 Sup. Ct. Rep. 417.

Three things must concur to constitute a valid increase of the capital stock of a national banking association: First, that the association in the manner pointed out in its articles, and not in excess of the maximum prescribed by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as part of the capital of the association; and, third, that the Comptroller of the Currency by his certificate specifying the amount of such increase of capital stock shall approve thereof and certify to the fact of its payment.

*Delano v. Butler*, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39.

The amendatory act of May 1, 1886, in no wise repeals § 5142. It only adds thereto the requirement that the increase must be voted by the owners of two thirds of the stock.

*Winters v. Armstrong*, 37 Fed. 508; *McFarlin v. First Nat. Bank*, 16 C. C. A. 46, 32 U. S. App. 426, 68 Fed. 868.

NOTE.—As to who are liable as shareholders in national banks—see note to *Beal v. Essex Sav. Bank*, 15 C. C. A. 130.

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Where the language of a statute is plain and unambiguous, it is the duty of the court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction based upon some supposed policy of Congress in regard to the subject of legislation, or upon consideration of injustice or inconvenience arising from the enforcement of the statute according to its terms.

*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.

*Montclair v. Ramsdell*, 107 U. S. 152, 27 L. ed. 432, 2 Sup. Ct. Rep. 391.

The liability of a stockholder to an additional amount equal to his stock, though created by statute, is contractual in its nature.

*First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 479.

Contracts for stock in a corporation, which are induced by fraud, create no obligation, and the victim of the fraud has a right to their abrogation.

*Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 190; *Thompson, Liability of Stockholders*, § 142.

No time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it.

*Scheftel v. Hays*, 7 C. C. A. 308, 19 U. S. App. 220, 58 Fed. 457; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55.

If a vendor by the fraudulent representations by which he sells his goods procures an assumption of liability by the vendee, the right of the latter to a rescission of the sale and a cancelation of the obligation is superior to the right of either his creditors or his receiver to enforce it.

*Beach, Receivers*, § 704; *Litchfield Bank v. Peck*, 29 Conn. 384; *Bussing v. Rice*, 2 Cush. 48; *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. 460; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208; *Slagle v. Goodnow*, 45 Minn. 531, 48 N. W. 402; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 42 Am. Rep. 53, 10 N. W. 900; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *Devoe v. Brandt*, 53 N. Y. 462; *Benjamin, Sales*, § 433, note 1.

One who is induced by a continuing fraud to subscribe for or to purchase and retain stock is not estopped, as against creditors, on the principles of fair dealing, from repudiating the contract and liability when he discovers the facts, because he has never knowingly or negligently deceived them to their injury.

*Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339, 33 L. R. A. 727, 40 U. S. App. 1, 74 Fed. 135; *Florida Land & Improv. Co.* 181 U. S.

*v. Merrill*, 2 C. C. A. 629, 2 U. S. App. 434, 52 Fed. 77; *Upton v. Tribilecock*, 91 U. S. 54, 23 L. ed. 207; *Winters v. Armstrong*, 37 Fed. 516; *Duffield v. E. T. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310.

An estoppel arises only when one knowingly or negligently represents to another who is ignorant and relies and acts upon the representation to his injury, that a fact or condition exists which has no existence. An essential element of such an estoppel is a wilful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be some moral turpitude or some breach of duty.

*Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 633; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63.

Another requisite ingredient of an estoppel by conduct or declarations is that the party claiming its benefit has acted upon it in such a way that he will be injured if the natural inference from it is denied. The deceit of the victim of the representations, and consequent damage from their denial, are indispensable to the existence of the estoppel.

*New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63; *Bonsack Mach. Co. v. Hess*, 15 C. C. A. 303, 25 U. S. App. 315, 68 Fed. 119.

Moreover, an estoppel does not operate in favor of everybody. No one can set it up or derive any benefit from it who has not been misled by the misrepresentation or conduct to his injury.

*Ketchum v. Duncan*, 96 U. S. 659, 24 L. ed. 868; *Re Harris*, 6 C. C. A. 320, 14 U. S. App. 506, 57 Fed. 243.

The rights of a purchaser of bank stock whose purchase was induced by false representations as to its solvency and flourishing condition are equal to that of a creditor who by the same fraud was induced to take the bank's promise of repayment for the money he deposited with it. Neither of them knowingly or negligently deceived the other, and neither is entitled to stop the other from undoing the fraud from which they suffer.

*Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339, 33 L. R. A. 727, 40 U. S. App. 1, 74 Fed. 135; *Florida Land & Improv. Co. v. Merrill*, 2 C. C. A. 629, 2 U. S. App. 434, 52 Fed. 77; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. ed. 203; *Winters v. Armstrong*, 37 Fed. 512; *Duffield v. E. T. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310.

So far as the rights of this receiver with reference to Scott are concerned, he stands in exactly the same position as the bank itself stands, when it is a question of whether or not a subscription contract has ripened into stock ownership.

*Winters v. Armstrong*, 37 Fed. 521; *Eaton v. Pacific Nat. Bank*, 144 Mass. 260, 10 N. E. 844; *McFarlin v. First Nat. Bank*, 16 C. C. A. 46, 32 U. S. App. 426, 68 Fed. 868.

**Mr. William S. Shirk** argued the cause and filed a brief for defendant in error:

The certificate of the Comptroller, approving the increase of capital stock, and certifying that it had been fully paid in, is conclusive; and the validity of the increase cannot be assailed in a collateral proceeding like this.

*Latimer v. Bard*, 76 Fed. 536; *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801; *Sheafe v. Larimer*, 79 Fed. 921.

This is so held with reference to the Comptroller's action in making an assessment against stockholders.

*Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

And with reference to his action in certifying that a banking association is duly organized and entitled to commence business.

*Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Latimer v. Bard*, 76 Fed. 536.

The purchaser of this increased stock cannot, in this collateral action, be permitted to go back to a time four years before the bank failed and six years before the action was brought, and inquire into the fact as to whether a surplus existed, and upon the determination of that fact assert that the stock was or was not paid for.

*Latimer v. Bard*, 76 Fed. 536; *Winters v. Armstrong*, 37 Fed. 503; *Veeder v. Mudgett*, 95 N. Y. 295; *Stutz v. Handley*, 41 Fed. 531; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. ed. 779, 10 Sup. Ct. Rep. 417; *Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985.

Although the increase may not be valid, and could be successfully questioned by the shareholders at the proper time, or by the state by quo warranto or other proceeding, yet the power is conferred to increase the stock in a certain way in a certain event, and although it may not have been paid in, yet the defendant is estopped to show that fact by his action, and he must stand by his engagement.

*Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220.

The cases growing out of the failure of the Pacific National Bank of Boston are fully in accord with the foregoing.

*Delano v. Butler*, 118 U. S. 649, 30 L. ed. 264, 7 Sup. Ct. Rep. 39; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. ed. 779, 10 Sup. Ct. Rep. 417; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. ed. 702, 11 Sup. Ct. Rep. 984; *Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; *Thayer v. Butler*, 141 U. S. 234, 35 L. ed. 711, 11 Sup. Ct. Rep. 987.

Many acts may be contrary to the provisions of the statute, and so be held invalid and illegal as between the shareholders and the corporation, and yet valid in favor of creditors, or the act or contract may contravene the plain provision of the statute, and yet not be, in legal contemplation, void.

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*Union Nat. Bank v. Matthews*, 98 U. S. 625, 25 L. ed. 189.

When a person subscribes to the capital stock of a corporation he must be held to contemplate and intend that the corporation shall incur debts and pledge its capital, including the liability of its members for unpaid capital, as security. Creditors who, in good faith, trust the corporation upon the faith of this security, stand in the position of innocent purchasers for value to the extent of their equitable lien, and it would be most unjust to permit a shareholder to disaffirm his contract and refuse to pay his share of the capital, for it has been thus pledged, with his knowledge and consent, to innocent third parties.

*Morawetz, Priv. Corp.* § 839.

\***Mr. Justice Harlan** delivered the opinion of the court: [203]

This case went off in the circuit court upon a motion for a judgment in favor of the plaintiff upon the pleadings. The motion was sustained and judgment was entered in accordance with the prayer of the petition. That judgment was affirmed in the circuit court of appeals, Judge Sanborn dissenting. 33 C. C. A. 1, 14, 60 U. S. App. 720, 743, 89 Fed. Rep. 843, 856. The case is here upon writ of error sued out by the defendant Scott.

The case made by the petition is substantially as follows:

The First National Bank of Sedalia, Missouri, was organized on the 30th of October, 1865, with a capital stock of \$100,000 and thereafter, until the 24th day of October, 1885, continued to do a banking business.

On the day last named the bank, pursuant to the provisions of \*the act of Congress approved July 12th, 1882 (22 Stat. at L. 162, chap. 290), extended the period of its succession for a term of twenty years from and after the 30th of October, 1885; and on the 24th of October, 1885, the Comptroller of the Currency issued his certificate stating that the bank had complied with the provisions of the act of Congress in thus extending the period of its existence, and was authorized to have succession until the close of business on the 30th of October, 1905. [204]

On the 6th of September, 1890, the bank increased its capital stock in the sum of \$150,000; and on the 17th of January, 1891, the Comptroller of the Currency certified that it had increased its stock to the above extent in accordance with the provisions of the act of May 1st, 1886 (24 Stat. at L. 18, chap. 73), and that such increase was approved; also, that the increase had been duly paid in as part of the capital stock of the company.

The bank continued to do a banking business upon the basis of a capital stock of \$250,000 until the 4th day of May, 1894, on which day it became insolvent, closed its doors, and ceased to do business.

On the 10th of May, 1894, the original plaintiff, W. A. Latimer, was duly appointed receiver of the bank by the Comptroller of the Currency under the laws relating to na-

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tional banking associations. The defendant in error, Deweese, was after that date substituted in his place as receiver.

In winding up and settling the affairs of the bank the Comptroller of the Currency determined that it was necessary to enforce the individual liability of stockholders and to collect from them an amount equal to 75 per cent of their stock at par value; and on the 13th day of April, 1895, that officer made an assessment and requisition upon shareholders for the sum of \$187,500, to be paid by them ratably on or before the 15th day of May, 1895, and made demand upon the defendant Scott for \$75 upon every share of the capital stock of the bank held or owned by him at the time of the failure of the bank as above stated, payable on or before the 15th day of May, 1895. The receiver was directed to enforce against shareholders the payment of the amounts assessed against them.

[205] At the time of the failure and suspension of the bank the defendant \*Scott was the owner and holder of fifty shares of its capital stock of the par value of \$100 each. The amount ratably due by him as such shareholder under the above assessment was \$3,750.

On the 17th day of April, 1895, the receiver of the bank notified the defendant of the assessment and requisition and demanded payment of the same; but he did not pay that sum or any part thereof. Hence this action.

Judgment was asked for the sum of \$3,750, with interest from May 15th, 1895, as well as for costs of suit.

The defendant in his answer admitted the organization of the bank and the extension of the period of its incorporation as alleged; also that the bank continued to do a banking business as set out in the petition, and that it had become insolvent and closed its doors. He also admitted the appointment and qualification of the receiver and the allegations of the petition as to the order of the Comptroller of the Currency.

Further answering, he alleged, that on September 6th, 1890, the bank, by a vote of the owners of two thirds of its capital stock, voted to increase that stock in the sum of \$150,000; that it notified the Comptroller that the whole amount of such increase had been paid in; that on January 17th, 1891, that officer—then knowing that more than the entire capital of the bank was loaned, directly and indirectly, to its president, and that the amount so loaned had been steadily increased for several years up to the date just named by adding the interest which was not paid to the notes evidencing the loans or the renewals thereof, and who based his action wholly upon the notification from the bank—issued a certificate stating that the amount of the increase of capital was \$150,000, that the same was paid in, and that such increase was approved; that thereafter, until May 24th, 1894, the bank continued to do business with a pretended capital of \$250,000.

That "in September, 1890, the officers of  
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said bank informed and represented to defendant as follows: That said bank contemplated increasing its capital stock from \$100,000 to \$250,000; that said intended increase of capital was made desirable on account \*of the increasing business of said [206] bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock, and then had a surplus of \$50,000 over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the 2,500 shares of stock worth the sum of \$108."

That relying upon such representations the defendant—never having held or owned any stock in the bank—subscribed for fifty shares of the proposed increase of \$150,000, and in October, 1890, deposited in the bank the sum of \$5,400.

That it was the understanding between the defendant and the bank that that sum was to be held by it and applied in payment of defendant's subscription for fifty shares, when all of the proposed increase was subscribed and the money therefor paid into the bank, "and the issues of the shares of said increase could be legally made."

That the bank gave to the defendant a receipt for said sum of \$5,400, and about October 25th, 1890, delivered to him a certificate for fifty shares of "its said pretended increase of capital;" and—

That the "bank then, falsely and fraudulently and with intent to deceive defendant, represented to defendant that the said increase of capital had been lawfully made, and that the full amount thereof had been subscribed for and paid in full, and defendant, deceived by said representations, and relying thereon, accepted and retained said certificate, and that defendant held and claimed as owner said certificate thereafter and until the closing of said bank, and in the years 1891 and 1892 received and retained alleged dividends aggregating 18 per cent of the par value of said certificate; that said alleged dividends were paid out of the money paid as aforesaid by defendant to said bank."

The defendant further alleged that in September, 1890, and for many months prior thereto and afterwards, the bank was in fact wholly insolvent, had no surplus whatever, and at the time of the increase of the stock all of its capital had been lost,—its liabilities irrespective of its capital stock and alleged surplus \*exceeding its assets,—and it [207] was earning no dividends upon its capital;

That said pretended increase of stock was never of any value or validity whatever; that only about *two thirds of the increased stock was ever paid*; that the officers of the bank made false entries in its books and records for the purpose of showing an apparent surplus, and declaring a dividend to themselves therefrom, turning the dividends into the bank in pretended payment for a large part of the increased stock;

That the whole transaction was a sham for the purpose of bolstering up an insolvent institution by obtaining large sums of money  
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from the subscribers for the increased stock, and for the further purpose of "watering" its capital stock and permitting its officers to appropriate to themselves, without paying anything therefor, a large part of such pretended increase, of all of which defendant had no knowledge whatever until long after the bank had closed its doors on May 4th, 1894, nor had defendant any information whatever that could in any way have created a suspicion thereof;

That the books and records of the bank during all the time after October 25th, 1890, had shown, and it had been made by them to appear, that all of the pretended increase of capital was paid in; and that from a time prior to the last-named date until the bank closed its books and records were systematically, skilfully, and cunningly falsified by its officers, and so kept that the defendant could not by the utmost diligence have ascertained the true condition of the bank; and,

That as soon as he discovered that the increased stock was not fully paid in, defendant disclaimed and denied that he was or ever had been a stockholder of the bank.

Such being the case made by the pleadings, we are to inquire whether there was error in giving judgment against the defendant.

By § 5151 of the Revised Statutes, "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Within the meaning of that section, was the defendant, in view of the facts stated in the pleadings, to be deemed a shareholder of the bank when it suspended and was put into the hands of a receiver?

The defendant admits in his answer that he held, and for three years and more previous to that date had held, a certificate for fifty shares of the bank's stock, and exercised the rights of a shareholder by receiving dividends for the years 1891 and 1892, aggregating 18 per cent of the par value of the stock standing in his name on the book of the association. He thus enjoyed the privileges of a shareholder.

The defendant, however, contends that although he may have exercised the rights of a shareholder in holding a certificate of shares and in receiving and retaining dividends, he was not a shareholder within the meaning of § 5151 so as to become individually liable, to the extent prescribed by that section, for the contracts, debts, and engagements of the bank.

That position is supposed to be justified by § 5142 of the Revised Statutes declaring that "any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in

the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." That section was modified, in some respects, by the act of May 1st, 1886, chap. 73, which provided "that any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding \*the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided." Under this last statute the bank proceeded when by the vote of two thirds of its shareholders it determined to increase its stock by \$150,000. 24 Stat. at L. 18, § 1.

The defendant lays great stress on the words in § 5142, "no increase of capital shall be valid until the whole amount of such increase is paid in," and until the Comptroller shall certify that the amount of the proposed increase "has been duly paid in as part of the capital of such association." But does it follow that one who claimed to be a shareholder in respect of an increase of the bank's capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under § 5151, by simply proving, after the bank has suspended and has been placed into the hands of a receiver, that the whole amount of the proposed increase was not in fact "paid in" as required by § 5142, although the contrary was certified by the Comptroller upon the bank's report to that officer? We think not.

The literal construction insisted upon by the defendant might produce results which we cannot suppose were ever contemplated by Congress. Referring to that construction the court below well said: "If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of the certificates for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result. If this is the true meaning of the statute, it is made possible for parties in control of a national bank, with the approval of the Comptroller, to authorize the increase of the capital stock, to obtain subscription and payment in full for all the shares but one or two and then, if that be desirable, to deny to the holders of these full-paid certificates any participation in the control of the bank, or,



[210] in case the bank becomes insolvent, \*to shield these holders of certificates from liability to creditors. Certainly a construction of the statute having such results should not be adopted unless the statute as a whole imperatively demands it."

The primary object of the provision that "no increase of capital shall be valid until the whole amount of such increase is paid in" was to prevent the "watering" of stock, that is, prevent banking business being done upon the basis of an increased capital which did not in fact exist. If this prohibition be disregarded by a national bank, the conduct of its business could no doubt be controlled by the representatives of the government so far as might be necessary to compel obedience to the law. Rev. Stat. § 5205. But the statute does not, in terms, make void a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. Certainly, the statute should not be so applied in behalf of a person sought to be made liable as a shareholder, when, as, in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank which were open to inspection, as of right, by creditors. Rev. Stat. § 5210. As between the bank and the defendant, the latter having paid the amount of his subscription for shares in the proposed increase of capital was entitled to all the rights of a shareholder, and therefore, as between himself and creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him. That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital had been paid in, was a matter between it and the government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, \*who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by § 5151.

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In *Union Nat. Bank v. Matthews*, 98 U. S. 621, 629, 25 L. ed. 188, 190, it appeared that a national bank had made a loan of money, the repayment of which by the borrower was in part secured by a deed of trust on real estate. The borrower insisted that the taking of the deed of trust as security was in violation of the act of Congress. This court conceded that the statute by clear implication forbade a national bank from making a loan on real-estate security, but held that the violation of the statute by the bank was a matter of which the borrower could not complain, saying: "We cannot believe it was meant that stockholders, and perhaps depos-

itors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." The doctrine of the *Matthews Case* has been often reaffirmed. *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. ed. 1050, 1052; *Jones v. New York Guaranty & Indemnity Co.* 101 U. S. 622, 628, 25 L. ed. 1030, 1035; *Fritts v. Palmer*, 132 U. S. 282, 291, 33 L. ed. 317, 320, 10 Sup. Ct. Rep. 93; *Logan County Nat. Bank v. Townsend*, 189 U. S. 67, 76, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 251, 36 L. ed. 956, 961, 13 Sup. Ct. Rep. 66.

By § 5201 of the Revised Statutes it is provided that "no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association." "While this section," this court said in *First Nat. Bank v. Stewart*, 107 U. S. 676, 677, 27 L. ed. 592, 2 Sup. Ct. Rep. 778, 779, [212] "in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can, then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves."

These principles are, in our judgment, applicable to the case before us.

The defendant alleged that he subscribed for the fifty shares of the proposed increase of the bank's capital and deposited in the bank the amount necessary to pay for the stock, upon an understanding with the bank that the amount so deposited should be applied in payment of his subscription when all of the proposed increase of capital had been subscribed for and paid in, so that

shares based upon such increase could be legally issued. But this does not present the whole case. The defendant, having paid in the amount subscribed, subsequently accepted a certificate for the shares subscribed for by him, knowing, as he must be conclusively presumed to have known, that the money paid in by him was the basis of such certificate. He assumed the position, and claimed and exercised the rights, of a shareholder. He drew money from the bank as dividends upon his stock. No understanding which the defendant may have had with the officers of the bank prior to his completed subscription of stock could, under the circumstances disclosed, relieve him from the liability attaching to him as a shareholder, after he had, in the most unequivocal manner, claimed and was accorded by the bank the rights of a shareholder. It may be—although upon this question we express no

[213] opinion—that the \*defendant, by proper proceedings instituted in good faith and in due time before the suspension of the bank, could have had his subscription canceled upon the ground that the whole amount of the proposed increase of capital had not in fact been paid in, although according to the pleadings the contrary was certified by the Comptroller. But immediately upon the failure of the bank the rights of creditors attached under § 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. We concur with the circuit court of appeals in holding that under § 5142, as modified by the act of May 1st, 1886, each subscription for portions of increased capital “when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber paying his subscription in full cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for.” If this be a sound view, as we think it is, it follows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to enjoy, the privileges of a shareholder, as against the bank, is a shareholder upon whom assessments may be made in conformity with § 5151.

The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed not only for their protection, but to give confidence to all dealing with national banks in respect of their contracts, debts, and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of § 5151, if, at the time the rights of creditors ac-

crued, he occupied and was accorded the rights appertaining to that position.

Although this question has not arisen in any former case in \*the precise form in which [214] it is here presented, the views we have expressed are in line with former adjudications.

In *Aspinwall v. Butler*, 133 U. S. 595, 607, 609, 33 L. ed. 779, 783, 10 Sup. Ct. Rep. 417, 421, 422, the principal question was as to the liability under § 5151 of one who had subscribed and paid for a part of an authorized increase of the stock of a national bank, the whole amount of such increase not having been taken up by subscriptions. Referring to a by-law of the association relating to the power of the directors when there was a deficiency in subscriptions arising from the failure of some to take stock who had the privilege of doing so, the court, speaking by Mr. Justice Bradley, said: “There was no express condition that the individual subscriptions should be void if the whole \$500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed, and as to payment of instalments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital. There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances. It could hardly be contended that the present case, in which more than 92 per cent of the contemplated increase of capital was actually subscribed and paid in, would belong to that category. In *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. ed. 47, only \$320,000 out of \$500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations. Some reliance is placed on the words of the act of Congress which authorizes an increase of capital within \*the maxi- [215] mum prescribed in the articles of association. They are found in § 5142 of the Revised Statutes, which declares that any banking association may, by its articles, provide for an increase of its capital from time to time, but adds, ‘no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount,’ etc. This clause would have been violated by an issue of \$500,000 of new



stock, when only \$461,350 was paid in; but not by an issue of the exact amount that was paid in. The clause in question was intended to secure the actual payment of the stock subscribed, and so as to prevent what is called watering of stock. In the present case the statute was strictly and honestly complied with. The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?" Again: "The stock was lawfully created, the defendant subscribed for the shares in question and paid for them, and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. The defendant became a stockholder; he held the shares in question when the bank finally went into liquidation; and, of course, became liable under § 5151 of the Revised Statutes to pay an amount equal to the stock by him so held."

In *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 233, 234, 35 L. ed. 702, 704, 11 Sup. Ct. Rep. 984, 985, the court, again speaking by Mr. Justice Bradley, said: "The defendant in error was just as much bound by her subscription to the new stock as if the whole \$500,000 had been subscribed and paid in. The only question to be considered, therefore, is whether the fact that the defendant in error did not call for and take her certificate of stock made any difference as to her status as a stockholder. We cannot see how [216] it could make the slightest difference. Her actually going or sending to the bank, and electing to take her share of the new stock, and paying for it in cash, and receiving a receipt for the same in the form above set forth, are acts which are fully equivalent to a subscription to the stock in writing, and the payment of the money therefor. She then became a stockholder. She was properly entered as such on the stock book of the company, and her certificate of stock was made out ready for her when she should call for it. It was her certificate. She could have compelled its delivery had it been refused. Whether she called for it or not was a matter of no consequence whatever in reference to her rights and duties. The case is not like that of a deed for lands, which has no force, and is not a deed, and passes no estate, until it is delivered. In that case everything depends on the delivery. But with capital stock it is different. Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, 181 U. S.

without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself, and an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party." To the same effect was *Thayer v. Butler*, 141 U. S. 234, 35 L. ed. 711, 11 Sup. Ct. Rep. 987.

It is supposed that *First Nat. Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. ed. 1007, 1011, 19 Sup. Ct. Rep. 739, 742, is in opposition to the views herein expressed. We do not think so. In the case referred to it appeared that the bank, located at Concord, New Hampshire, purchased, for purposes of investment, 100 shares of the stock of the Indianapolis National Bank, doing business at Indianapolis, Indiana, and after such purchase appeared upon the books of the latter bank as the owner and holder of the shares so purchased. The bank at Indianapolis suspended and was put into the hands of a receiver. The question presented was whether, "in respect of the stock standing in its name, the bank in New Hampshire could be held as a shareholder in the other bank under § 5151. This court, following the decisions in prior cases, including *California Nat. Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831, held that a national bank had no power or authority to invest its surplus funds in the stock of another national bank. It was also adjudged that in the case of such a purchase the purchasing bank could plead its want of power, and thereby protect itself against the liability imposed upon shareholders by § 5151. The court said: "If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act. It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the validity of all the contracts by which the registered shareholders acquired their respective shares. The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course,



assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted."

[218] The difference between that case and the present one is apparent. In the case before us there was no want of power in the defendant to subscribe for stock in the bank at Sedalia \*and to assume the position of a shareholder. An individual may become a shareholder in a national bank by his own voluntary act. He can, if he choose, so act as to be estopped from saying that he is not a shareholder and liable as such for the contracts, debts, and engagements of the bank. But a national bank is without authority to use its funds for the purchase of the stock of another national bank merely for purposes of investment, and therefore, as held in the *Hawkins Case*, it could not under such circumstances become a shareholder within the meaning of § 5151. Of the powers of a national bank under the statutes providing for their creation everyone must take notice. Whether a national bank may not be deemed a shareholder, within the meaning of § 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which, in this case, no opinion need be expressed.

*The judgment is affirmed.*

INTERNATIONAL NAVIGATION COMPANY, *Petitioner*,  
v.  
FARR & BAILEY MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 218-227.)

*Admiralty—finding of unseaworthiness—Harter act—liability for failure to close portholes.*

1. The concurrent decisions of the two lower courts that a ship was unseaworthy at the commencement of a voyage will be accepted by the Supreme Court of the United States, if there is no adequate ground to conclude that the finding was erroneous.
2. Negligence in failing to have the portholes in a compartment of a vessel closed when the voyage begins, whereby the vessel is rendered unseaworthy and in consequence injury is sustained to cargo by water coming through such portholes during the voyage, renders the shipowner liable under the Harter act of February 13, 1893 (27 Stat. at L. 445, chap. 105), since the negligence is not a mere fault or error in navigation or in the management of the vessel, but amounts to a failure to exercise due diligence to make the vessel seaworthy.

[No. 193.]

*Argued March 12, 13, 1901. Decided April 22, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a decision

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reversing a decree dismissing a libel in admiralty. *Affirmed.*

See same case below, 39 C. C. A. 197, 98 Fed. Rep. 636.

Statement by Mr. Chief Justice Fuller:

\*This was an action brought by the Farr & [219] Bailey Manufacturing Company against the International Navigation Company, owner of the steamship *Indiana*, in the district court of the United States for the eastern district of Pennsylvania, in admiralty, to recover the sum of \$2,084.15, for damages to twenty bales of burlaps which were delivered to the navigation company at Liverpool, England, on board that steamship, in good order and condition, for carriage to the manufacturing company at Philadelphia. Upon the arrival of the steamship at Philadelphia the burlaps were found to have been damaged by sea water. The case was heard in the district court, and the libel sustained, and the cause referred to a commissioner to determine the extent of the loss. 94 Fed. Rep. 675. The navigation company applied for a reargument, which was had, and thereupon the libel was dismissed. 94 Fed. Rep. 678. From this decree the manufacturing company appealed to the circuit court of appeals for the third circuit, and that court, one of its members dissenting, reversed the decree of the district court, and held the navigation company liable. 39 C. C. A. 197, 98 Fed. Rep. 636. The case was then brought to this court on certiorari.

In the first opinion of the district court it was stated that—

"In May, 1895, twenty bales of burlaps in good condition were received by the vessel in Liverpool, consigned to the libellant, in Philadelphia, and a bill of lading was given therefor. The bales were stowed with some other goods in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, 2 or 3 feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool water was discovered in the compartment; and when the hatches were opened, a day or two later, it was found that the after \*port on the starboard side was admitting [220] water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The libellant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability."

"We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped, and supplied, and that she was in all respects fit for the voyage, except in the one respect of

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which the libellant complains,—the condition of the after port on the starboard side in compartment No. 3.”

And it was found “as a fact, that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool.”

In the second opinion it was said:

“It seems to me that, although the owners of the vessel provided the proper equipment for the porthole under consideration, and although the failure to close it properly was due to negligence in the use of such equipment, nevertheless the result was unseaworthiness, because the vessel set sail with a hole in her side that was not only unknown to her officers, but was believed not to exist. She was therefore not in a condition to afford due protection to the cargo in this particular compartment. If the hole had been caused by collision while she lay at her berth, and she had been sent upon her voyage without repair, it could not be successfully asserted that she was seaworthy, although the proper tools and materials might have been among the ship's stores, and the failure to repair might be properly said to have been due to negligence in failing to use the equipment at hand.”

The circuit court of appeals said that—

[221] “These goods were stowed in a compartment on the lower \*steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened; but, after the *Indiana* had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired.”

And found as to the port:

“The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened; and we are of opinion that, by reason of this fact, the vessel was unseaworthy.”

**Mr. J. Rodman Paul** argued the cause, and, with *Messrs. Biddle & Ward*, filed a brief for petitioner:

Among the many English cases, and in the case of *The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7, there is no hint that knowledge or ignorance of the open or insufficiently protected port was considered important as a criterion of seaworthiness.

*Steel v. State Line S. S. Co.* L. R. 3 App. Cas. 72; *Carmichael v. Liverpool Sailing Ship Owners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408.  
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Misuse or nonuse of equipment is a fault of navigation or management, whether occurring before or after sailing.

*Hedley v. Pinkney & Sons S. S. Co.* [1894] A. C. 222; *The Carron Park*, L. R. 15 Prob. Div. 203; *The Mexican Prince*, 82 Fed. 484; *Carmichael v. Liverpool Sailing Ship Owners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *Good v. London S. S. Owners' Mut. Protecting Asso.* L. R. 6 C. P. 563.

The employment of a sufficient number of experienced navigators, officers, and men, selected with due care, renders the vessel seaworthy in this respect, although there may be fatal latent defects of intellect, memory, and perception existing in those selected.

*Earnmoor S. S. Co. v. Union Ins. Co.* 44 Fed. 374; *MacLachlan, Shipping*, 418; *Carver, Carriage by Sea*, § 18.

The Harter act expressly relieves the owners from faults or errors in navigation or in the management of the vessel; yet all acts of management occurring at sea are covered by the word “navigation.”

*Carmichael v. Liverpool Sailing Ship Owners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *Good v. London S. S. Owners' Mut. Protecting Asso.* L. R. 6 C. P. 563; *Canada Shipping Co. v. British Shipowners' Mut. Protection Asso.* L. R. 23 Q. B. Div. 342; *Carver, Carriage by Sea*, § 26, note Z.

It was not the intent of the statute to restrict faults of management to those occurring while the vessel was actually at sea, which would then have been also faults of navigation.

*The Glenochil* [1896] P. 10; *The Rotherfield*, 8 R. I. D. § M. pp. 102, 104.

**Mr. John Frederick Lewis** argued the cause, and, with *Mr. Horace L. Cheyney*, filed a brief for appellee:

The decision as to the seaworthiness of the *Silvia*, a water-tight vessel, does not determine this case, where the vessel was not water-tight, but had an open port only 2 or 3 feet above the water line, opening directly into a cargo hold.

*The Manitoba*, 104 Fed. 145.

The shipowner does not use “due diligence” to make the vessel seaworthy, within the meaning of the Harter act, by merely furnishing proper equipment. It requires “due diligence” also on the part of his servants in the use of the equipment before the commencement of the voyage, and until it is actually commenced.

*Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408; *The Mary L. Peters*, 68 Fed. 919; *The Flamborough*, 69 Fed. 470; *The Alvena*, 74 Fed. 252; *The Colima*, 82 Fed. 665; *The Manitoba*, 104 Fed. 145.

The owner, in order to relieve himself of liability on account of error, or fault in “management,” must show a condition precedent; that is, either seaworthiness or the exercise of due diligence to make the ship seaworthy, and the burden is upon the owner to show the exercise of due diligence.

*The Friesland*, 104 Fed. 99; *The Manitoba*, 104 Fed. 145.

It is only errors or faults of management during the voyage which excuse the owner.



*The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408; *The Mexican Prince*, 82 Fed. 484.

There is a clear distinction between ports which in ordinary practice are left open, and an insecurely fastened or open porthole within a few feet of the water line.

*Hedley v. Pinkney & Sons S. S. Co.* [1894] A. C. 222; *Steel v. State Line S. S. Co. L. R.* 3 App. Cas. 72.

Because inaccessibility creates unseaworthiness it does not follow that the converse is true, and that accessibility produces seaworthiness.

*Steel v. State Line S. S. Co. L. R.* 3 App. Cas. 72.

[221] \*Mr. Chief Justice Fuller delivered the opinion of the court:

Counsel for petitioner states that the question raised on this record is: "Was the *Indiana* unseaworthy at the time of beginning her voyage from Liverpool to Philadelphia, or was the failure to securely fasten the port covers and keep them fastened a fault or error in the management of the vessel under the exemption of the 'Harter act'?"†

[222] \*The courts below concurred in the conclusion that the *Indiana* was unseaworthy when she sailed because of the condition of the porthole, but the district judge on the reargument felt constrained to yield his individual convictions to the rule he understood to have been laid down in *The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

*The Silvia* was decided, as all these cases must be, upon its particular facts and circumstances. The case is thus stated by Mr. Justice Gray, who delivered the opinion of the court:

[223] "The *Silvia*, with the sugar in her lower hold, sailed from \*Matanzas for Philadelphia

on the morning of February 16, 1894. The compartment between decks next the fore-castle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes and a small quantity of stores. This compartment had four round ports on each side, which were about 8 or 9 feet above the water line when the vessel was deep-laden. Each port was 8 inches in diameter, furnished with a cover of glass  $\frac{5}{8}$  of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken,—whether by the force of the seas or by floating timber or wreckage was wholly a matter of conjecture,—and the water came in through the port, and damaged the sugar."

And again:

"But the contention that the *Silvia* was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The portholes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or dead lights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were

†Act of February 13, 1893 (27 Stat. at L. 445, chap. 105), entitled "An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property." The 1st, 2d, and 3d sections read:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and out-

fit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."



battered down they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get [224] at the ports, the fact "that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing."

In the present case the compartment in which the burlaps were stowed was used exclusively as a cargo hold; the glass and iron covers were intended to be securely closed before any cargo was received; the persons whose duty it was to close them or see that they were closed supposed that that had been properly done; and the hatches were battered down with no expectation that any more attention would be given to the port covers during the voyage; but in fact the port was not securely covered, and there was apparently nothing to prevent the influx of water, even under conditions not at all extraordinary, the port being only 2 or 3 feet above the water line.

We are of opinion that the difference in the facts between the two cases was such that the court of appeals was at liberty to reach a different result in this case from that arrived at in *The Silvia*. The latter decision simply demonstrated the justness of Lord Blackburn's observation in *Steel v. State Line S. S. Co.* L. R. 3 App. Cas. 72, that the question whether a ship is reasonably fit to carry her cargo must be "determined upon the whole circumstances and the whole evidence."

On the question of fact in this case, we have the concurrent decisions of the two courts that the *Indiana* was unseaworthy at the commencement of the voyage, and as we find no adequate ground to conclude that the finding was erroneous, the settled doctrine that it should be accepted is applicable. *The Carib Prince*, 170 U. S. 655, *sub nom.* *Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

But it is contended that in spite of the fact that the condition of the porthole rendered the ship unseaworthy when she sailed, the omission to securely cover it was a fault or error in management and within the exemption of the 3d section of the Harter act. The proposition is that if the owner provides a vessel properly constructed and equipped, he is exempted from liability, no [225] "matter how unseaworthy the vessel may actually be, at the commencement of the voyage, through negligent omission or commission in the use of the equipment by the owner's servants. Or, to put it in another way, if the unseaworthiness is not the result of error or fault in management, the 3d section 181 U. S.

does not apply, and even if it were, the exemption still cannot obtain unless it appears that the owner used due diligence to make the vessel seaworthy. And it is said that the owner does exercise such diligence by providing a vessel properly constructed and equipped, and that while he is responsible for the misuse or nonuse of the structure or equipment by his "shore" agents, he exercises due diligence by the selection of competent "sea" agents, and that he is not responsible for the acts of the latter, although they produce unseaworthiness before the commencement of the voyage.

We cannot accede to a view which so completely destroys the general rule that seaworthiness at the commencement of the voyage is a condition precedent, and that fault in management is no defense when there is lack of due diligence before the vessel breaks ground.

We do not think that a shipowner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship in all respects seaworthy; and that, in our judgment, means due diligence on the part of all the owner's servants in the use of the equipment, before the commencement of the voyage and until it is actually commenced.

The ruling in *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. 408, is in point. The *Rossmore* left Baltimore with a port improperly caulked, which rendered the vessel unseaworthy, through the negligence of the ship's carpenter, who was a competent person. Sea water entered through this port and damaged the cargo. The bill of lading incorporated the Harter act by reference, and it was held, as correctly stated in the syllabus, that "to exempt the shipowner from liability it was not sufficient merely to show that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shown that those persons whom he employed to act for him in this [226] respect had exercised due diligence; and that therefore the negligence of the ship's carpenter prevented the exemption from applying, and the shipowner was liable."

The obligation of the owner is, in the language of § 2 of the act, "to exercise due diligence, to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage;" and that obligation was not discharged when this vessel sailed with a hole in her side, under the circumstances disclosed, whether the duty of seeing that it was closed devolved on officers of the ship, or the foreman of the stevedores, or on all of them. The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised;

and it is for the owner to establish the existence of one or the other of these conditions. The word "management" is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing.

It is, of course, not to be understood as intimated that failure to close portholes necessarily creates unseaworthiness. That depends on circumstances, and we accept the finding of the district court and of the court of appeals, that it did so under the circumstances of this case.

Nor do we say that the liability rests alone on the ignorance of the officers that the port covers were not securely fastened. This is not a case where it appears that the port would ordinarily have been left open, to be closed as the exigency might require, and where failure to close it during the voyage might be an error or fault in management. The importance of this point is well illustrated by *Dallas, J.*, in the court of appeals, thus: "But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not 'usually be left open for the 'admission of light,' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived."

*Decree affirmed.*

H. L. BEDFORD and Lou M. Bedford, His Wife, *Petitioners*,  
v.

EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, New York.

(See S. C. Reporter's ed. 227-243.)

*Building and loan associations—doing business in other states—impairing obligation of contract of—usury.*

1. The issuance of a certificate of stock to a member of a foreign loan association, and his application for a loan, made before the passage of a statute restricting the right of the association to do business in the state, constitute a contract, the obligation of which cannot be impaired by such statute; and therefore a loan made on that application after the statute was passed and to which

bis contract gave him a right, is valid, notwithstanding the statute.

2. A contract of a foreign loan association, which is not usurious under the laws of the state where the association is domiciled and where the obligations are payable, cannot be attacked for usury in the state where the land mortgaged is situated.

[No. 153.]

*Argued January 30, 31, 1901. Decided April 22, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision of a Circuit Court foreclosing a mortgage to a building and loan association. *Modified and affirmed.*

Statement by Mr. Justice McKenna:

\*This suit was brought in the circuit court of the United States for the western district of Tennessee by respondent to foreclose a mortgage executed by petitioners. A decree was entered in favor of the respondent. 88 Fed. Rep. 7. There was an appeal taken to the United States circuit court of appeals for the sixth circuit. From that court the case came here on certificate. Subsequently a writ of certiorari was issued.

The following are some of the material facts contained in the statement of the circuit court of appeals. Other facts will be stated in the opinion:

"The Eastern Building & Loan Association of Syracuse, New York, is a corporation organized under the laws of the state of New York for the purpose and with the power of conducting a general building association business in New York and other states. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay \$1 initiation fee for each share of \$100, and 75 cents per month as dues on each share, and certain fines on default; and when the whole amount of dues and dividends paid in amounts to \$100 the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance, and secure their compliance with requirements as to dues, fines, and interest by mortgage or otherwise. Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock, but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of di-

NOTE.—On the impairment of the obligation of contracts—see notes to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 12; and *Fletcher v. Peck*, 3 L. ed. U. S. 162.

On validity of contracts made by foreign corporations which have not complied with statu-

tory conditions of the right to do business in the state—see *Edison General Electric Co. v. Canadian Pacific Nav. Co.* (Wash.) 24 L. R. A. 315, and note.

As to usury in loans by building associations—see *Reeve v. Ladies' Bldg. Asso.*, *Perpetual* (Ark.) 18 L. R. A. 129, and note. And see *Andruss v. People's Bldg., L. & Sav. Asso.* 36 C. C. A. 343.



rectors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares, or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse, together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called 'the local board' in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's place of residence, who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer, through whom members might, if they desired, forward payments due to the association at Syracuse; but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders, and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office, in registered letter, express or money order, or drafts."

On the 2d day of January, 1891, H. L. Bedford, one of the petitioners, then being a resident of Shelby county, Tennessee, made application in due form, and under seal, to become a member of the association, and subscribed for forty-six shares of instalment stock. He delivered the application to the soliciting agent of the association at Memphis, to be forwarded to Syracuse. He agreed in the application "to abide by all the terms, conditions, and by-laws contained or referred to in the certificate of shares," and to comply with the rules and regulations of the association; and he appointed the secretary of the association as proxy to appear and vote on his shares.

[230] \*On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was numbered 4,773, and stated the number of shares to be forty-six, and the amount \$4,600; date of maturity, August 1, 1897. It certified that Bedford was thereby constituted a member of the association and holder of forty-six shares therein of \$100 each. "The terms, conditions, and by-laws printed on the front and back" of the certificate were made part of the contract, and it was stated "that this certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions."

These conditions were substantially as follows:

The payments of a monthly instalment of 75 cents on each share until it matures or is withdrawn; a fine of 10 cents per share per

month for each month if the payment of the instalment shall be in arrears; declaring the stock nonforfeitable; providing for its sale at auction if the monthly instalments due thereon be in arrears for six months or more, and providing for the application of the proceeds of the sale to the payment of such instalments and accrued fines; the balance remaining, if any, to be paid to the member in whose name the stock stands at the time of sale. "If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits."

Further conditions of the stock were "(4) that members could withdraw their monthly instalments at any time by giving thirty days' notice, and to receive 6 per cent annual interest on all shares of six months' standing and up to two years; the third year, 7 per cent; any time after the third year and before maturity, 8 per cent; (5) if a shareholder died, his personal representative could continue or withdraw his share; (6) at stated periods the profits arising from interest, premiums, fines, and other sources shall be apportioned among the shares in good standing; (7) all payments were required to be paid to an authorized agent, or sent to the secretary at the home office; \* (8) [231] reservation of a right in the association to make investigation prior to approval of claims; (9) the by-laws of this association, which are attached to and indorsed hereon, are a part of this contract, and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder; (12) no shareholder to have an interest in the affairs, assets, or funds of the association, except as above stated, or to assume liability, except as hereafter described; (13) upon the cessation or determination of the contract, all payments made thereon shall become forfeited to the association; (14) actions to be brought within six months after filing proofs in the county of Onondaga, in the state of New York; (15) 'no agent has authority to change this contract, and the association assumes no liability for any statements not contained in its printed literature.'"

The certificate concluded as follows:

Given under the seal of said association at Syracuse, New York, the second day of Feby., A. D. 1891.

H. H. Loomis, President.

[L. s.] Jno. W. Reynolds,  
Secretary and Gen'l Manager.

On the 20th of March, 1891, Bedford made an application for a preference for an advance, which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at

Syracuse. Bedford then applied on June 20 for the loan in the letter following:

*Application for an Advance.*

To the Board of Directors of the Eastern Building & Loan Association of Syracuse, N. Y.

Gentlemen:—

At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4,773 of your association, at a premium of 10 per cent, I now respectfully request the advance be granted. I hereby agree to comply with the charter and \*by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. Bedford, Applicant.

Witness: J. H. T. Martin.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage recited among other things that the—

“grant is intended as security for the payment of the sum of fifty-six hundred eighty-three and 8/100 dollars, the same being the principal, interest, and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent per annum, payable semiannually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators, and assigns, hereby covenants and agrees with the party of the second part, its successors and assigns, to pay said principal, interest, and premiums at maturity and the interest accruing on said notes after maturity, and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association. . . .”

[233] \*The seventy-eight notes were all of the same tenor, *mutatis mutandis*, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-

100 dollars (\$72 86/100) to the order of the Eastern Building & Loan Association at its office in Syracuse, N. Y. Value received.

H. L. Bedford.

Bailey, Tenn., May 1, 1891.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act passed by the legislature of Tennessee went into effect:—

CHAPTER 122.

An Act to Amend Chapter 31 of the Acts of 1877, Declaring the Terms on Which Foreign Corporations Organized for Mining or Manufacturing Purposes May Carry on their Business and Purchase, Hold, and Convey Real and Personal Property in this State, So as to Make the Provisions of Said Act Apply to all Foreign Corporations that May Desire to Own Property or to Do Business in this State.

Sec. 1. Be it enacted by the general assembly of the state of Tennessee, That chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other states or countries for any purpose whatsoever, which may desire to do any kind of business in this state.

Sec. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this state, for any purpose whatever, desiring to own property or carry on business in this state, of any kind or character, shall first file in the office of the secretary of the state a copy of its charter, and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by § 2 of chapter 31 of Acts of 1877.

Sec. 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business, or \*to own or acquire any property in this state, without having first complied with the provisions of this act; and a violation of this statute shall subject the offender to a fine of not less than \$100 nor more than \$500, at the discretion of the jury trying the case. [234]

Sec. 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state, just as though it were created under the laws of this state.

Sec. 5. Be it further enacted, That when such corporation has no agent in this state upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent, or attorney, need only make oath of



the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

Sec. 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged, and extended by this act, be and the same is declared to be in full force.

Sec. 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows (chapter 2 of the Acts of 1891):

[235] Sec. 3. Be it further enacted, That no building and loan association organized under the laws of any other state, territory, or foreign government shall do business in this state unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some state officer of \*this or some other state of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand (\$25,000) dollars nor more than fifty thousand (\$50,000) dollars, at the discretion of the state treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the state, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any state, territory, or foreign government shall, before commencing to do business in this state—

First. File with the treasurer of this state a duly authenticated copy of its charter or articles of corporation.

Second. File with the treasurer of this state the certificate of the proper state officer of another state or the president and treasurer of some responsible trust company, certifying that it has on deposit securities, not less than \$25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

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Third. File with the state treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing that if any legal process affecting such association be served on said state treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this state.

\*Fourth. Pay the state treasurer twenty-[236] five (\$25) dollars as fees for filing the papers mentioned in this section.

Sec. 7. Be it further enacted, No officer, director, or agent of any foreign building and loan association shall, in this state, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this state, any stock of an association while said association has not on deposit securities as required by § 3 of this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the 1st of January, and said treasurer is authorized to collect from each agent for said license \$2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars.

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for, after that date.

The supreme court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are nevertheless void in Tennessee, and cannot be enforced in the courts of Tennessee. *United States Sav. & L. Co. v. Miller* (Tenn. Ch.) 47 S. W. 17, Affirmed on appeal by the supreme court of Tennessee, December 18, 1897, without written opinion.

Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the circuit court of the United States for the western district of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant Bedford answered, averring that the notes and mortgage \*were in violation of the [237] above-quoted laws of Tennessee, and were void, and could not be enforced.

**Mr. Robert M. Heath** argued the cause, and, with Messrs. *Heber J. May* and *W. J. McLean*, filed a brief for petitioners:

The contract was closed in Tennessee when the notes and mortgage were executed in that state and given to the association's agent therein, and the validity thereof is to be determined by Tennessee law. A contract illegal where made cannot be made good merely because it is payable elsewhere.

*Scudder v. Union Nat. Bank*, 91 U. S. 412, 23 L. ed. 248; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Tilden v. Blair*, 21 Wall. 246, 22 L. ed. 633.

The rule that contracts to be performed in another state are sometimes supposed to be valid as entered into with a view to the law of such state is subject to the exception "that where a contract is declared void by the law of the state or country where it is made it cannot be enforced as a valid contract," though it would be valid in the state where it is to be performed.

*Hyde v. Goodnow*, 3 N. Y. 269; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 161, 42 L. ed. 121, 17 Sup. Ct. Rep. 785; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

To contend that the fact that notes executed in one state are payable in another indicates that the law of the state where they are payable governs, where the business in which such notes are given is prohibited by the law of the state where the notes are executed, sanctions an evasion of that law.

*Pope v. Nickerson*, 3 Story, 484, Fed. Cas. No. 11,274; *Andreus v. Pond*, 13 Pet. 77, 10 L. ed. 66; *Vliet v. Camp*, 13 Wis. 198; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 299, 9 So. 143; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *Banks v. Flint*, 54 Ark. 40, 10 L. R. A. 460, 14 S. W. 769, 16 S. W. 477; *Thompson v. Edwards*, 85 Ind. 414; *Elliot Nat. Bank v. Western & A. R. Co.* 2 Lea, 679; *Hooper v. California*, 155 U. S. 658, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; *Reynolds v. Geary*, 26 Conn. 179; *Davis v. Bronson*, 6 Iowa, 425; *Barrett v. Delano* (Me.) 6 New Eng. Rep. 551, 14 Atl. 288. See also *Wooten v. Miller*, 7 Smedes & M. 380.

Parties cannot go out of a state to evade its law, and then claim that the transaction outside of such state was valid.

*Stull's Estate*, 183 Pa. 625, 39 L. R. A. 539, 39 Atl. 16; *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703; *State v. Tutty*, 7 L. R. A. 50, 41 Fed. 753; *Sutton v. Cole*, 3 Pick. 244; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 423; *Parham v. Pulliam*, 5 Coldw. 506; *Mix v. Madison Ins. Co.* 11 Ind. 117; *Eagle v. Troup*, 68 Ill. App. 302; *Bolton v. Street*, 3 Coldw. 31; *Gooch v. Faucett*, 122 N. C. 270, 39 L. R. A. 835, 29 S. E. 362; *Pope v.*

*Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Wharton*, Conf. L. § 696; *Story*, Conf. L. § 246; *Lacey v. Palmer*, 93 Va. 159, sub nom. *Ex parte Lacy*, 31 L. R. A. 822, 24 S. E. 930.

Where there is a doubt as to whether the law of the forum or the *lex loci contractus* should prevail, the former will always be given the preference.

2 Kent, Com. p. 461; *Story*, Conf. L. §§ 326, 328; *Bank of Columbia v. Walker*, 14 Lea, 307; *Ramsay v. Stevenson*, 5 Mart. (La.) 23, 12 Am. Dec. 468, and note; *Woods v. Wicks*, 7 Lea, 47.

Contracts are governed by the law of the place of performance, subject to the qualification that the parties act in good faith and that the form of the transaction is not adopted to disguise its real character.

*Miller v. Tiffany*, 1 Wall. 310, 17 L. ed. 543.

Even if the contracts were technically closed outside of Tennessee, the business being forbidden by the Tennessee law, it is an evasion of that law to claim that it is not applicable.

*Allgeyer v. Louisiana*, 165 U. S. 579, 587, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *United States v. Joint Traffic Assn.* 171 U. S. 572, 43 L. ed. 288, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Where the contracts sought to be enforced were made in the state of the creation of the corporation, and were valid under these laws and were valid under the laws where they were to be performed, but were invalid by the *lex fori*, they cannot be enforced within the latter jurisdiction.

*Seamans v. Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408; *People's Mut. Ben. Soc. v. Lester*, 105 Mich. 716, 63 N. W. 977; *Cowan v. London Assur. Corp.* 73 Miss. 321, 19 So. 298; *Rose v. Kimberly & C. Co.* 89 Wis. 545, 27 L. R. A. 556, 62 N. W. 526; *Wasserboehr v. Boulier*, 84 Me. 165, 24 Atl. 308; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 299, 34 L. ed. 673, 11 Sup. Ct. Rep. 92; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 733, 28 L. ed. 1138, 5 Sup. Ct. Rep. 739.

The rule that a contract valid where made is generally valid everywhere is subject to the exception that no nation or state is bound to recognize or enforce contracts made elsewhere which are injurious to its citizens or subjects.

*Galliano v. Pierre*, 18 La. Ann. 10, 89 Am. Dec. 643; *Smith v. Godfrey*, 28 N. H. 379; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 351; *McLean v. Hardin*, 56 N. C. (3 Jones Eq.) 294, 69 Am. Dec. 740; *Swann v. Swann*, 21 Fed. 299.

The validity of a contract as to land must be determined by the law of the place where the lands are situated.

*Brine v. Hartford F. Ins. Co.* 96 U. S. 635, 24 L. ed. 861; *McGoon v. Scales*, 9 Wall. 27, 19 L. ed. 546; *Suydam v. Williamson*, 24 How. 433, 16 L. ed. 745; *Clarke v. Clarke*, 181 U. S.



178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 15; *Walling v. Christian & C. Grocery Co.* (Fla.) 47 L. R. A. 608, 27 So. 46; *Wharton*, Conf. L. §§ 275, 276a, 291, 293, 296, 390a; *Story*, Conf. L. §§ 364, 424, 446, 447; 1 *Jones*, *Mortg.* 4th ed. § 662; *Goddard v. Sawyer*, 9 Allen, 78; *Hosford v. Nichols*, 1 Paige, 226; *Bondurant v. Watson*, 103 U. S. 288, 26 L. ed. 450; *McCullum v. Smith*, Meigs, 342, 33 Am. Dec. 147; *Jones v. Marable*, 6 Humph. 116; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; *Reid v. House*, 2 Humph. 581.

Bedford had no fixed or vested right to a loan by virtue of the fact that he held stock in the Eastern Building & Loan Association.

He could only get a loan if the association chose to give it to him. Any loan was dependent, not only upon the condition of the association, but upon its willingness to loan to him. The association could not force him to borrow, and when the state law forbade the business Bedford could not assist the association in breaking that law.

*Hooper v. California*, 155 U. S. 656, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

There is no vested right to a loan, merely because a party holds stock.

*Illinois Bldg. & L. Asso. v. Walker* (Tenn. Ch. App.) 42 S. W. 192; *New York Nat. Bldg. & L. Asso. v. Cannon*, 99 Tenn. 344, 41 S. W. 1055.

The fact that the Eastern Building & Loan Association had sold stock to Bedford before the passage of the acts of 1891 did not give the association any right, after the passage of the laws of 1891, to loan to Bedford, or give him any right to demand a loan of such association.

*Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

There was no contract right to a loan prior to the statutes of 1891, but the laws often render performance of contracts illegal which were legal when made, and prevent performance thereof.

*Odlin v. Insurance Co.* 2 Wash. C. C. 312, Fed. Cas. No. 10,433; *Rogers v. Hough*, 4 Vt. 172; *Fitzgerald v. Grand Trunk R. Co.* 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76; *Bradford v. Jenkins*, 41 Miss. 336; *Dermott v. Jones*, 2 Wall. 7, *sub nom.* *Ingle v. Jones*, 17 L. ed. 764; *Sauner v. Phoenix Ins. Co.* 41 Mo. App. 480; *Brick Presby. Church v. New York*, 5 Cow. 538; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

Receiving a fixed premium for a loan of money is usury in Tennessee and in most of the states.

*McCauley v. Workingman's Bldg. & Sav. Asso.* 97 Tenn. 421, 35 L. R. A. 244, and note, 37 S. W. 212; *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201, 37 S. W. 216.

It is not usury where the agreement to pay above the legal rate depends upon a contingency.

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*Spain v. Hamilton*, 1 Wall. 604, 17 L. ed. 619; *Patterson v. Workingmen's Bldg. & L. Asso.* 14 Lea, 690; *McCauley v. Workingman's Bldg. & Sav. Asso.* 97 Tenn. 431, 35 L. R. A. 244, 37 S. W. 212.

Where, however, the party withdraws his stock and loses all interest in the profits of the association, the loan is fixed and certain, and no element of contingency remains.

*Citizens' Mut. Loan & Accumulating Fund Asso. v. Webster*, 25 Barb. 268; *City Bldg. & Loan Co. v. Fatty*, 1 Abb. App. Dec. 350; *Melville v. American Ben. Bldg. Asso.* 33 Barb. 113.

A corporation has no implied authority to do any act in a foreign state, which is not permitted by the law of the latter to individuals generally.

2 *Morawetz*, *Priv. Corp.* §§ 694, 695; *Clarke v. Central R. & Bkg. Co.* 15 L. R. A. 683, 50 Fed. 338; *Rhodes v. Missouri Sav. & Loan Co.* 173 Ill. 621, 42 L. R. A. 93, 1 N. E. 998.

That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state.

*Orient Ins. Co. v. Daggs*, 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 281.

The spirit of comity does not require that a nonresident shall be allowed a remedy which is by the policy of the law denied to its own citizens.

*Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412; *Williams v. Gold Hill Min. Co.* 96 Fed. 454; *Sokoloski v. New South Bldg. & L. Asso.* 77 Miss. 155, 26 So. 361; *Crofton v. New South Bldg. & L. Asso.* 77 Miss. 166, 26 So. 362.

Making the notes payable in New York was an attempted evasion of Tennessee law, as the business was being carried on in Tennessee.

*United States Sav. & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 236; *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092; *Banks v. Flint*, 54 Ark. 40, 10 L. R. A. 459, 14 S. W. 769, 16 S. W. 477; *Thompson v. Edwards*, 85 Ind. 414; *Andrews v. Pond*, 13 Pet. 78, 10 L. ed. 67; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924; *McIlwaine v. Iseley*, 96 Fed. 68.

The transaction was not in accordance with the principles applicable to building and loan associations, and should be treated as a plain loan of money. When such is the case the party should be charged only with what he received, and be credited with all payments made by him in full.

*Williar v. Baltimore Butchers' Loan & Annuity Asso.* 45 Md. 547; *Kupfert v. Guttenberg Bldg. Asso.* 30 Pa. 465; *Hughes's Appeal*, 30 Pa. 471; *Overby v. Fayetteville Bldg. & L. Asso.* 81 N. C. 56; *Hanner v. Greensboro Bldg. & L. Asso.* 78 N. C. 188; *Price v. Empire Loan Asso.* 75 Mo. App. 551.

The bill herein treats Bedford's stock as canceled, and wants a complete settlement. In such cases all payments should go as a credit on the debt, including payments on stock.

*Randall v. National Bldg. Loan & Protective Union*, 42 Neb. 809, 29 L. R. A. 133,



60 N. W. 1019; *Tilley v. American Bldg. & L. Asso.* 52 Fed. 618.

The so-called "premium" is simply a cover for interest.

*Butler v. Mutual Aid, Loan & Invest. Co.* 94 Ga. 562, 20 S. E. 101.

Mr. William Hepburn Russell argued the cause, and, with Messrs. D. A. Pierce, William Beverly Winslow, Joseph W. Buchanan, and H. Dent Minor, filed a brief for respondent:

The appellee is a building and loan association organized upon a purely mutual basis under the laws of New York, and its members, as has been well said in many cases, are essentially partners in a common enterprise, in the burdens and benefits of which they must mutually share.

N. Y. Laws 1851, chap. 122; *Silver v. Barnes*, 6 Bing. N. C. 180, 8 Scott, 300; *Burridge v. Cotton*, 5 DeG. & S. 17, 21 L. J. Ch. N. S. 201, 8 Eng. L. & Eq. 57; *Seagrave v. Pope*, 1 DeG. M. & G. 783, 22 L. J. Ch. N. S. 258, 15 Eng. L. & Eq. 477; *Cutbill v. Kingdom*, 17 L. J. Exch. N. S. 177, 1 Exch. 494; *Re Durham County Permanent Invest. Land & Bldg. Soc.* L. R. 12 Eq. 516, 25 L. T. N. S. 83; *Robertson v. American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 145; *Patterson v. Workmen's Bldg. & L. Asso.* 14 Lea, 677; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289, 42 N. E. 710; *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016; *Tilley v. American Bldg. & L. Asso.* 52 Fed. 618; *Thompson, Bldg. Asso.* 2d ed. §§ 3, 4.

In the courts of New York the contracts of such associations with their members have been almost uniformly sustained, and the rights and privileges of both the associations and the members in that state are well settled.

*Concordia Sav. & Aid Asso. v. Read*, 93 N. Y. 474; *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016; *People ex rel. Fairchild v. Preston*, 140 N. Y. 549, 24 L. R. A. 57, 35 N. E. 979; *O'Malley v. People's Bldg. L. & Sav. Asso.* 92 Hun, 572, 36 N. Y. Supp. 1016; *Heslin v. Eastern Bldg. & L. Asso.* 28 Misc. 376, 59 N. Y. Supp. 572; *Eagle Sav. & Loan Co. v. Samuels*, 43 App. Div. 386, 60 N. Y. Supp. 91; *People v. Bankers' Loan & Invest. Co.* 13 Misc. 221, 34 N. Y. Supp. 235; *House v. Eastern Bldg. & L. Asso.* 52 App. Div. 163, 66 N. Y. Supp. 109.

These views of the contract rights of appellee and like associations have been accepted by the courts of other states, and, in a very recent case to which the appellee was a party, by the supreme court of Tennessee.

*Miller v. Eastern Bldg. & L. Asso.* (Tenn. Ch. App.) 53 S. W. 231.

There cannot be the slightest doubt that the plan and method of operation of appellee are in strict accordance with the laws of New York, and that its contracts with its shareholders, both "advanced" and "nonadvanced," are to be construed in accordance with its articles of incorporation and by-laws, and the laws of New York.

*Ibid.*; *House v. Eastern Bldg. & L. Asso.* 52 App. Div. 163, 66 N. Y. Supp. 109; *O'Mal-*

*ley v. People's Bldg. L. & Sav. Asso.* 92 Hun, 572, 36 N. Y. Supp. 1016; *Eagle Sav. & Loan Co. v. Samuels*, 43 App. Div. 386, 60 N. Y. Supp. 91; *Western Massachusetts Mut. F. Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Heslin v. Eastern Bldg. & L. Asso.* 28 Misc. 376, 59 N. Y. Supp. 572; *Concordia Sav. & Aid Asso. v. Read*, 93 N. Y. 474.

Nor can it be successfully denied that H. L. Bedford, although a citizen and resident of Tennessee now and at the time he became a member of the appellee association, is, as to his contract of membership in appellee and his obligations assumed in connection therewith as an "advanced" or borrowing shareholder, bound by the articles of association and the by-laws of appellee, and by the construction given to such articles and by-laws by the courts of New York.

*Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Relfe v. Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America v. Rundle*, 26 L. ed. 337; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 154, 43 L. R. A. 390; *Sulz v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242; *Ware v. Bankers Loan & Invest. Co.* 95 Va. 680, 29 S. E. 744; *Smith v. Taggart*, 30 C. C. A. 563, 57 U. S. App. 493, 87 Fed. 94; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289, 42 N. E. 710; 3 Thomp. Corp. § 3040; 5 Thomp. Corp. § 5987; *Shaw v. Quincy Min. Co.* 145 U. S. 444, *sub nom. Ex parte Shaw*, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867.

The contract rights of Bedford as a member of appellee, to receive an "advance" of the par or maturity value of his shares, and of appellee to make such "advance," cannot be impaired by subsequent state legislation, even though the "advance" to Bedford was made after the passing of the laws of 1891 and without compliance therewith upon the part of appellee.

*American Bldg. & L. Asso. v. Rainbolt*, 48 Nev. 434, 67 N. W. 493; *Von Hoffman v. Quincy*, 4 Wall. 535, *sub nom. United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. ed. 856; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Osborn v. Nicholson*, 13 Wall. 654, 20 L. ed. 689; *Long v. Walker*, 105 N. C. 94, 10 S. E. 588; *Nevada Bank v. Steinmiz*, 64 Cal. 316, 30 Pac. 970; *Tufts v. Tufts*, 8 Utah, 146, 16 L. R. A. 482, 30 Pac. 309; *Garneau v. Port Blakely Mill Co.* 8 Wash. 471, 36 Pac. 463.

The Tennessee acts, if construed to make this contract void, are themselves unconstitutional because they impair the obligations



of a contract, seek to divest vested rights and, so far as Bedford is concerned, might well be held to interfere with his rights, privileges, and immunities as a citizen of the United States.

*Korn v. Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195; *White v. Hart*, 13 Wall. 646, 20 L. ed. 685; *The Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493.

It makes no difference whether the contract between the parties was executory or executed, so far as the protection of the constitutional provision against the impairment of the obligation of contracts by state legislation is concerned.

*Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162.

And implied, as well as expressed, contracts are protected.

*Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212.

Having exercised his rights of membership under his contract of membership with appellee and in accordance with the laws of New York, appellant Bedford is certainly now estopped from claiming that the contract into which he entered was illegal and void under the laws of Tennessee.

*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523.

The Tennessee statutes of March 26, 1891, if given the construction contended for by appellants, not only impair the obligation of a contract, but deny the appellee "the equal protection of the laws" of the state of Tennessee, which is guaranteed to all persons within the jurisdiction of any state by the 14th Amendment to the Constitution of the United States.

*Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 327, 30 L. ed. 1200, 1 Inters. Com. Rep. 303, 7 Sup. Ct. Rep. 1118; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 205, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Within the meaning of this clause of the amendment a corporation is a "person" entitled to the equal protection of the laws.

*Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

To pass laws depriving Tennessee stockholders in a New York corporation of their

rights as stockholders to the benefits of the corporate organization, and making their contracts with the New York corporation void and unenforceable in the courts of Tennessee, merely because of the giving of a mortgage upon Tennessee property to secure the performance of the stockholders' obligations to the corporation, would be a denial of the equal protection of the laws.

*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Western Massachusetts Mut. F. Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632.

The right of appellee, a corporation of New York, to enter into contracts under the laws of New York with appellant Bedford, a citizen of Tennessee, the state of Tennessee cannot by its laws either abridge or deny.

U. S. Rev. Stat. § 1977; *Yiek Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

And such contracts, when they are to be performed in New York by the payment of Bedford's notes and obligations in that state, at the home office of the corporation of which he was a member, and in strict compliance with the laws of New York and the corporate charter, and for the purpose of discharging the obligations assumed by him as a member of the corporation, are beyond the reach of legislation by the state of Tennessee; and the mortgage to secure the payment of such notes and obligations is enforceable in the Federal courts in Tennessee without regard to state legislation intended to invalidate the contract.

*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Lauter v. Jarvis-Conklin Mortg. Trust Co.* 29 C. C. A. 473, 54 U. S. App. 49, 85 Fed. 894; *Jarvis-Conklin Mortg. Trust Co. v. Willhoit*, 84 Fed. 514; *Cæsar v. Capell*, 83 Fed. 403; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755.

Nor does it make the slightest difference that the notes payable in New York were executed in Tennessee and secured by a mortgage upon real property in that state.

*Ware v. Bankers Loan & Invest. Co.* 95 Va. 680, 29 S. E. 744; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. 39; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Scudder v. Union Nat. Bank*, 91 U. S. 411, 23 L. ed. 248; *Scotland*



*County v. Hill*, 132 U. S. 117, 33 L. ed. 265, 10 Sup. Ct. Rep. 26; *Coghlan v. South Carolina R. Co.* 142 U. S. 110, 35 L. ed. 954, 12 Sup. Ct. Rep. 150; *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *London Assur. Co. v. Companhia De Mougens Do Barreiro*, 167 U. S. 161, 42 L. ed. 121, 17 Sup. Ct. Rep. 785; *Brown v. Jones*, 125 Ind. 379, 25 N. E. 452; *Burckle v. Eckhart*, 3 N. Y. 135; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 42 N. E. 856; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Orcutt v. Nelson*, 1 Gray, 536; *Johnston v. Gawtry*, 83 Mo. 339.

The by-laws of the appellee required all payments to be made by both "advanced" and unadvanced members at the home office in Syracuse, and this applied, not only to "dues" or "calls" upon stock, but also to payments of "premiums" and "interest" by "advanced" or borrowing members.

*Andruss v. People's Bldg. L. & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 575.

The purchase of stock in a corporation of another state, even though it is done through a soliciting agent in a state of the residence of the purchaser, is not "doing business" in that state in violation of laws forbidding the transaction of business in such state by foreign corporations.

*Payson v. Withers*, 5 Biss. 272, Fed. Cas. No. 10,864.

Nor is the lending of money to a citizen of a state wherein a foreign corporation is not authorized to do business, and the acceptance of a mortgage upon lands in such state for the purpose of securing the repayment of the loan, "doing business" within such state, when the notes secured by the mortgage are made payable in the state of the corporate domicil, and the contract is a unilateral one.

*Cæsar v. Capell*, 83 Fed. 403; *Sullivan v. Sheehan*, 89 Fed. 247; *Neal v. New Orleans Loan Bldg. & Sav. Asso.* 100 Tenn. 607, 46 S. W. 755; *Andruss v. People's Bldg. L. & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 575.

No matter what business a corporation does in another state, its residence is exclusively in the state of its creation.

*Reimers v. Seatco Mfg. Co.* 17 C. C. A. 228, 30 L. R. A. 364, 37 U. S. App. 426, 70 Fed. 573; *Shaw v. Quincy Min. Co.* 145 U. S. 444, *sub nom. Ex parte Shaw*, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

When the application for a loan or "advance" by appellant Bedford was "examined and approved" by the board of directors of appellee at the home office of the appellee, in Syracuse, on May 18th, 1891, a perfectly legal and valid contract was made, and became by such acceptance binding upon the parties, subject only to compliance with conditions precedent by the appellant Bedford.

*Giddings v. Northwestern Mut. L. Ins. Co.* 102 U. S. 108, 26 L. ed. 92.

It is settled law in this court, that if a rate of interest called for in a contract is permissible under the law of the state where the contract is to be performed, there is no usury.

*Andrews v. Pond*, 13 Pet. 78, 10 L. ed. 67; *Cockle v. Flack*, 93 U. S. 344, 23 L. ed. 949; *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *Scotland County v. Hill*, 132 U. S. 107, 33 L. ed. 261, 10 Sup. Ct. Rep. 26.

The supreme court of Tennessee has expressly decided, and such, of course, is the general rule, that the usury laws of Tennessee can have no extraterritorial effect.

*Pioncer Sav. & Loan Co. v. Cannon*, 96 Tenn. 599, 33 L. R. A. 112, 36 S. W. 386.

The taking of a premium in such case is sanctioned by the act of 1851 as amended by N. Y. Laws 1875, chap. 564, and does not render the loan usurious.

*Concordia Sav. & Aid Asso. v. Read*, 93 N. Y. 474.

A contract made by a resident of one state, who applied to become a member of a loan association situated in another state, to pay it money at the place of its residence, is to be governed by the law of the latter state as to usury, although the contract was made through an agency situated within the state of the residence of such member, and the payment of the money was secured by mortgage on land therein.

*Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684.

Contracts between the appellee and its stockholders in Tennessee are to be construed in accordance with its articles of association and by-laws and the laws of the state of New York.

*Miller v. Eastern Bldg. & L. Asso.* (Tenn. Ch. App.) 53 S. W. 231.

This requirement is not a matter of mere comity between the states, but becomes a rule of constitutional obligation.

*Cooley*, Const. Law, 3d ed. 203.

And it has been so held by this court many times.

*Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

The fixing of such a premium, being authorized by the articles of incorporation of the appellee, has been held to be in strict accordance with the laws of New York.

*Eagle Sav. & Loan Co. v. Samuels*, 43 App. Div. 386, 60 N. Y. Supp. 91.

So far as appellants' proposition that the contract of appellants with appellee involved only a fixed and definite number of payments is concerned, it has been met and disposed of in a number of recent cases in the courts of New York and elsewhere, to which the appellee was a party or by which it is bound.

*House v. Eastern Bldg. & L. Asso.* 52 App. Div. 163, 66 N. Y. Supp. 109; *Heslin v. Eastern Bldg. & L. Asso.* 28 Misc. 376, 59 N. Y. Supp. 572; *O'Malley v. People's Bldg. L. & Sav. Asso.* 92 Hun. 572, 36 N. Y. Supp. 1016; *Miller v. Eastern Bldg. & L. Asso.* (Tenn. Ch. App.) 53 S. W. 231.

The same doctrine laid down in these cases has just been adopted and followed by the supreme court of appeals of Virginia.

*Campbell v. Eastern Bldg. & L. Asso.* 98 Va. 729, 37 S. E. 350.



[237] \*Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The assignments of error, except one, present the question of the enforceability of the notes and mortgage under the Tennessee law, or, as the question may be put, whether there was a contract between the parties,—a right in one and an obligation in the other arising from a consideration given and received; mutual covenants by which each party acquired the right to that which the other promised or engaged to do, and whether the laws of Tennessee, as interpreted by its courts, impaired that right.

(1) A recapitulation of the facts in this connection will be useful. The Eastern Building & Loan Association was organized under the laws of New York, and one of its purposes was to make "advances" to members. It had a capital stock of \$50,000, divided into shares of \$100 each. The funds of the association were divided into two classes,—a loan fund and an expense fund. The articles of incorporation provided that "the loan fund shall consist of all receipts which do not go into the expense fund, as hereinbefore provided, together with all interests and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security, as provided by the by-laws, and to pay amounts due withdrawing shareholders. The funds of the association not required for advances on shares may be invested by the board of directors in such securities as the savings banks of the state of New York are permitted to take, or \*deposited at interest in the savings banks, trust companies, or duly incorporated banks of said state, and which are in good standing."

[238] The articles of incorporation and the by-laws also provided the manner of becoming a member of the association, the rights of a member, and the obligations of the association. The entrance fee of new members and new shares were to be \$1 per share, monthly dues 75 cents, fines for nonpayment of dues on unpledged stock 20 cents. And it was provided by §§ 1 and 2, article 19, under the heading *Contract of Members*, as follows:

Sec. 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

Sec. 2. All persons desiring to become shareholders of this association must fill out, sign, and deliver to the secretary an application according to the form adopted by the association, which said application shall be a part of said application with this association. Such applicant shall also pay a membership fee of \$1 per share for each and every share held by him.

Sec. 16. All remittances for advance, instalments, premiums, monthly instalments,  
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fines and penalties, interest and premiums, and all other payments shall be made to the secretary of the association at the home office, and in registered letter, express or money order, or drafts. Individual checks shall not be received.

The other sections of the article provide for the manner in which the loan shall be made, upon what security, interest and premium, and covenants, the manner of payment and prepayment, and the enforcement of payment, and when shares may be canceled and forfeited. "Punctuality and strict performance on the part of all members, borrowers, and shareholders, in payment of fines, dues, interest, loans, and premiums, are made the essence of the contract."

The articles also provide with what the stock shall be charged \*and to what it shall [239] be subject, the amount of monthly instalments to be paid, and when paid, and when and to what extent and upon what terms shares may be withdrawn, and for the issue of paid-up stock.

Article 15 of the by-laws is as follows:

#### Loans.

Sec. 1. Each shareholder, for each share named in their certificate, shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received, and be examined and approved, or rejected, by the board in their regular order.

Sec. 2. All shares must be in force three months before said shareholder shall be entitled to a loan. All applications for loans are part of the contract of the shareholders with this association. Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above provided, upon approved securities.

On the 2d of January, 1891, Bedford applied to become a shareholder of the association, and subscribed for forty-six shares of instalment stock. The application was accepted, and a certificate of stock was issued to him on the 2d of February, 1891, and on the 20th of March, 1891, he presented a written application for a loan as follows: "\_\_\_\_\_ do hereby make application for a loan of forty-six hundred (\$4,600.00) dollars, for six and a half years, to bear interest at the rate of 5 per cent per annum, and a premium of 5 per cent per annum payable on or before the last Saturday of each month;" and to secure the sum, agreed to give a mortgage on the real estate set forth in certain questions and answers which accompanied the application, which described with particularity the real estate and the improvements thereon, and stated that the loan was "for investment to relieve adjoining property." The property was



[240] stated to be of the value of \$6,000, and all of his property \*easily to be worth \$40,000. The application was sworn to and accompanied by the affidavit of three other persons that they regarded Bedford "as a prompt, upright, reliable person, pecuniarily responsible for his contracts."

The application and report of the local board of appraisers was received by the association on the 12th of May, 1891, by mail from H. B. Martin, the soliciting agent of the association. It was accepted and a loan granted on the 18th of May, and to secure the same the notes and mortgage in suit were subsequently executed.

The statutes of Tennessee relied on as a defense were passed March 26, 1891; and, to repeat, the question is, Did the subscription to the stock of the association, its issuance, and the application for a loan in pursuance of it, constitute a contract which was inviolable by the state legislature? We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the supreme court of Tennessee, in *New York Nat. Bldg. & L. Asso. v. Cannon*, 99 Tenn. 344, 41 S. W. 1054, notwithstanding our high respect for that learned tribunal. It was there contended that "Cannon, having become a stockholder in the association before the acts were passed, with a view to becoming a borrower, and for that purpose, and having made his application for a loan likewise before the acts passed, acquired a vested right to the consummation of the loan, and the association became legally obligated to complete it, and it was also unfinished business, which the association had a right, and which was its duty, to finish, notwithstanding the acts of the legislature." To this contention the court replied: "If we were to grant that the borrower had a vested right to the loan, and the association had a legal obligation to consummate it, still, it must follow that the contract could be entered into, and the

[241] loan and mortgage \*made, only in compliance with the law. There was nothing to prevent the association from complying with the statutes and thus placing itself in the attitude where it could legally make the loan and take the mortgage, if it were under obligation to do so, as it claims."

And the court observed that it could not be considered that the association and Cannon were winding up an old transaction and unfinished business, but were doing business in the sense of the statute and in defiance of its prohibition, and refused to enforce the mortgage of the association. We cannot assent to the view that there is nothing to prevent the association from complying with the statutes. The mere filing of its char-

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ter in a particular office—the secretary of state's or some other office—might be easily complied with, but the deposit, with some responsible trust company or state officer of the state or some other state, of mortgages or securities of from \$25,000 to \$50,000 in amount, at the discretion of the state treasurer, might be impossible to comply with. At any rate, the requirement is so very onerous that the association could justly decline to do business in the state on that condition. It might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The state could not affect that obligation nor impair it. "The obligation of a contract 'is the law which binds the parties to perform their agreement.'" 4 Wall. 452. The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing,—means in the treasury, a tender of good security,—the contingent right became a vested one, a contract was formed; and can there be a doubt that it was enforceable against the association? If it could have been enforced by suit, it was properly yielded to without suit, and possessed all legal sanctions.

We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We \*have af-[242] firmed the existence of that power many times; but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations.

It is claimed, however, that if the transactions between Bedford and the association were otherwise legal they were affected with usury, and to the extent that they were usurious they were unenforceable. The contention is that in making the loan of \$4,600 Bedford was required to pay a fixed premium of \$460, and received only \$4,140, and that this constituted usury in Tennessee. This is made out because, it is said, Bedford was required to withdraw his stock and receipt in full, and could therefore get no benefit from future profits of the association, and, it is asserted, that thereby the loan became "fixed and certain, and no element of contingency" remained, and the transactions are withdrawn from the principle expressed in *Spain v. Hamilton*, 1 Wall. 604, 17 L. ed. 619, that "where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." But the fact was not as asserted.

The stock was pledged as security for the advance; and the pledge was no more a withdrawal of the stock, terminating Bedford's ownership of it, than his mortgage was an absolute conveyance of his land. It is provided in § 3, article 19, that in addition to real-estate security for a loan a

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shareholder shall "transfer in pledge to the association one share of the stock held by said shareholder, as collateral security, on all loans made by the association" to him. Besides, the transactions were not usurious under the laws of New York, where the notes were payable. *Concordia Sav. & Aid Assn. v. Read*, 93 N. Y. 474. Therefore the principle expressed in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, applies. It was said in that case: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." See also *Andrews v. Pond*, 13 Pet. 78, 10 L. ed. 67; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385; *Scotland County v. Hill*, 132 U. S. 107, 33 L. ed. 261, 10 Sup. Ct. Rep. 26; *Cromwell v. Sac County*, 96 U. S. 57, 24 L. ed. 686; *Cockle v. Flack*, 93 U. S. 344, 23 L. ed. 949.

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In *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599, 33 L. R. A. 112, 36 S. W. 386, a note secured by mortgage was given to a building association and made payable at Minneapolis. It provided for the payment of 5 per cent interest per annum, a 5 per cent premium per annum, monthly, on or before the last Saturday of each month, and stipulated, further, that "any failure to pay interest or premium, when due, shall, at the election of the payee, make the principal, interest, and premium at once due." Of the note and mortgage the court said: "The second assignment of error is that the note and mortgage were both usurious on their faces, and nonenforceable. As already stated, the note stipulates on its face to pay 5 per cent interest per annum, and 5 per cent premium per annum, at the office of the company at Minneapolis, Minnesota. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that state, which have been distinctly proved, and appear on the record." The assignment of error was held not well taken.

The circuit court adjudged Mrs. Bedford personally liable for the indebtedness to the association. This is conceded to be error, and it has been stipulated "that an order or decree may be entered in this cause releasing her from said liability upon such terms and conditions as to this court may seem just."

The judgment of the Circuit Court will be modified in accordance with the stipulation, and, as modified, affirmed. Costs are awarded to Mrs. Bedford on her appeal to and in the Circuit Court of Appeals and in this court.

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\*JOHN D. WALL and Thomas W. Huske, [244]  
Trading as Wall & Huske, *Appts.*,  
v.

WALTER O. COX, Trustee of W. H. Gilbert.

(See S. C. Reporter's ed. 244-247.)

*Bankruptcy—jurisdiction of court—of suit by trustee.*

United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy, to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendants, since such jurisdiction is denied them by the bankruptcy act of 1898, § 23.

[No. 504.]

Submitted April 15, 1901. Decided April 29, 1901.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit stating a question as to jurisdiction of a District Court of a suit by a trustee in bankruptcy to set aside an alleged fraudulent conveyance. Answered in the negative.

See same case below, 41 C. C. A. 408, 101 Fed. Rep. 403.

The facts are stated in the opinion.

Mr. Clement Manly submitted the cause for appellants. Messrs. Watson, Buxton, & Watson, and Messrs. Glenn, Manly, & Henderson were with him on the brief.

Mr. Louis M. Swink submitted the cause for appellee. Mr. Lindsay Patterson was with him on the brief.

\*Mr. Justice Gray delivered the opinion of [244] the court:

On October 12, 1899, certain creditors of W. H. Gilbert filed against him a petition in bankruptcy in the district court of the United States for the western district of North Carolina, alleging that he was insolvent, and on October 10, 1899, transferred his stock of goods, with intent to hinder, delay, and defraud his creditors, by a bill of sale to John D. Wall and Thomas W. Huske.

On October 14, 1899, the district court issued an order of notice to Wall and Huske to show cause on October 24, 1899, why they should not be perpetually enjoined from disposing of the goods alleged to have been purchased by them from Gilbert, and meanwhile restraining them from disposing of it. At the time of the issue of that order, Wall and Huske had those goods in their possession.

\*The district court, on October 27, 1899, [245] adjudged Gilbert a bankrupt, and on November 6, 1899, "ordered that the restraining order heretofore issued be continued until the appointment and qualification of trustee of W. H. Gilbert, bankrupt. Upon the appointment and qualification of said trustee, in a proper case and upon a proper showing, an injunction or restraining order may be obtained upon application, in which Wall

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and Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and the matters at issue be determined, either by a suit in equity or action at law in the United States courts or the courts of the state, as petitioners may be advised."

Walter D. Cox, on November 23, 1899, was duly elected and qualified as trustee of Gilbert, bankrupt, and on December 6, 1899, filed a plenary bill in equity in the district court of the United States for the western district of North Carolina against Wall and Huske, to set aside as fraudulent the sale by Gilbert to them, alleging that Cox had requested them to deliver the property to him as trustee, to be divided among Gilbert's creditors, but they had refused to do so and alleged that the sale to them was valid, and they thereby acquired title to the property, and were purchasers in good faith and for a present fair consideration. The bill prayed that the sale be set aside, and the property be decreed to belong to Cox as part of the bankrupt's estate, and for an injunction and a receiver.

On December 16, 1899, Cox filed a supplemental bill setting forth the former bill and its service upon Wall and Huske, alleging that the property was within the district and in the jurisdiction of this court, and was deteriorating in value by reason of being stored.

At the time of the filing of these bills and of the service of the subpoena upon Wall and Huske, they were in possession of the stock of goods, holding it under the bill of sale from Gilbert.

On the filing of the bill the district judge issued an order to Wall and Huske to show cause why a receiver should not be appointed to take charge of the stock of goods, and issued an injunction restraining them from disposing of it until the \*further order of the court. By consent the hearing was postponed until January 9, 1900.

On January 6, 1900, Wall and Huske, "specially appearing under protest for the purpose of this plea, and for no other," filed a plea and demurrer assigning as reasons that the plaintiff had an adequate remedy at law; that the district court had no jurisdiction to entertain this bill, or to determine the question arising between the plaintiff, as trustee in bankruptcy of Gilbert, and these defendants; that the defendants claimed title to the property described in the bill under a purchase from Gilbert prior to the institution of proceedings in bankruptcy against him; that both the plaintiff and the defendants were citizens of the state of North Carolina; and that the defendants do not consent to the jurisdiction of the court.

On January 9, 1900, a hearing was had on the motion for a receiver and an injunction, and the demurrer and plea, without objection to its form, and on January 15, 1900, the district court overruled the demurrer and plea to the jurisdiction of the court, ordered the injunction to be continued until the final hearing of the cause, and appointed a tempo-

rary receiver to take into his possession the stock of goods. 99 Fed. Rep. 546.

On January 22, 1900, Wall and Huske filed in the Circuit Court of Appeals a petition asking the supervisory power of that court under the bankrupt act of 1898. Upon that petition the decision of the district court was affirmed on May 1, 1900. 41 C. C. A. 408, 101 Fed. Rep. 403.

On June 2, 1900, Wall and Huske filed a motion for a rehearing, which was granted by the circuit court of appeals; and that court certified the following questions on which it desired the instructions of this court:

"First. Under the facts and the pleadings above stated, had the district court of the United States for the western district of North Carolina jurisdiction over the controversy?

"Second. Said district court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings, or in ancillary proceedings instituted either by the original petitioners, the receiver \*of the court, the bankrupt's[247] trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property thus in the court's possession, and do full and complete justice in one litigation?"

In disposing of the questions certified, we are confined to the facts stated in the certificate, and cannot consider the allegations, made in the briefs, of other facts.

According to the statements of the certificate, the present case is a bill in equity, filed by a trustee in bankruptcy in the district court of the United States in which bankruptcy proceedings are pending, against persons to whom the bankrupt, before the petition in bankruptcy, had made a sale and conveyance of property, which the plaintiff sought to set aside as fraudulent against creditors, but which the defendants asserted to have been made in good faith and to have vested title in them. This is a bill, of which, unless by consent of the defendants, the district court of the United States, as was directly adjudged by this court at the last term, since the first hearing of this case in the circuit court of appeals, has no jurisdiction under the bankrupt act of 1898. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006. The statement certified distinctly shows that the defendants, specially appearing for the purpose, protested that the district court had no jurisdiction to entertain this bill, or to determine the question arising between the trustee and the defendants, and that the defendants did not consent to the jurisdiction of the court. The answer to the first question certified must therefore be that the district court had no jurisdiction of the case.

The second question, if it does not depend on the first, is too comprehensive and indefi-



mite to be answered at all. It speaks generally of the district court having appointed a receiver; but does not state, nor does the certificate show, that the receiver was appointed before the election of the trustee in bankruptcy. Beyond this, the question comprehends what the district court may do, not merely on this bill by the trustee, but on proceedings, original or ancillary, by the petitioning creditors, or by the receiver, or on the court's own motion.

*First question answered in the negative.*

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\*W. P. SMITH, *Plff. in Err.*,  
v.

ST. LOUIS & SOUTHWESTERN RAIL-  
WAY COMPANY OF TEXAS.

(See S. C. Reporter's ed. 248-263.)

*Quarantine—exclusion of animals from other state—presumptions—regulation of commerce.*

1. Quarantine regulations established by the governor of the state on recommendation of a live-stock sanitary commission in pursuance of Tex. Rev. Stat. 1895, art. 5043c, whereby the importation of all cattle from the state of Louisiana until the 15th day of the following November is prohibited, because the live-stock commission had reason to believe that anthrax had or was liable to break out in that state,—are a proper exercise of the police power of the state.
2. The presumption which the law attaches to the acts of public officers exists in favor of quarantine regulations established by the governor on the recommendation of a live-stock sanitary commission, with respect to the sufficiency of the information on which the regulations were adopted.
3. Proper quarantine regulations restricting the importation of cattle from another state on account of the danger of disease do not make unconstitutional regulations of commerce.

[No. 155.]

*Submitted January 31, 1901. Decided April 22, 1901.*

**I**N ERROR to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas to review a decision reversing a decree declaring quarantine regulations unconstitutional. *Affirmed.*

See same case below, 20 Tex. Civ. App. 451, 49 S. W. 627.

**NOTE.**—*On what constitutes a regulation or restraint upon interstate commerce*—see note to Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*That police regulations are not regulations of commerce*—see notes to People v. Budd (N. Y.) 5 L. R. A. 560; State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co. (Ind.) 6 L. R. A. 579.

*On quarantine regulations by health authorities*—see Hurst v. Warner (Mich.) 26 L. R. A. 484, and note.

*As to presumption of performance of official duty*—see note to Douglass v. Blshop (Kan.) 10 L. R. A. 857.

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Statement by Mr. Justice McKenna:

\*This case involves the constitutionality of [249] certain quarantine regulations of the state of Texas. The laws of Texas provide for the creation of a live-stock sanitary commission, consisting of three members appointed by the governor, and prescribe their duty. The particular provisions which are material to the case are inserted in the margin.†

The governor of the state issued the following proclamation:

Whereas, the live-stock sanitary commission of Texas \*has this day recommended the [250] adoption of the following regulations:

The live-stock sanitary commission of the state of Texas have been reliably informed that the cattle, mules, and horses in the southern portion of Jefferson county, state of Texas, are affected with disease, known as charbon or anthrax, and are liable to impart such disease to cattle, mules, and horses ranging in upper portion of Jefferson and other counties, from this time forth to the 15th day of November, 1897, no cattle, mules, or horses are to be transported or driven north or west of Taylor and Salt bayous, said bayous running across the southern portion of Jefferson county, state of Texas.

†Article 5043o of the Revised Statutes, 1895, provides: "It shall be the duty of the commission provided for in article 5043a to protect the domestic animals of this state from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain, and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to co-operate with live-stock quarantine commissioners and officers of other states and territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules, and regulations as shall best protect the live-stock industry of this state against Texas or splenic fever. It shall be the duty of said commission, upon receipt by them of reliable information of the existence among the domestic animals of the state of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live-stock reported to be affected, and whether the same is contagious or infectious, and if said disease is found to be of a malignant, contagious, or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animal infected with disease, or capable of communicating the same, shall be permitted to enter or leave the district, premises, or grounds so quarantined, except by authority of the commissioners. The said commission shall also, from time to time, give and enforce such directions and prescribe such rules and regulations as to separating, feeding, and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said commissioners are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act."



This order is given for the purpose of quarantining all cattle, mules, and horses south and east of said Taylor and Salt bayous. The Texas live-stock commission has reason to believe that charbon or anthrax has or is liable to break out in the state of Louisiana. From this time forth until the 15th day of November, 1897, no cattle, mules, or horses are to be transported or driven into the state of Texas from the state of Louisiana. The live-stock sanitary commission of the state of Texas hereby order that any violation of any of the aforesaid rules and regulations by moving of any cattle, mules, or horses north of said bayous, or out of Louisiana into the state of Texas, is contrary to said rules and regulations, and shall be an offense, and punishable as provided by the laws of the state of Texas.

Now, therefore, I, C. A. Culberson, governor of Texas, in conformity with the provisions of chapter 7, title 102, of the Revised Statutes of Texas of 1895, do hereby declare that the quarantine lines, rules, and regulations set forth in the above-recited order of the live-stock sanitary commission of Texas shall be in full force and effect from and after this date.

In witness whereof, I have hereunto set my hand, and caused the seal of the state to be affixed, at Austin, this 5th day of June, A. D. 1897.

C. A. Culberson,  
Governor of Texas.

In consequence of this proclamation the [251] railway company refused to deliver certain cattle to their owners, of whom the plaintiff in error was one, which it had received as freight from a connecting carrier, and which had been delivered to the latter in the state of Louisiana. The facts, or as many of them as is necessary to state, are as follows:

The shipment of cattle was made upon a through bill of lading issued by the St. Louis & Southwestern Railway Company, at Plain Dealing, La., for Fort Worth, Tarrant county, Texas, and was a through and continuous shipment. The cattle arrived at Fort Worth on the 28th of August, 1897. The owners were ready to receive them, and tendered the amount of freight due thereon. The tender was rejected, and the delivery of the cattle refused. The cattle remained in the pens of the plaintiff in error, the stock yards at Fort Worth refusing to receive them on account of the proclamation of the governor, and permission, which was asked by the railway company of the live-stock sanitary commission, to deliver them to their owners, was also refused on account of the governor's proclamation. Thereafter the railway company shipped the cattle back to Texarkana, to the line of railway from which they were received, by which line they were returned to Plain Dealing, and there tendered to the shippers, who refused to receive them. Thereupon they were sold, after proper advertising, and the proceeds of the sale, less pasturage at Plain Dealing, were tendered to the owners, which was also refused. At the time of the shipment the live-stock sanitary commission had recom-

mended the adoption of the following regulation with reference to Louisiana cattle:

"The Texas live-stock commission has reason to believe that charbon or anthrax has or is liable to break out in the state of Louisiana; and from this time forth until the 15th day of November, 1897, no cattle, mules, or horses are to be transported or driven into the state of Texas from the state of Louisiana."

The quarantine established (if valid) was in full force at the time of the shipment of the cattle. The bill of lading contained stipulations as to a measure of damages in case of a total loss of the cattle, and other provisions, which, as they do not raise Federal questions, we are not concerned with on this record.

\*The trial court held that—

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"1. The quarantine regulations above mentioned, established by the governor of the state, as a regulation of or an interference with interstate commerce, in that its effect is to prohibit the importation of all cattle from the state of Louisiana into the state of Texas, whether affected with or capable of communicating the disease mentioned in said proclamation or not, and is therefore void as being in contravention of § 8 of article 1 of the Constitution of the United States.

"Had the live-stock sanitary commission of the state found upon investigation that charbon or anthrax had broken out among the entire cattle of the state of Louisiana, and that all cattle of the state of Louisiana were liable to communicate either of said diseases to cattle of the state of Texas, and had said proclamation of the governor been based upon said finding, then I think it would have been in law a police regulation of no greater scope than necessary to the protection of cattle in the state of Texas, and therefore valid, even though it did interfere with interstate commerce."

It also held that the stipulation in the contract of shipment limiting the damages at a fixed sum per head was void, and gave judgment for the actual cash value of the cattle, less freight charges. The judgment amounted to \$578.10.

The judgment was reversed by the court of civil appeals, and thereupon the chief justice of that court granted this writ of error. Before the commencement of the action the plaintiff in error became the vendee of the interests of the other owners.

Mr. F. E. Albright submitted the cause for plaintiff in error. Mr. Wallace Hendricks was with him on the brief:

The state may not absolutely prohibit the importation of all cattle, mules, or horses from another state, without making any provision for quarantine and inspection, or providing any method whatever for a determination of the question as to whether the facts exist justifying it in suspending the right and privilege of engaging in that business.

*Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 468, 24 L. ed. 529; *Henderson v. New York*, 92 U. S. 265, sub nom. *Henderson v. Wickham*, 23 L. ed. 547; *Schollenberger v.*

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*Pennsylvania*, 171 U. S. 4, 43 L. ed. 50, 18 Sup. Ct. Rep. 757; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 473, 31 L. ed. 703, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Scott v. Donald*, 165 U. S. 59, 41 L. ed. 633, 17 Sup. Ct. Rep. 265; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1121; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Mr. Samuel H. West submitted the cause for defendant in error:

Defendant in error was placed in the position where it must either violate a statute of Texas and be subject to a prosecution for the penalties therein prescribed, or obey the law and subject itself to a suit for damages. Under such circumstances a citizen can only elect to obey the law.

*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 428; *State ex rel. Nicholls v. Shakespeare*, 41 La. Ann. 156, 6 So. 592.

The quarantine regulations and orders of the live-stock sanitary commission of Texas, promulgated by the proclamation of the governor of that state, constituted a valid exercise of the police powers of the state, and were binding upon its citizens.

*Holden v. Hardy*, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383; *Com. v. Alger*, 7 Cush. 84; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 629, 42 L. ed. 883, 18 Sup. Ct. Rep. 488; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277.

[252] \*Mr. Justice McKenna, after making the foregoing statement, delivered the opinion of the court:

There are other questions in the record [253] besides the Federal \*one, upon which the writ of error is based. They seem not to have been earnestly pressed, either in the trial court or in the court of civil appeals. They were not passed on by either court. The court of civil appeals, however, said:

"It was shown that appellee's vendors had actual notice of the quarantine, and that appellant had not. It was also shown that after such notice was brought home to appellant it sought permission of the sanitary commission to deliver the cattle. The sanitary commission ruled and ordered otherwise. It has been given power to make rules. It has the power to call upon the sheriff and peace officers to enforce them. It was the duty of such officers to obey the orders of such commission. Our law also provides heavy penalties for a violation of the rules and regulations of the sanitary commission."

It is possible that the court may have concluded that the defense which those facts suggest could not be made by the railway company, and that, notwithstanding the plaintiff in error could compel the company to receive his cattle, and force into contest the constitutionality of the Texas statute, either by resisting the imposition of its penalties or in some other way. At any rate, the court rested its decision on the statute, 181 U. S.

holding it valid; and it is its judgment which we are called upon to review.

To what extent the police power of the state may be exerted on traffic and intercourse with the state, without conflicting with the commerce clause of the Constitution of the United States, has not been precisely defined. In the case of *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543, it was held that the statute of the state, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the state, required shipowners to pay a fixed sum for each passenger,—that is, to pay for all passengers,—not limiting the payment to those who might actually become such charge,—was void. Whether the statute would have been valid if so limited was not decided.

In *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, a statute declaring the same purpose as the New York statute, and apparently directed against persons mentally and physically infirm, \*and against convicted criminals and immoral women, was also declared void, because it imposed conditions on all passengers, and invested a discretion in officers which could be exercised against all passengers. The court, by Mr. Justice Miller, said:

"We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object alone shall, in a proper controversy, come before us, it will be time enough to decide that question."

In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, a statute of Missouri which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid.

The relation of the police power of a state and the power of Congress to regulate commerce came up again in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep.



689, 1062. The principle which underlies both powers and the range and operation of those powers were considered. The action was against the railroad company for refusing to transport beer from Chicago to Marshalltown, in Iowa. The refusal was attempted to be justified under a statute of Iowa against traffic in intoxicating liquors (255)\* and the conveyance of the same by an express or railway company into the state, except under certain conditions. The statute was decided to be a regulation of commerce,—to be not within the police power of the state and therefore void. *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, is of the same general character, and need not be commented upon. See also *Scott v. Donald*, 165 U. S. 59, 41 L. ed. 633, 17 Sup. Ct. Rep. 265.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, some prior cases were reviewed, and the court, speaking by Mr. Justice Peckham, said:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state, if the inspection prescribed were of such a character, or if it were burdened with such conditions, as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer v. Reberman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; and in *Scott v. Donald*, 165 U. S. 58, 97, 41 L. ed. 632, 644, 17 Sup. Ct. Rep. 265."

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce,—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not (256)\* only to the actually diseased, but to what has become exposed to disease. In *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. 850

Ct. Rep. 1114, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the states. In *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the state any Texas cattle, unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever," and there was, besides, criminal punishment. The court did not pass upon the 1st section. In commenting upon the 2d some pertinent remarks were made on the facts which justified the statute, and the case of *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' p. 473, L. ed. 531. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering \*within it. p. 472, L. ed. (257) 530. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, 181 U. S.



the *Husen Case* was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state "any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this state shall be liable . . . for . . . damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of March 29, 1884 (23 Stat. at L. 31, chap. 60), known as the animal industry act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543, and *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the court of civil appeals said: "The necessities of such cases often require prompt action. If too long delayed the end [258] to be attained by \*the exercise of the power to declare a quarantine may be defeated and irreparable injury done."

It is urged that it does not appear that the action of the live-stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in *Kimmish v. Bell*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277. But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome, and the remarks of the court of civil appeals become pertinent:

"The facts in this case are not disputed. The plaintiff sues as for a conversion, because of a refusal to deliver his cattle at Fort Worth. It is necessary to his recovery that he show that it was the legal duty of [259] 181 U. S.

the defendant company to make such delivery. It is for the breach of this alleged duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. So far as the record shows, every animal of the kind prohibited in the state of Louisiana may have been actually affected with charbon or anthrax; and it is conceded that this is a disease different from Texas or splenic fever, and that it is contagious and infectious and of the most virulent character."

*Judgment affirmed.*

\*Mr. Justice Harlan dissenting:

[259]

I am unable to concur in the opinion and judgment of the court. The grounds of my dissent are these: (1) The railroad company was bound to discharge its duties as a carrier unless relieved therefrom by such quarantine regulations under the laws of Texas as were consistent with the Constitution of the United States. It could not plead in defense of its action the quarantine regulations adopted by the state sanitary commission and the proclamation of the governor of that state, if such regulations and proclamation were void under the Constitution of the United States. (2) The authority of the state to establish quarantine regulations for the protection of the health of its people does not authorize it to create an embargo upon all commerce involved in the transportation of live stock from Louisiana to Texas. The regulations and the governor's proclamation upon their face showed the existence of a certain cattle disease in one of the counties of Texas. If, under any circumstances, that fact could be the basis of an embargo upon the bringing into Texas from Louisiana of all live stock during a prescribed period, those circumstances should have appeared from the regulations and the proclamation referred to. On the contrary, there does not appear on the face of the transaction any ground whatever for establishing a complete embargo for any given period upon all transportation of live stock from Louisiana to Texas.

I think, therefore, that the regulations and proclamation upon which the defendant relied were to be deemed void and therefore inapplicable to the particular transportation referred to in the complaint.

It seems to me that the present case comes within the principles announced in *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543. That case involved the validity of a statute of New York having for its object the protection of the people of that state against the immigration of foreign paupers. It was held by this court to be unconstitutional, because "its practical result was to impose a burden upon all passengers from foreign countries." \*In that case it was said that, [260] in whatever language a statute was framed, its purpose must be determined by its nature.



al and reasonable effect. So, also, in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 473, 24 L. ed. 527, 531, we held that a statute of Missouri relating to the bringing into that state of any Texas, Mexican, or Indian cattle between certain dates was a plain intrusion upon the exclusive domain of Congress. This court said: "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure." What was said of the Missouri statute may be repeated as to the regulations adopted by the sanitary commission and the proclamation of the governor of Texas forbidding the bringing of cattle into that state from Louisiana. The result in my judgment is, in view of our former decisions, that the quarantine regulations and proclamation in question involved, by their natural and practical operation, an unauthorized obstruction to the freedom of interstate commerce. This must be so, even if the statute of Texas, reasonably interpreted, was itself not repugnant to the Constitution of the United States.

Mr. Justice **White** authorizes me to say that he concurs in these views.

Mr. Justice **Brown** dissenting:

[261] The law of Texas for the creation of a livestock sanitary commission, cited in the opinion of the court, provides that "it \*shall be the duty of said commission, upon receipt by them of reliable information, . . . of any malignant disease, to go . . . and make a careful examination of the animals believed to be affected, . . . and if said disease is found to be of a malignant, contagious, or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animal infected with disease, or capable of communicating the same, shall be permitted to enter or leave the district, premises, or grounds so quarantined, except by authority of the commissioners."

I had supposed the authority of the commissioners to be fixed by this act, and their right to quarantine or forbid the entry of animals was limited to such as were infected with disease or capable of communicating the same.

The proclamation of the governor, based upon the report of the sanitary commission, covers two separate classes of cases. It finds that cattle in the southern portion of

Jefferson county, Texas, are affected with disease, and liable to impart such disease to cattle ranging in the upper portion of Jefferson and other counties, and therefore forbids such cattle from being transported north or west of certain bayous running across the southern portion of Jefferson county. So far the order is within the statute.

But it also finds that the commission "has reason to believe that charbon and anthrax has (broken out) or is liable to break out in the state of Louisiana," and hence that no cattle are to be transported into Texas from Louisiana. This portion of the order seems to me a plain departure from the terms of the statute. It does not find that there are cattle in Louisiana "infected with disease or capable of communicating the same," but simply that the disease is liable to break out in that state. It does not even find that it has broken out, or that there are any cattle in that state capable of communicating the disease. If the fact that a contagious disease is liable to break out in a certain locality be sufficient to justify a quarantine against such locality, then it is possible that every port of the United States may quarantine against Cuban or other West Indian ports, \*since it is a well-known fact [262] that yellow fever is liable to break out there at almost any time, and especially during the summer months.

The sweeping nature of this order is manifest by comparing it with the first order relating to the Jefferson county cattle. There is a finding there that the cattle in the southern portion of a particular county "are affected with disease, known as charbon or anthrax, and are liable to impart such disease to cattle" ranging in the upper portion of Jefferson county, and therefore no cattle shall be transported north or west of the infected district. In other words, it finds the actual existence of disease within a definite and circumscribed locality, and prohibits the transportation of cattle from such locality to noninfected districts.

On the other hand, the second order assumes to quarantine against cattle from the entire state of Louisiana, without any finding that the disease has broken out there, or that the cattle in such state are liable to communicate such disease to other cattle. The order is not limited to cattle coming from any particular portion of the state, but applies to the whole state, regardless of the actual existence of the disease or the liability to communicate contagion.

It seems to me that the proclamation goes far beyond the authority of the statute, beyond the necessities of the case, and is a wholly unjustifiable interference with interstate commerce. The statute thus construed puts a power into the hands of a sanitary commission which is liable to be greatly abused, and to be put forward as an excuse for keeping out of Texas perfectly healthy animals from other states, and putting a complete stop to a large trade.

In the case of the *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, the statute of Kansas in



question applied only to "cattle capable of communicating, or liable to impart what is known as Texas, splenetic or Spanish fever" to any domestic cattle of the state, and was a proper exercise of the power of quarantine, since healthy cattle were not interfered with. These were substantially the terms of the Texas statute, to which I see no objection; [263] but the action of the commission "was a plain departure from the terms of the statute, and I think unauthorized by law. It was practically as sweeping as the statute of Missouri, condemned by this court in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this state, between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," regardless of the fact whether these cattle were diseased or were capable of communicating disease. This was held to be in conflict with the interstate commerce clause of the Constitution. As justly observed of the opinion in that case by the court in its opinion in this case, "A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle, and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid." This is the precise objection I make to the finding of the commission, and to the proclamation of the governor in this case.

It is sufficient to say of the finding of the court of civil appeals of Texas that, "so far as the record shows, every animal of the kind prohibited in the state of Louisiana may have been actually affected with charbon or anthrax," that there is no such finding in the report of the commission or in the governor's proclamation, and that, under the statute, there must be a finding either of disease or of a liability to communicate disease, to justify the action of the commission. It cannot of its own motion put in force the quarantine laws of the state, without the finding of some facts that such enforcement is necessary to the protection of Texas cattle. I am therefore constrained to dissent from the opinion of the court.

[264] \*CHARLES H. TREAT, United States Collector of Internal Revenue, *Plff. in Err.*,

v.

STEPHEN V. WHITE.

(See S. C. Reporter's ed. 264-269.)

*Stamp tax—on "call" for stock.*

A "call" for stock, which contains an absolute promise to sell the stock at any time within fifteen days at a certain price, though it may be a unilateral contract, is an "agreement to sell," within the provision of the war revenue act of June 13, 1898 (30 Stat. at L. 448), Schedule A, § 25, requiring a stamp tax of 2 cents on each \$100 of face value or fraction thereof.

venue act of June 13, 1898 (30 Stat. at L. 448), Schedule A, § 25, requiring a stamp tax of 2 cents on each \$100 of face value or fraction thereof.

[No. 227.]

*Argued April 10, 1901. Decided April 29, 1901.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit stating a question as to the liability of a "call" for stock to a stamp tax. *Answered in the affirmative.*

Statement by Mr. Justice Brewer:

On September 18, 1899, S. V. White brought an action in the supreme court of the state of New York against Charles H. Treat, United States collector of internal revenue, to recover the sum of \$604, alleged to have been unlawfully exacted by such collector. The action was removed to the United States circuit court for the southern district of New York, and a judgment there rendered in favor of the plaintiff. 100 Fed. Rep. 290. The case was taken to the United States court of appeals for the second circuit, which, before any decision, certified a question to this court. The statement of facts and question are as follows:

"From the 1st day of July, 1898, until the date of the commencement of this action the defendant in error, Stephen V. White, was doing business as a stockbroker on the New York stock exchange. In the course of his business White sold 'calls' upon 30,200 shares of stock, the said 'calls' being of the same effect and tenor as Exhibit A, hereinafter set forth, and only varying in the names of the stock, the date, and the price at which they were offered.

"EXHIBIT A.

"New York, May 18th, 1899.

"For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refining Company at 175 per cent at any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, at 3 P. M.

"(Signed) S. V. White.

"These 30,200 shares of stock, for which 'calls' at various times had been in existence, were, as matter of fact, never actually 'called,' and no stamp was put upon the same. That the plaintiff in error, Charles H. Treat, United States collector of internal revenue, demanded of the defendant in error, Stephen V. White, the sum of \$604, which sum was the value of 30,200 internal revenue stamps of the denomination of 2 cents each.

"This sum of \$604 was paid by the defendant in error, Stephen V. White, under protest. Subsequently the defendant in error demanded the return of the said \$604, but the demand was refused.

"Upon the facts set forth the question of

law, concerning which this court desires the instruction of the Supreme Court for its proper decision, is:

"Is the above memorandum in writing, designated as Exhibit A, an 'agreement to sell' under the provisions of § 25, Schedule A, act of Congress approved June 13th, 1898, and, as such, taxable?"

The collector acted under the provision of § 25, Schedule A, of the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448), which reads as follows:

"On all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or to secure the future payment of money or for the future transfer of any stock, on each hundred dollars of face value or fraction [266] thereof, two cents: *Provided*, That in \*case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell, or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

Assistant Attorney General Beck argued the cause and filed a brief for plaintiff in error.

Mr. Stephen V. White argued the cause and filed a brief in *propria persona*.

Mr. Justice Brewer delivered the opinion of the court:

The question before us is simply one of statutory construction. Is a "call" (a copy of which is incorporated in the statement of facts) an agreement to sell, within the meaning of Schedule A? In reference to this the learned circuit judge, in delivering his opinion, said:

"It is an agreement, and manifestly an 'agreement to sell.' It may be referred to as an 'offer,' or an 'option,' or a 'call,' or what not, but it is susceptible of no more exact definition than 'an agreement to sell.' Inasmuch, therefore, as the statute requires stamps to be affixed 'on all sales or agreements to sell,' it would seem that these 'calls' are within its provisions."

We fully agree with this definition. "Calls" are not distributed as mere advertisements of what the owner of the property

described therein is willing to do. They are sold, and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It \*may [267] be a unilateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the circuit judge that this is in its terms, its essence, and its nature an agreement to sell. Therefore it comes within the letter of the statute.

The defendant in error, who has argued in his own behalf with ability the questions presented, has referred in his brief to this rule of construction: That the duty of the court "is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity." Sedgw. Stat. & Const. L. [2d ed.] 220. With that rule of construction we are in entire sympathy, and approve of it. In the ordinary reading of this instrument no one would doubt that there was an agreement on the part of the promisor to sell at the time named the property therein described. That being the ordinary, natural, grammatical interpretation of the language, it is, as the learned circuit judge declared, neither more nor less than an agreement to sell. Why should not the ordinary meaning of the language in the statute be enforced in respect to this particular instrument? Certainly there must be some satisfactory reason for departing from the general rule of construction. It is also true, as said by this court in *United States v. Isham*, 17 Wall. 496, 504, 21 L. ed. 728, 730, "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr v. Scudds*, 11 Exch. 191, 'a tax cannot be imposed without clear and express words for that purpose.'" With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. But when the language is clear a different thought arises.

We do not question the fact that there are times when the mere letter of a statute does not control, and that a fair consideration of the surroundings may indicate that that which is within the letter is not within the spirit, and therefore must be \*ex- [268] cluded from its scope. *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511. But that proposition implies that there is something which makes clear an intent on the part of Congress against enforcement according to



the letter. Nothing of that kind exists in this case. There is nothing to suggest that Congress did not mean that this provision should be enforced according to its letter and spirit everywhere. The defendant in error, in the course of his argument, says that Congress must be assumed to have been familiar with the ordinary modes of dealing on the stock exchange of New York, and that if it intended by its legislation to reach "calls," a term well understood in that exchange, it would have named them or used some word which necessarily includes them. But this takes for granted the question at issue, and assumes that the words used do not include "calls." It is not to be assumed that Congress legislated with sole reference to transactions on stock exchanges, but its action is to be taken as having been exerted for the whole nation, and if it should so happen that dealings on any stock exchange come within the purview thereof, the parties so dealing are bound by it, and cannot claim an immunity from its burden. An isolated agreement to sell stock, made by an individual in Austin, Texas, is an agreement to sell subject to the stamp duty imposed. It is none the less an agreement to sell when made in the stock exchange of New York, as one of a multitude of similar transactions.

That there is a difference between an agreement to sell and an agreement of sale is clear. The latter may imply, not merely an obligation to sell, but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. That Congress recognized the difference between these two terms is evident, because in the very next paragraph of Schedule A it provides, in reference to merchandise, for a stamp "upon each sale, agreement of sale, or agreement to sell." That no stamp duty was imposed on agreements to buy (or, in the vernacular of the stock exchange, "puts") furnishes no ground for denying the validity of the stamp duty on agree-  
 [269]ments to sell. The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty, and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one, and not upon the other.

In conclusion, we may say that the language of the statute seems to us clear. It imposes a stamp duty on agreements to sell. "Calls" are agreements to sell. We see nothing in the surroundings which justifies us in limiting the power of Congress or denying to its language its ordinary meaning.

Therefore we answer the question submitted to us by the Circuit Court of Appeals in the affirmative, and hold that a "call" is an agreement to sell, and taxable as such.

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EDWARD W. SPEED, as Administrator of William B. Franklin, Deceased, et al.,  
 Plffs. in Err.,

v.

PATRICK B. MCCARTHY.

(See S. C. Reporter's ed. 269-276.)

*Error to state court — Federal questions.*

1. The question of the estoppel of a party to deny the validity of a mining location does not constitute a Federal question for review by the Supreme Court of the United States on writ of error to a state court.
2. A decision by a state court that a cotenant who relocates a mining claim held in common is to be deemed a trustee for all the cotenants does not determine a Federal question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.
3. A statement in a pleading, that the other party intended to set up certain rights under certain mining claims, and that these claims were abandoned and forfeited before certain other claims were located, is not sufficient to constitute a definite claim of a right or title under a statute of the United States, which will present a Federal question on writ of error from the Supreme Court of the United States to a state court.

[No. 230.]

*Argued April 10, 11, 1901. Decided April 29, 1901.*

**I**N ERROR to the Circuit Court of Pennington County, State of South Dakota, to review a decision in favor of plaintiff in an action to determine adverse claims to mining property. *Dismissed.*

See same case below, 12 S. D. 7, 50 L. R. A. 190, 80 N. W. 135.

Statement by Mr. Chief Justice **Fuller**:

Patrick B. McCarthy commenced this action in the circuit court of Pennington county, South Dakota, against William B. Franklin and others, to determine their adverse claims in and to certain mining property. Before the trial William B. Franklin died, and his heirs and his administrator, Edward W. Speed, were substituted.

The circuit court filed findings of fact and conclusions of law, and entered judgment for defendants on the facts so found.

The facts found by the trial court are thus stated in the opinion of the supreme court:

"On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious, and peaceable possession of the claim, were acknowledged and reputed to

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



be its owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889 and about four days' work in 1891; such work not exceeding \$14 in each of those years. There was no agreement on the part of defendants Blair or Franklin with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor [271] has been performed or improvement "made upon Tin Bar No. 2, except about four days' work in 1891, of value not exceeding \$14. There was no agreement on the part of defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893, or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4, on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888 Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin (since deceased) and defendants Blair, Fayel, and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim and an undivided seven-thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery "being outside the [272] limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until during the trial of this action in the court below."

Plaintiff appealed to the supreme court of South Dakota from the judgment and from an order denying a new trial, and the judgment was reversed and a new trial ordered. 11 S. D. 362, 50 L. R. A. 184, 77 N. W. 590. Subsequently a rehearing was had, and judgment was directed to be entered below for plaintiff on the findings of fact for one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as was embraced by Tin Bar No. 1 and Tin Bar No. 2. 12 S. D. 7, 50 L. R. A. 190, 80 N. W. 135. This was accordingly done by the circuit court, and this writ of error was thereupon allowed.

**Mr. George Lines** argued the cause, and, with *Messrs. Joseph Quarles, James W. Fowler, Fred H. Whitfield, and Charles Quarles*, filed a brief for plaintiffs in error: The phrase "specially set up or claimed," used in U. S. Rev. Stat. § 709, does not mean that the particular section of the Constitution, treaty, or statutes need be set out at length, or designated by number or in any particular manner. It means merely that it must appear, unmistakably, that the party intends to invoke, for the protection of his rights, a provision of the Constitution, a treaty, or a statute.

*F. G. Oaley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

Doubtless the pleadings should be sufficiently definite to indicate the particular act of Congress or part of the Constitution upon which it is intended to rely, but this need not be done in express words.

*Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Green Bay & M. Canal Co. v. Patten Paper* 181 U. S.



Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

To give this court jurisdiction to review the decision of a state court, under U. S. Rev. Stat. § 709, it is sufficient if it appear upon the whole record that the adjudication of one of the class of questions mentioned in that section was necessarily involved in the disposition of the case by the state court, and was decided against the party seeking a review; and it is not necessary that this should appear in express terms, either in the opinion of the state court or elsewhere, if the whole record shows that the state court could not have reached the conclusion it did without deciding such a question.

*Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

Though it were true that the assignment of error attached to and sent up with the writ made no reference to any statute of the United States under which the plaintiffs in error claim a right and title, this would afford no ground for dismissal. A writ of error will not be dismissed, even if no assignment of errors at all is sent up with the writ.

*Independent School Dist. v. Hall*, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; *Gumbel v. Pitken*, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; *United States v. Pena*, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

If it were true that the supreme court of South Dakota had ignored the Federal questions, and had clearly declared that it decided the case upon other grounds, that would not affect the jurisdiction of this court, since the Federal questions are in the case, and cannot be avoided by passing them over in silence or by declaring that they are not involved.

*Chapman v. Goodnow*, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 236, 8 Sup. Ct. Rep. 211; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

**Mr. William L. McLaughlin** argued the cause, and, with **Messrs. Charles W. Brown** and **Daniel McLaughlin**, filed a brief for defendant in error:

The plaintiff, if the statement of his own

claim does not disclose a Federal question, cannot create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States.

*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

The words "specially set up or claimed" imply that if a party intends to invoke, for the protection of his rights, the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare, "specially," that is, unmistakably, this court is without authority to re-examine the final judgment of the state court.

*Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Hoyt v. Sheldon*, 1 Black, 518, *sub nom. Hoyt v. Thompson*, 17 L. ed. 65; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Chicago & N. W. R. Co. v. Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129.

The Supreme Court of the United States will not entertain jurisdiction of state judgments, where, besides the Federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained.

*Kennebec & P. R. Co. v. Portland & K. R. Co.* 14 Wall. 23, 20 L. ed. 850; *Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Castillo v. Mo-Connico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Sherman v. Grinnell*, 144 U. S. 198, 36 L. ed. 403, 12 Sup. Ct. Rep. 574; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 722; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Moran v. Horsky*, 178 U. S. 205, 44 L. ed.

1038, 20 Sup. Ct. Rep. 856; *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; *Seeberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

[272] \*Mr. Chief Justice Fuller delivered the opinion of the court:

It is objected that jurisdiction of this writ of error cannot be maintained because no title or right was specially set up or claimed within § 709 of the Revised Statutes. But plaintiffs in error contend that, while they admit that they made no specific reference to the statutes of the United States, their pleading, nevertheless showed that they asserted title through valid mining claims duly located, and denied the title of defendant in error on the ground that the locations under which he claimed had become forfeited and abandoned, and that that was a sufficient compliance with the requirements of § 709.

We cannot concede that this is so in view of the rule expounded in *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709, and \*many other cases; and are the less disposed to that conclusion, as the case might well be held to have been decided on grounds independent of Federal questions.

Counsel for plaintiffs in error assert in their printed brief that the following questions were presented by the findings of fact:

"First. Whether Tin Bar No. 1 claim, in its entirety, was extinguished and lost to the owners thereof by the patenting of the Reed placer claim.

"Second. Whether the Tin Bar No. 2 claim, to the extent that it conflicted with the Reed placer, was extinguished and lost to the owners thereof by the patenting of the placer claim.

"Third. Whether, notwithstanding the failure of the owners of the Tin Bar claims to perform thereon the work required by § 2324, Rev. Stat., those claims continued to be valid and subsisting claims, and the locators thereof or their grantees, cotenants in respect thereto; so that one of such locators or grantees could not make a new location, for his own benefit solely, and include therein a portion of the ground covered by said Tin Bar claims, although, by reason of such failure to work, said claims had become 'open to relocation in the same manner as if no location of the same had ever been made.'"

And they insist that these questions could only have been determined by the application of the provisions of chapter 6 of Title 32 of the Revised Statutes correctly interpreted, particularly of § 2324.†

†"Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of re-

\*But the supreme court of South Dakota[274] held that plaintiffs in error, defendants below, were not in a position to allege or prove against defendant in error, plaintiff below, that the declarations contained in the recorded location certificates were false.

In its first opinion, after saying that there was "certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim;" and also that "if the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patents;" the court proceeded to hold that the conduct of the original locators was such as to induce "persons who might examine the records to believe that they were the owners of properly located mining claims," and that the rights of defendant in error in this action depended "upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded \*representations were[275] false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations."

In the opinion on rehearing the court said that the findings of the circuit court showed "that Reed, Franklin, Blair, and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of the register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators; and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations."

If, as thus held, defendants below could not deny the validity of these locations, the estoppel covered the objection to the right to locate a lode claim within a placer claim previously located, and the objection based on the supposed effect of the patenting of the placer claim, as raised on this record. And whether a party is estopped or not is not a Federal question. *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

Having determined that for the purposes of this action the Tin Bar claims were to be regarded as valid in their inception, the supreme court considered the controversy as to the right of a cotenant to relocate a mining claim when the annual assessment work

ording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records



has not been done, and obtain title as against his cotenants.

The court held that the relation of cotenancy existed between McCarthy and Franklin when Franklin located the Holy Terror and Keystone claims; that original locators may resume work at any time before relocation; that Franklin's acts of relocation did not terminate the fiduciary relation between himself and McCarthy; and said: "We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the Federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be [276] open to relocation \*in the same manner as if no location of the same had ever been made.' Rev. Stat. U. S. § 2324. It is contended that if Congress intended to have the locator regarded as a trustee under any circumstances, such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute."

The state court thus disposed of this branch of the case upon general principles of law, and its decision did not rest on the disposition of a Federal question.

Counsel argue, however, that the court,

of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

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before reaching the question of cotenancy, was compelled to hold, and did hold, that the Tin Bar claims existed at the time of the location of the Holy Terror and Keystone claims, and that in so holding the court necessarily decided against the contention of plaintiffs in error that the Tin Bar claims had absolutely ceased to exist by virtue of the statute properly interpreted.

But was that contention so put forward as to constitute the special assertion of a right given or protected by the act of Congress? The only approach to such an assertion was the statement of plaintiffs in error in their amended answer, that defendant in error intended to set up certain rights under the Tin Bar claims, and that these claims were abandoned and forfeited before the Holy Terror and Keystone claims were located. We think these general allegations fall short of that definite claim of a right or title under a statute of the United States, which § 709 requires; and that, as the record stands, this court would not be justified in holding that the state court denied a right or title specially set up as secured by the statute, when it determined this particular question on the general principles of law recognized as prevailing in South Dakota.

*Writ of error dismissed.*

\*AMERICAN SUGAR REFINING COM-[277]  
PANY, *Petitioner*,  
v.

CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 277-283.)

*Appeal—jurisdiction of circuit court of appeals — constitutional question — certiorari.*

1. The mere fact that a constitutional question may have so arisen that a direct resort to the Supreme Court of the United States may be had, where the jurisdiction of the circuit court depends on diverse citizenship, does not deprive the court of appeals of jurisdiction of an appeal, or justify it in declining to exercise that jurisdiction.
2. On petition for certiorari or mandamus to a circuit court of appeals which has erroneously dismissed a writ of error for want of jurisdiction, where the record is before the Supreme Court on the return to a rule to show cause and full argument has been had, the writ of certiorari is issued, and the return to the rule is allowed to stand as a return to the writ, and judgment thereupon reversed, and the cause remanded, with a direction to take jurisdiction and dispose of the cause.

[No. 535.]

NOTE.—On the jurisdiction of the circuit court of appeals—see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *Salmon v. Mills*, 13 C. C. A. 374; and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

*Argued and Submitted March 18, 1901. Decided April 29, 1901.*

**P**ETITION for certiorari or mandamus to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision dismissing a writ of error for want of jurisdiction. *Reversed and remanded.*

See same case below, 43 C. C. A. 393, 104 Fed. Rep. 2.

**Statement by Mr. Chief Justice Fuller:**

This was a petition for a writ of certiorari requiring the United States circuit court of appeals for the fifth circuit to certify to this court for its review and determination the case of *American Sugar Ref. Co. v. New Orleans*, No. 920, Nov. Term 1899, 43 C. C. A. 393, 104 Fed. Rep. 2, or in the alternative for a writ of mandamus to command the judges of said court to hear, try, and adjudge said cause.

The petition alleged that on June 14, 1899, the city of New Orleans brought suit by rule in a civil district court for the parish of Orleans, Louisiana, against the American Sugar Refining Company for a city license tax for the year 1899 for the sum of \$6,250, with interest thereon, claiming said [278] license tax \*solely by virtue of the laws of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar and molasses in that city; that the American Sugar Refining Company petitioned the district court for an order removing the suit to the circuit court of the United States for the eastern district of Louisiana, the petition for removal being based solely upon the ground that the defendant was a corporation of New Jersey, and the plaintiff a corporation of Louisiana; which petition was granted, the bond required given, a certified copy of the record filed, and the suit docketed in the circuit court.

That thereafter, by order of the court, the city reformed its pleadings in some parts, "the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the formal prayer for a recognition of a lien and privilege on defendant's property, and for an injunction against defendant carrying on its business."

That the defendant answered:

"First. That it was a manufacturer, and as such exempt from license taxation under article 229 of the Constitution of the state of Louisiana of 1898, which exempts all manufacturers from state and municipal license taxation, except those of distilled, alcoholic, and malt liquors, tobacco, cigars, and cottonseed oil; and—

"Second. That the ordinance of the city of New Orleans under which said tax was claimed was based upon act No. 171 of the general assembly of Louisiana of 1898, and that the said act was in contravention of the 14th Amendment to the Constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and

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thereby sought to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the state of Louisiana; and that the said act and city ordinance based thereon were therefore unconstitutional and void as to defendant."

That the suit was tried before the court and a jury, and evidence was adduced showing the nature and character of \*defendant's [279] business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; and also showing that the gross receipts of defendant's business were of such amount that, if liable at all for license tax, it was liable for the sum claimed; and defendant also filed an exception of no cause of action.

That at the close of the evidence defendant requested the court to direct the jury to render a verdict in its favor, which the court refused to do, and charged in plaintiff's favor, and plaintiff obtained a verdict and judgment. On defendant's application a bill of exceptions was duly settled and signed by the presiding judge; and the case carried on error to the United States circuit court of appeals for the fifth circuit. The cause was there heard, and on May 29, 1900, judgment was rendered by the circuit court of appeals dismissing the writ of error on the ground of want of jurisdiction. 43 C. C. A. 393, 104 Fed. Rep. 2. Petitioner thereupon applied for a rehearing, which was denied November 20, 1900.

Petitioner prayed for the writ of certiorari, or for the writ of mandamus as before stated. Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made.

**Mr. Joseph W. Carroll** argued the cause, and, with **Mr. Charles Carroll**, filed a brief for petitioner:

We conceive that the petition for a writ of mandamus in the alternative is properly addressed to the court, because of the circumstances of the case and upon the authority of *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

The jurisdiction of the circuit court was sought and attached solely because of the diverse citizenship of the parties to the suit; and, under repeated decisions of this court, the ground upon which the jurisdiction of a circuit court attaches is alone to be looked to in determining the character of the suit, for the purposes of an appeal or writ of error under the act of March 3, 1891.

*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40;

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*Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222.

Even when a Federal question is raised by the plaintiff in a supplemental bill, the circuit court of appeals has appellate jurisdiction when the jurisdiction of the circuit court was originally invoked on the ground of diversity of citizenship of the parties to the suit.

*Third Street & S. R. Co. v. Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

There is no doubt as to the right of this court to remove the case from the court of appeals at any stage of the proceedings in that court.

*United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

Mr. Samuel L. Gilmore submitted the cause for respondent:

Under the act of March 3, 1891, creating the court of appeals, and the interpretation repeatedly put upon that act by this court, it was entirely discretionary with the circuit court of appeals for the fifth circuit whether it would take jurisdiction of the instant cause or not.

*Carter v. Roberts*, 177 U. S. 500, 44 L. ed. 863, 20 Sup. Ct. Rep. 713; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1.

However the constitutional question arose, the fact that it was an issue in the case was sufficient to vest jurisdiction in the Supreme Court of the United States under § 5 of 26 Stat. at L. 826-828 (act of March 3, 1891), which says that appeals or writs of error may be prosecuted to the Supreme Court "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

*Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

[279] \*Mr. Chief Justice Fuller delivered the opinion of the court:

The jurisdiction of the circuit court rested on diverse citizenship, and not on any other ground, and had the circuit court of appeals gone on and decided the case, its decision would have been final, and our interposition could only have been invoked by certiorari.

This was so notwithstanding one of the defenses was the unconstitutionality of the ordinance. *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222. These, and many other cases to the same effect, related to the appellate jurisdiction of this court over the court of appeals under the 6th section of the judiciary act of March 3, 1891, but they necessarily involved consideration of our jurisdiction under the 5th section, and that of the court of appeals under the 181 U. S.

6th section. By the 5th section appeals or writs of error may be taken from the district or circuit courts direct to this court in any case that "involves the construction or application of the Constitution of the United States;" "in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question;" "in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." Section 8 provides that the circuit courts of appeals shall exercise appellate jurisdiction to review the final decisions of the district and circuit courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court attaches solely by reason of diverse citizenship, it follows that the court of appeals has power to review the judgment of the circuit court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the circuit court attached, by reason whereof the case became embraced by section 5.

Thus, it was held in *Loeb v. Columbia Twp.* 179 U. S. 472, ante, 280, 21 Sup. Ct. Rep. 174, where the jurisdiction of the circuit court rested on diverse citizenship, but the state statute involved was claimed in defense to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from \*this[281] court to revise the judgment of the circuit court, although it was also ruled that the plaintiff might have carried the case to the circuit court of appeals, and that, if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the circuit court.

The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." [§ 6.]

And the right to two appeals would exist in every case (the litigated matter having the requisite value), where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the

circuit courts of appeals, for their decisions would not come within the category of those made final.

As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States (*Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867); and as those cases fall strictly within the terms of section 5, the appellate jurisdiction of this court in respect of them is exclusive.

If plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that,—a question expressly reserved in *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35,—and the case is taken to the court of appeals, propositions as to the latter [282] grounds may \*be certified; or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide) an appeal or writ of error would lie under the last clause of section 6, because the jurisdiction would not depend solely on diverse citizenship. *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

In *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713, we said: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals those courts may decline to take jurisdiction, or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship, and it turns out that the case involves the construction or application of the Constitution of the United States, or the constitutionality of a law of the United States, or the validity or construction of a treaty, is drawn in question, or the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States, the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised, or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take juris-

diction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in § 5 may have so arisen that a direct resort to this court might be had does not deprive the court of appeals of jurisdiction, or justify it in declining to exercise it.

In the case at bar the jurisdiction rested on diverse citizenship. Two defenses were interposed, one of which asserted exemption from the license tax, and the other denied the constitutionality of the legislation under which the tax was imposed. \*Both de- [283] fenses were overruled, and judgment rendered for the plaintiff. The case was then carried on error to the circuit court of appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a certiorari should issue that its judgment to that effect may be revised. As the record is before us on the return to the rule herebefore entered, and full argument has been had, it will be unnecessary for another return to be made to the writ, or further argument to be submitted.

*Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause.*

Mr. Justice Gray concurred in the result.

FRANK M. FAIRBANK, *Plff. in Err.*,  
v.  
UNITED STATES.

(See S. C. Reporter's ed. 283-323.)

*Constitutional law—stamp tax—prohibiting tax on exports.*

1. The practical construction of a constitutional provision by legislative action is entitled to no force except in cases of doubt.
2. The stamp tax imposed on a foreign bill of lading by the act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448), § 6, is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, prohibited by U. S. Const. art. 1, § 9.

[No. 226.]

*Argued December 13, 1900. Decided April 15, 1901.*

**I**N ERROR to the District Court of the United States for the District of Minnesota to review a conviction for issuing an export bill of lading without an internal revenue stamp. *Reversed.*

NOTE.—On interpretation of constitutional provisions—see note to *Sanders v. St. Louis & N. O. Anchor Line (Mo.)* 3 L. R. A. 390.



Statement by Mr. Justice **Brewer**:

On March 7, 1900, plaintiff in error was convicted in the district court of the United States for the district of Minnesota on the charge of issuing, as agent of the Northern [284] Pacific Railway \*Company, an export bill of lading upon certain wheat exported from Minnesota to Liverpool, England, without affixing thereto an internal revenue stamp, as required by the act of June 13, 1898 (30 Stat. at L. 448, chap. 448). Upon that conviction he was sentenced to pay a fine of \$25. His contention on the trial was that that act, so far as it imposes a stamp tax on foreign bills of lading, is in conflict with article 1, § 9, of the Constitution of the United States, which reads: "No tax or duty shall be laid on any articles exported from any state." This contention was not sustained by the trial court, and this writ of error was sued out to review the judgment solely upon the foregoing constitutional question.

Section 6 of the act reads:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule."

In schedule A is this clause:

"Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

Also the following:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached [285] and \*canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

And this proviso at the end of the schedule:

"Provided, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying be-  
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tween ports of the United States and ports in British North America."

Mr. C. W. Bunn argued the cause and filed a brief for plaintiff in error:

A tax on the occupation of importer is a tax on imports.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Almy v. California*, 24 How. 169, 16 L. ed. 644.

A stamp tax on a bill of lading is a tax on the goods described therein.

*Almy v. California*, 24 How. 169, 16 L. ed. 644; *Woodruff v. Parham*, 8 Wall. 137, 19 L. ed. 386.

The clause of the Federal Constitution, that no tax or duty shall be laid on articles exported from any state, means that the taxing and duty power of the government should not be laid as a burden on the products of any of the states, which are to be exported.

2 Tucker, Const. pp. 659, 660.

Messrs. George A. King and William B. King, attorneys for other interested parties, filed a further brief on behalf of plaintiff in error:

This tax, though nominally on the bill of lading, is, by reason of the fact that it is laid upon a necessary concomitant of the exportation of goods, in effect a tax upon the exported articles themselves.

*Almy v. California*, 24 How. 169, 16 L. ed. 644; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

The discrimination made by the concluding proviso of schedule A in favor of the ports from which vessels are despatched to ports of British North America renders the entire tax on bills of lading unconstitutional.

*Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435.

Solicitor General **Richards** argued the cause and filed a brief for defendant in error:

The object of the constitutional prohibition against the levying of a tax or duty on articles exported from any state was to secure uniformity in matters of taxation among the several states.

1 Curtis, Constitutional History of U. S. chap. 26, p. 494; Rawle, Const. p. 115; 1 Story, Const. § 1014; 1 Tucker, Const. § 221, p. 469.

A stamp tax on tobacco intended for export has been held not to violate the clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any state."

*Pace v. Burgess*, 92 U. S. 372, 23 L. ed. 657.

This tax has been used for over one hundred years, since the days when the men who framed the Constitution were in Congress making laws in order to execute its powers and carry out its purposes.

*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Acts of Congress

July 6, 1797, February 28, 1799, July 1, 1862, § 94, p. 475, July 30, 1864, § 151.

An extra tonnage duty levied upon a cargo exported from New York to Cuba upon a Spanish vessel has been sustained over an objection that such duty amounted to a tax or duty upon articles exported from a state.

*Aguirre v. Maxwell*, 3 Blatchf. 140, Fed. Cas. No. 101.

And a state tax imposed on a broker dealing exclusively in foreign bills of exchange has been held not to be repugnant to the constitutional power of Congress to regulate commerce.

*Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993.

[285] \*Mr. Justice Brewer delivered the opinion of the court:

The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written constitutions are to be regarded as of value, the duty of the court is plain to uphold the Constitution, although in so doing the legislative enactment falls. The reasoning in support of this was, in the early history of this court, forcibly declared by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 177, 2 L. ed. 60, 73, and nothing can be said to add to the strength of his reasoning. His language is worthy of quotation:

"The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

[286] "If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter \*part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.

"This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. . . .

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conform-

ably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts as well as other departments are bound by that instrument."

This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation. That in the enforcement of this rule the decisions, national and state, are not all in harmony is not strange. Conflicts \*between constitutions and statutes [287] have been easily found by some courts. It has been said, and not inappropriately, that in certain states the courts have been strenuous as to the letter of the state Constitution, and have enforced compliance with it under circumstances in which a full recognition of the spirit of the Constitution and the general power of legislation would have justified a different conclusion. We do not care to enter into any discussion of these varied decisions. We proceed upon the rule, often expressed in this court, that an act of Congress is to be accepted as constitutional unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution.

In the light of this rule the inquiry naturally is, Upon what principles and in what spirit should the provisions of the Federal Constitution be construed? There are in that instrument grants of power, prohibitions, and a general reservation of ungranted powers. That in the grant of powers there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure has been again and again asserted. The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. Further, by the last clause of § 8, art. 1, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." This, construed on the same principles, vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to this court, and it was affirmed that there could be no narrow and technical limitation or construction; that the instrument should



be taken as a constitution. In the course of the opinion the chief justice said:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could [288] insure, their beneficial execution. \*This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *M'Culloch v. Maryland*, 4 Wheat. 316, 415, 4 L. ed. 579, 603.

And thereafter, in language which has become axiomatic in constitutional construction (p. 421, L. ed. 605) —

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It is true that in that and other kindred cases the question was as to the scope and extent of the powers granted, and the language quoted must be taken as appropriate to that question and as stating the rule by which the grants of the Constitution should be construed.

We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the [289] \*Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitu-  
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tion in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

With this rule in mind we pass to a consideration of the precise question presented. The constitutional provision is, "no tax or duty shall be laid on any articles exported from any state." The statute challenged imposes on "bills of lading . . . for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign port or place, ten cents." The contention on the part of the government is that no tax or duty is placed upon the article exported; that, so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily, though ordinarily, used in connection with the exportation of goods; that it is a mere stamp imposition on an instrument, and, similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon this alone, but upon a great variety of instruments used in the ordinary transactions of business. On the other hand, it is insisted that though Congress by \*virtue of [290] its general taxing power may impose stamp duties on the great bulk of instruments used in commerce, yet it cannot in the exercise of such power interfere with that freedom from governmental burden in the matter of exports which it was the intention of the Constitution to protect and preserve. It must be noticed that by this act of 1888, while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged 1 cent; an export bill of lading 10 cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature, but, by virtue of the difference, an attempt to burden exports with a discriminating and excessive tax.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is, "no tax or duty." Whether such provision is or is



not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it [291] placed a duty directly upon the \*articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

The power to tax is the power to destroy. And that power can be exercised, not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export. To the suggestion that a stamp duty is necessarily small in amount, we reply that the fact is to the contrary. The act by which the stamp tax in question was imposed imposes a like tax on many other instruments, and in some instances graduating the amount thereof by the value of the property conveyed or affected by the instrument taxed. Thus, "each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place" is subject to a stamp tax in the sum of 1 cent for each \$100 of value of the property sold or agreed to be sold. Bills of exchange are likewise taxed by a graduated scale. Deeds or other instruments for the conveyance of land are charged with a stamp tax of 50 cents for each \$500 of value of property conveyed. And so of others. It is a well-known fact that under this graduated system many instruments are subject to stamp duties of large amount. No question has ever been raised as to this power of graduating, and if valid in the cases of bills of exchange, agreements of sale, or conveyances of property, it is equally valid as to bills of lading. The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. By a graduated system, although the tax is called a tax on "the vellum, parchment, or paper" upon which transactions are written, or by which they are evidenced, a burden may be cast

upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is, "no tax or duty." A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is, "*Obsta principiis*," [292] not, "*De minimis non curat lex*."

Counsel for the government, in his interpretation of the scope and meaning of this constitutional limitation, says:

"To give Congress the power to lay a tax or duty 'on articles exported from any state' meant to authorize inequality as among the states in the matter of taxation. If the north happened in control in Congress, it might tax the staples of the south; if the south were in power, it might place a duty on the exports of the north. As a part, therefore, of the great compromise between the north and the south, this clause was inserted in the Constitution. The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some states and in favor of others."

This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the states by imposing an export tax on certain articles which might be a product of only a few of the states, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the states was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the \*na- [293] tional government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax



which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export.

In *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, we had occasion to consider this very act in reference to another stamp duty required by the same schedule A, to wit, the clause:

"Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, one cent."

We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying (p. 521, L. ed. 793, Sup. Ct. Rep. 527):

"A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.

These considerations find ample support in prior adjudications of this court. Thus, in *Almy v. California*, 24 How. 169, 174, 16 L. ed. 644, 646, it appeared that the state of California had imposed a stamp tax on bills of lading for gold or silver shipped to any place outside of the state; and the contention was that such stamp tax was not a tax on the goods themselves, but the court said:

[294] "But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported  
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to a foreign country, and consequently a duty upon that is, in substance and effect; a duty on the article exported."

It is true that thereafter, in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, it was held that the words "imports" and "exports," as used in the Constitution, were used to define the shipment of articles between this and a foreign country, and not that between the states, and while, therefore, that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected. In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited. It was recognized long anterior thereto, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. In that case it appeared that the state of Maryland, in order to raise a revenue for state purposes, required all importers of certain foreign articles to take out a license before they were authorized to sell the goods so imported; and it was held that such license tax, although in form a tax upon the person importing, for the privilege of selling \*the[295] goods imported, was in fact a tax on imports, and that the mode of imposing it by giving it the form of a tax on the occupation of importer merely varied the form without changing the substance. The argument in the opinion in that case, announced by Chief Justice Marshall, remains unanswered. As the states cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner, the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance. In the course of his argument Chief Justice Marshall used this illustration:

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not the right to do, because it is prohibited by the Constitution." p. 444, L. ed. 687.



The first clause of § 8 of article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts, and excises." Were this the only constitutional provision in respect to the matter of taxation, there would be no doubt that, tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the *License Tax Cases*, 5 Wall. 462, 471, 18 L. ed. 497, 500:

[297] "It is true that the power of Congress to tax is a very extensive \*power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

This proposition is restated by counsel for government at the commencement of his argument, and is undoubtedly correct. We have hitherto had occasion to consider the two qualifications,—the one, that direct taxes must be imposed by the rule of apportionment, and the other, that indirect taxes shall be uniform throughout the United States. In the *Income Tax Cases*, *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, the constitutional provision as to the apportionment of direct taxes was elaborately considered, and it was held that a tax on the income made up of the rents of real estate, and one on the income from personal property, were substantially direct taxes on the real estate and the personality. In the first of these cases, on page 581, L. ed. 819, Sup. Ct. Rep. 689, discussing the principles of constitutional construction, the chief justice said:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has indeed been established by repeated decisions of this court. Thus, in *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. ed. 678, 687, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481, it was held that a tax on the in-

come of United States securities was a tax on the \*securities themselves, and equally in-[297] admissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds, and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins v. Erie County Comrs.* 16 Pet. 435, 10 L. ed. 1022, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy v. California*, 24 How. 169, 16 L. ed. 644, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Northern O. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88, that a tax upon the interest payable on bonds was a tax, not upon the debtor, but upon the security; and in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, and *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, it was held that a tax on income received from interstate commerce was a tax upon the interstate commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 14, 15 Sup. Ct. Rep. 268, 270, 360."

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, we considered the qualification in the matter of uniformity. The question presented was the validity of the inheritance tax imposed by the act of \*June 13, 1898. 30 Stat. at L. [298] 448, chap. 448. After showing that the tax was not a direct tax within the constitutional meaning of the term, we examined the objection that it was not uniform throughout the United States, and, after full consideration, held that the uniformity required was a geographical, and not an in-



trinsic, uniformity, and was synonymous with the expression "to operate generally throughout the United States." While upon some of the questions in that case there was a difference of opinion, yet concerning the construction of the uniformity clause the justices who took part in the decision were agreed. After discussing the construction of the uniformity clause, Mr. Justice White, speaking for the court, proceeded to show that the tax in question did not violate such uniformity. There was no suggestion that the qualification could be disregarded or limited in any legislation; the opinion proceeded upon the assumption that the uniformity provision was an absolute restriction on the power of Congress, and the argument was to demonstrate that the tax in question in no manner conflicted with either the letter or spirit of such restriction. If it had been in the mind of the court that such restriction as to uniformity could be evaded by a mere change in the form of legislation, the opinion could have been less elaborate and the difficulties of the case largely avoided.

We have referred to these cases for the purpose of showing that the rule of construction of grants of powers has been also applied when the question was as to restrictions and limitations. Other cases may also well be referred to in this connection.

In *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, the question presented was whether an act of the state of Tennessee, requiring "all drummers and all persons not having a regular licensed house of business in the taxing district [of Shelby county] offering for sale, or selling, goods, wares, or merchandise therein by sample," to pay a certain tax to the county trustee, could be enforced as to those drummers who were engaged simply in soliciting business in the state of Tennessee in behalf of citizens of other states. It was held that it could not, that such act of solicitation, being a matter of interstate commerce, was therefore beyond the power of the state [299] to "regulate. In the opinion, Mr. Justice Bradley, speaking for the court, said:

"In view of these fundamental principles which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited de-

mand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states. "Must he sit still in his fac- [300] tory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

"The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak, at least, unadvisedly and without due attention to the truth of things." p. 494, L. ed. 696, Inters. Com. Rep. 47, Sup. Ct. Rep. 594.

The scope of this argument is that, inasmuch as interstate commerce can only be regulated by Congress, and is free from state interference, state legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, cannot be sustained. Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, it appeared that Congress had passed an act authorizing the condemnation of a lock and dam known as the upper lock and dam on the Monongahela river, belonging to the navigation company, with a proviso "that in estimating the sum to be paid by the United States the franchise of said cor-



poration to collect tolls shall not be considered or estimated;" the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the 5th Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived; the court saying:

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"Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it \*necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post roads: but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon a price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken, there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation." p. 336, L. ed. 471, 13 Sup. Ct. Rep. 630.

In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify, or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

In *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, the 5th

section of the act \*of June 22, 1874 (18 Stat. [302] at L. 186, chap. 391), which authorized a court of the United States in revenue cases, on motion of the district attorney, to require the defendant or the claimant to produce in court his private books, invoices, and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the 4th and 5th Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those Amendments, and in respect to this the court said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." p. 635, 29 L. ed. 753, 6 Sup. Ct. Rep. 535.

On the other hand, *Pace v. Burgess*, 92 U. S. 372, 23 L. ed. 657, is cited as an authority against these conclusions; but an examination of the case shows that this is a mistake. The act of 1868 (15 Stat. at L. 125, chap. 186), imposed certain taxes on the manufacture of tobacco for consumption or use, required as evidence of the payment of such taxes the affixing of revenue stamps to the packages, and forbade the removal of any tobacco from the factory without payment of the taxes and affixing of the stamps. It further provided that tobacco might be manufactured for export and exported without payment of any tax. Sections 73 \*and [303] 74, page 157, are the sections making provision for such export, and authorized the removal of the tobacco from the manufactory to certain designated warehouses at ports of entry upon the giving of suitable bonds. The latter part of § 74 reads:

"All tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such



stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation."

This act was amended in 1872 (17 Stat. at L. 230, chap. 315), the amendments to §§ 73 and 74 being found on page 254; but they have no significance in respect to the present question. Now, it was the cost of those removal stamps which was complained of as in conflict with the constitutional provision against a tax or duty upon exports, but the contention was overruled, the court saying (pp. 374, 375, 376, L. ed. 658, 659):

"The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'no tax or duty shall be laid on articles exported from any state.' But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud and secure the faithful carrying out of the declared intent with regard to the tobacco so marked.

[304] We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution\* were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretense of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used except for the purpose of levying a duty or

tax. But we must regard things rather than names. A stamp may be used, and, in the case before us we think it is used, for quite a different purpose from that of imposing a tax or duty; indeed, it is used for the very contrary purpose,—that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents, and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold dust exported from California by a law of that state was clearly an export tax, as this court decided in the case of *Almy v. California*, 24 How. 169, 16 L. ed. 644. In all such cases no one could entertain a reasonable doubt on the subject."

\*Obviously, this opinion, taken as a whole, [305] makes against, rather than in favor of, the contention of counsel for the government. Its argument is to the effect that the stamp required was in no proper sense a tax for revenue; that there was no burden of any kind on the export; that it was something to facilitate, rather than to hinder, exports; that it was only a means of identification and to enable parties to remove their tobacco from the manufactory to the warehouse, and that the sum demanded was simply a matter of compensation for services rendered. The statute itself declared that the 25 cents was to be paid "for the expense attending the providing and affixing" of the stamps. This clearly excludes the idea that any tax or duty was intended to be imposed, and the opinion notes the fact that the difficulty arises because ordinarily stamps are used for the purpose of duty or tax, says that we must always regard things rather than names, and that this stamp was not used for the purpose of tax or duty, but only for identification and to prevent frauds on the government. If it had been supposed that a stamp tax could properly be charged, the line of argument would have been entirely different. In the case before us the stamp is distinctly for the purpose of revenue, and not by way of compensation for services rendered, so that the question is whether revenue can be collected from exports by changing the form of the tax from a tax on the article exported to a tax on the bill of lading which evidences the export.

Again, it is said that if this stamp duty on foreign bills of lading cannot be sustained it will follow that tonnage taxes and stamp duties on manifests must also fall. The validity of such taxes is not before us for determination, and therefore we must decline to express any opinion thereon, and yet it may be not improper to say that, even if the suggested result should follow, it furnishes no reason for not recognizing that which, in our judgment, is the true construction of the constitutional limitation. Mingling in one statute two or three unconstitutional taxes cannot be held operative to validate either one, and if the reasoning we have stated and followed in reaching the conclusion in this



case shall also lead to the result that such taxes are \*invalid, it of itself does not weaken the force of the reasoning or justify us in departing from its conclusions. But we may be permitted to suggest, without deciding, that there may be a valid difference as indicated by the decisions of this court in respect to interstate commerce. It has been distinctly held that no state could by a license or otherwise impose a burden on the business of interstate commerce. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, and cases cited in the opinion. And yet that decision was followed by decisions that it might tax the vehicles and property employed in interstate commerce so long and so far as they were a part of the property of the state. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, and cases cited in the opinion. This difference may have significance in respect to these other taxes. As heretofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered.

Another matter pressed upon our attention, which deserves and has received careful consideration, is the practical construction of this constitutional provision by legislative action. On July 6, 1797, an act was passed entitled, "An Act Laying Duties on Stamped Vellum, Parchment, and Paper" (1 Stat. at L. 527, chap. 11), which contained this clause:

"Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same state, ten cents; if to be exported to any foreign port or place, twenty-five cents," etc. p. 528.

This was changed by the act of February 28, 1799 (1 Stat. at L. 622, chap. 17), but only as to the amount. On April 6, 1802 (2 Stat. at L. 148, chap. 19), a repealing act was passed. Again, on July 1, 1862 (12 Stat. at L. 432, chap. 119), a similar stamp duty was imposed on foreign bills of lading, which was continued by the act of June 30, 1864 (13 Stat. at L. 218, 291, chaps. 172, 173), finally repealed by the act of June 6, 1872 (17 Stat. at L. 230, 256, chap. 315), and then followed the act in question. In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, in which the inheritance tax was considered, the significance of this practical construction by legislative action was referred to, and on pages 56, 57, L. ed. 976, Sup. Ct. Rep. 753, 754, we said:

"The act of 1797, which ordained legacy taxes, was adopted \*at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the

Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question."

And again, when the construction of the uniformity clause was being considered (p. 92, L. ed. 990, Sup. Ct. Rep. 767):

"But one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts, and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced."

That was not the first case in which this matter has been considered by this court. On the contrary, it has been often presented. See in the margin a partial list of cases in which the subject has been discussed.† An examination of the opinions \*in those cases will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that, if there were doubt in reference thereto, the practical construction placed by Congress or the department charged with the execution of the statute was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long-continued construction by the officials charged with the execution of the statute; and, third, those in which the court,

†*Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 351, 4 L. ed. 97, 109; *Cohen v. Virginia*, 6 Wheat. 264, 418, 5 L. ed. 257, 294; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. State Bank*, 6 Pet. 29, 39, 8 L. ed. 308, 311; *United States v. Macdaniel*, 7 Pet. 1, 15, 8 L. ed. 587, 592; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. ed. 61, 68; *United States v. Alexander*, 12 Wall. 177, 181, *sub nom.* *United States v. Mayes*, 20 L. ed. 381, 382; *Peabody v. Stark*, 16 Wall. 240, 243, *sub nom.* *Peabody v. Draughn*, 21 L. ed. 311, 313; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 237, 22 L. ed. 80, 81; *Smythe v. Fiske*, 23 Wall. 374, 382, 23 L. ed. 47, 49; *United States v. Moore*, 95 U. S. 760, 763, 24 L. ed. 588, 589; *Swift & C. & B.*



noticing the fact of a long-continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute.

The first class is illustrated by *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. There the question presented was the jurisdiction of this court over proceedings by indictment in a state court for a violation of a state statute. In an elaborate argument Chief Justice Marshall sustained the jurisdiction, and then added (p. 418, L. ed. 294):

[309] "Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is \*believed, has arisen to which this principle applies more unequivocally than to that now under consideration."

And in support of that referred to the writings in the *Federalist*, which were presented before the adoption of the Constitution, and were generally recognized as powerful arguments in its favor; also to the judiciary act of 1789 (1 Stat. at L. 73, chap. 20), the decisions of this court, and the assent of the courts of several states thereto, saying (p. 421, L. ed. 295):

"This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

Again, in *United States v. State Bank*, 6 Pet. 29, 39, 8 L. ed. 308, 311, Mr. Justice Story, in like manner, said:

"It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the second class may be placed *Stuart*

*v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279, in which last case Mr. Justice Miller, speaking for the court, used this language (p. 57, L. ed. 351, Sup. Ct. Rep. 381).

"The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

See also *The Laura*, 114 U. S. 411, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; \**United States v. Hill*, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; and *Schell v. Fauche*, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376, 380, in which it was said:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The third class is the largest. While the language used by the several justices announcing the opinions in these cases is not the same, the thought is alike. Thus, in *Swift & C. & B. Co. v. United States*, 105 U. S. 691, 695, 26 L. ed. 1108, 1109, Mr. Justice Matthews said:

"The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

In *United States v. Graham*, 110 U. S. 219, 221, 28 L. ed. 126, 3 Sup. Ct. Rep. 582, 583, Chief Justice Waite thus stated the law:

"Such being the case it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no

*Co. v. United States*, 105 U. S. 691, 695, 26 L. ed. 1108, 1109; *Hahn v. United States*, 107 U. S. 402, 406, 27 L. ed. 527, 528, 2 Sup. Ct. Rep. 494; *United States v. Graham*, 110 U. S. 219, 221, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Brown v. United States*, 113 U. S. 568, 571, 28 L. ed. 1079, 1080, 8 Sup. Ct. Rep. 648; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. ed. 1137, 1138, 5 Sup. Ct. Rep. 739; *The Laura*, 114 U. S. 411, 416, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *United States v. Hill*, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. ed. 772, 776, 11 Sup. Ct. Rep. 174; *Schell v. Fauche*, 138 U. S. 562, 570, 34 L. ed. 1040, 1042, 11 Sup. Ct. Rep. 376; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. ed. 321, 322, 13 Sup. Ct. Rep. 436; *United States v. Union P. R. Co.* 148 U. S. 562, 572, 37 L. ed. 560, 563, 13 Sup. Ct. Rep. 724; *United States v. Alger*, 152 U. S. 384, 397, 38 L. ed. 488, 14 Sup. Ct. Rep. 635; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. ed. 179, 182, 16 Sup. Ct. Rep. 963; *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. ed. 399, 404, 17 Sup. Ct. Rep. 45; *Hewitt v. Schultz*, 180 U. S. 139-156, ante, 436, 21 Sup. Ct. Rep. 309.

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need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous."

In *United States v. Tanner*, 147 U. S. 661, 663, 37 L. ed. 321, 322, 13 Sup. Ct. Rep. 436, 437, it was said by Mr. Justice Brown:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Swift & Co. & B. Co. v. United States*, 105 U. S. 691, 26 L. ed. 1108. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

In *United States v. Alger*, 152 U. S. 384, 397, 38 L. ed. 488, 14 Sup. Ct. Rep. 635, Mr. Justice Gray used this language:

[311] "If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In *Webster v. Luther*, 163 U. S. 342, 41 L. ed. 179, 182, 16 Sup. Ct. Rep. 963, 967, Mr. Justice Harlan stated the rule in these words:

"The practical construction given to an act of Congress fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Healey*, 160 U. S. 136, 141, 40 L. ed. 369, 371, 16 Sup. Ct. Rep. 247. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

From this résumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful

cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter, \*that during the first period exports [312] were limited and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war, or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition. *The judgment of the District Court will be reversed*, and the case remanded, with instructions to grant a new trial.

Mr. Justice **Harlan** (with whom concurred Mr. Justice **Gray**, Mr. Justice **White** and Mr. Justice **McKenna**) dissenting:

By the act of June 13th, 1898, chap. 448, imposing certain stamp duties, it was declared that there should be levied, collected, and paid the sum of ten cents "for and in respect of the vellum, parchment, or paper upon which . . . shall be written or printed by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued. . . . bills of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place. . . . *Provided*, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America." 30 Stat. at L. 448, 451, 458, 459, 462, §§ 6 and 24, schedule A.

\*It is contended that this stamp duty is [313] forbidden by the clause of the Constitution declaring that "no tax or duty shall be laid on any articles exported from any state" (art. 1, § 9); and that the stamp duty here in question was, within the meaning of that instrument, a tax or duty on the wheat re-



ceived by the Northern Pacific Railway Company to be carried from Minnesota to Liverpool, and for which the company issued its bill of lading.

We are of opinion that this contention cannot be sustained without departing from a rule of constitutional construction by which this court has been guided since the foundation of the government. Let us see to what extent Congress has exercised the power now held not to belong to it under the Constitution.

As early as July 6th, 1797, Congress passed an act entitled "An Act Laying Duties on Stamped Vellum, Parchment, and Paper." By the 1st section of that act it was provided that from and after the 31st day of December thereafter there should be "levied, collected, and paid throughout the United States the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . . Any note or bill of lading for any goods or merchandise . . . to be exported to any foreign port or place, twenty-five cents." 1 Stat. at L. 527, 528, chap. 11, § 1. The same act provided: "That if any person or persons shall write or print, or cause to be written or printed, upon any unstamped vellum, parchment, or paper (with intent fraudulently to evade the duties imposed by this act), any of the matters and things for which the said vellum, parchment, or paper is hereby charged to pay any duty, or shall write or print, or cause to be written or printed, any matter or thing upon any vellum, parchment, or paper that shall be marked or stamped for any lower duty than the duty by this act payable, such person so offending shall for every such offense forfeit the sum of one hundred dollars." Id. § 13.

By an act approved December 15th, 1797, chap. 1, it was provided that the duties prescribed by the act of July 6th, 1797, should be levied, collected, and paid from and after June 30th, 1798, and not before. 1 Stat. at L. 536.

[314] \*The above act of July 6th, 1797, was amended in certain particulars by an act approved March 19th, 1798, chap. 20, by which certain provisions were made for furnishing the vellum, parchment, or paper required by the former act to be stamped and marked. 1 Stat. at L. 545.

It not having occurred to any of the great statesmen and jurists who were connected with the early history of the government that enactments such as that of July 6th, 1797, violated the Constitution, Congress passed another act on the 28th day of February, 1799, chap. 17, imposing a duty of 10 cents "on every skin or piece of vellum or parchment or sheet or piece of paper on which shall be written or printed any or either of the instruments following, to wit: . . . Any note or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise . . . to be export-

ed to any foreign port or place." 1 Stat. at L. 622.

Congress, still supposing that it was acting within the limits of its powers under the Constitution, again, by the act of April 23d, 1800, chap. 31, amended and extended that of July 6th, 1797. By the latter act a general stamp office was established, and provision was made, among other things, for the punishment, by fine and imprisonment, of those who, with the intent to defraud the United States of any of the duties laid by the original act of 1797, counterfeited or caused to be forged or counterfeited, any vellum, parchment, or paper provided for by Congress under that act. 2 Stat. at L. 40, 42. The act of April 23d, 1800, was amended by an act passed March 3d, 1801, chap. 19, by which it was provided that deeds, instruments or writings issued without being stamped could be thereafter stamped and become valid and available as if they had been originally stamped as required by law. 2 Stat. at L. 109.

By an act approved April 6th, 1802, chap. 19, internal duties on "stamped vellum, parchment, and paper" were discontinued,—for the reason, doubtless, that the further imposition of such duties was unnecessary. 2 Stat. at L. 148.

As late as March 3d, 1823, Congress passed a general statute in execution of the act of April 23d, 1800, establishing a general stamp office. 3 Stat. at L. 779, chap. 55.

By an act approved July 1st, 1862, chap. 119, Congress provided \*that there should be [315] levied, collected and paid a stamp duty of 10 cents "for or in respect of the vellum, parchment, or paper" upon which was written or printed any "bill of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place." 12 Stat. at L. 432, 475, 479, 480, §§ 94, 110. By the act of June 30th, 1864, chap. 173, the stamp duties provided by the act of July 1st, 1862, were continued in force until August 1st, 1864, and it was provided that from and after the latter date there should be levied, collected and paid a stamp duty of 10 cents "for and in respect of the vellum, parchment, or paper upon which shall be written or printed" any "bill of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place." 13 Stat. at L. 223, 291, 292, 298, §§ 151, 170, schedule B. But by an act approved June 6th, 1872, chap. 315, all the taxes imposed under and by virtue of schedule B of § 170 of the act of June 30th, 1864, and the several acts amendatory thereof, were abrogated from and after October 1st, 1872, excepting only the tax of 2 cents on bank checks, drafts, or orders. 17 Stat. at L. 230, 256.

We have referred somewhat in detail to the above enactments for the purpose of bringing out clearly the fact that stamp duties were imposed specifically for and in respect of the vellum, parchment, or paper upon which was written or printed a bill of



lading for goods or merchandise to be exported to foreign countries, and had no reference to the kind, quality, or value of the property covered by such bill of lading. Congress *ex industria* declared in each act that the tax was for and in respect of the vellum, parchment, or paper upon which the bills of lading were written or printed. This fact plainly distinguishes the present case from *Almy v. California*, 24 How. 169, 16 L. ed. 644, which involves the validity, under the Constitution of the United States, of a statute of California passed April 26th, 1858, imposing a stamp tax on bills of lading for the transportation from that state, to any port or place without the state, of any quantity of gold or silver coin, in whole or in part, gold dust, or gold or silver in bars or other form. This court, after observing that "a tax laid on the gold or silver exported from California was forbidden by the clause declaring that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," said: "In the case now before the court, the intention to tax the exports of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and, so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other. In the judgment of this court the state tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to." This interpretation was demanded by the words of the statute of California, which provided: "The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment, or other material upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to wit: Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this state to any point or place without the limits of this state, of any sum, amount, or quantity of gold or silver in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to wit: For one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one fifth of one per cent upon the amount or value thereof,

the payment whereof to be included in the bill of lading, contract, or agreement, or obligation \*for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty," etc. Stat. Cal. 1858, p. 305; Id. 1857, p. 304.

The difference between the California statute and the act of Congress is manifest. By the former the amount of the tax upon bills of lading depended upon the value of the gold or silver specified in them and exported, while the latter imposed a tax of only 10 cents on the vellum, parchment, or paper upon which was written or printed a bill of lading for property to be exported, without regard to its quantity or value. If Congress had graduated the stamp duty according to the quantity or value of the articles exported, there might have been ground for holding that the purpose and the necessary result was to tax the property, and not the vellum, parchment, or paper on which the bill of lading was written or printed.

This rule of interpretation was recognized in *Pace v. Burgess*, 92 U. S. 372, 375, 23 L. ed. 657, 659. That case arose under the act of July 20th, 1868, chap. 186, imposing duties on distilled spirits and tobacco, and for other purposes, and which provided that "all tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation." 15 Stat. at L. 125, 158, § 74. The contention was that the statute imposed a tax or duty in violation of the constitutional prohibition of taxes or duties "on any articles exported from any state." Art. 1, § 9. This court overruled that contention upon the ground that it was apparent from the statute that "the stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud and secure the faithful \*carrying out of the declared intent with regard to the tobacco so marked. The payment of 25 cents or of 10 cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo." The court added—and this is important in its bearing on the case before us: "It [the stamp] bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only



shows that he was carrying on an immense business." As in *Pace v. Burgess*, so in the present case, the stamp duty imposed was without any reference to the quantity or value of the property.

In our judgment, the small stamp duty imposed by the act of 1898 specifically upon the vellum, parchment, or paper upon which was written or printed a bill of lading for property, of whatever value, intended for export, cannot be regarded as a duty on the property itself.

It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of 10 cents upon the vellum, parchment, or paper on which is written a bill of lading for articles to be exported from a state, it could as well impose a duty of \$5,000, and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A stamp duty has now, and has had for centuries, a well-defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of the property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of \$5,000 for and in respect of the vellum, parchment, or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp-tax laws, and that the purpose and necessary operation of such legislation was, in violation of the Constitution, to tax the articles specified in such bill, and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity, or value \*of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment, or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported.

There is another view of this case which presents considerations of a serious character. In the opinion just rendered it is conceded that a stamp tax on vellum, parchment, or paper on which is printed or written a bill of lading of goods to be shipped out of the United States could be sustained if regard be had to the practice of the government since its organization. But that practice, covering more than a century, must, it seems, go for naught.

In *Stuart v. Laird* (1803) 1 Cranch, 299, 309, 2 L. ed. 115, 118, the question arose whether the justices of this court had the right, although authorized by an act of Congress, to sit as circuit judges, not having been appointed as such nor having any distinct commissions for that purpose. This court, speaking by Mr. Justice Patterson, said: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary in-

terpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

In *Prigg v. Pennsylvania*, 16 Pet. 541, 608, 621, 10 L. ed. 1061, 1086, 1091, this court, speaking by Mr. Justice Story, after referring to the section of the act of February 12th, 1793, requiring a certificate to be given, under certain circumstances, to the owner of a fugitive slave apprehended under that act, said: "So far as the judges of the courts of the United States have been called upon to enforce it and to grant the certificate required by it, it is believed that it has been uniformly recognized as a binding and valid law, and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our judgment, entitle the question[320] to be considered at rest; unless, indeed, the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation and of national operations. Congress, the executive, and the judiciary have, upon various occasions, acted upon this as sound and reasonable doctrine,"—citing, among other cases, that of *Stuart v. Laird*, 1 Cranch, 229, 2 L. ed. 115.

In *The Laura*, 114 U. S. 411, 416, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881, 883, in which the question arose as to the validity of an act of Congress approved March 3d, 1797 (1 Stat. at L. 506, chap. 13), authorizing the Secretary of the Treasury to remit a forfeiture of property after final sentence of condemnation, this court said: "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' *Stuart v. Laird*, 1 Cranch, 308, 2 L. ed. 118. The same principle was announced in the recent case of *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279, 281, where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said: "The construction placed upon the Constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not



been disputed during a period of nearly a century, it is [almost] *conclusive*." This quotation in *The Laura* from the opinion in *Sarony's Case* was defective in that it omitted, by mistake in printing, the word "almost" before "conclusive." But the error does not affect the substance of the decision rendered, as the court, in the case of *The Laura*, approved and reaffirmed what was said in *Stuart v. Laird*.

[321] In *Schell v. Fauche*, 138 U. S. 562, 34 L. ed. 1040, 11 Sup. Ct. Rep. 376, this court, speaking by Mr. Justice Brown, cited with approval what is above quoted from *Stuart v. Laird*, adding: "In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be *controlling*."

In *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. ed. 869, 874, 13 Sup. Ct. Rep. 3, 7, this court, speaking by the present chief justice, said: "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force; and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the *contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled*. *Stuart v. Laird*, 1 Cranch, 299, 309, 2 L. ed. 115, 118."

Cases almost without number could be referred to in which the same principles of constitutional construction are announced as in the cases above cited. In the latest case—*Knowlton v. Moore*, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747, 753 — this court had occasion, in its review of taxing legislation by Congress, to refer to the act of July 6th, 1797, the very act in which Congress first imposed a stamp duty on vellum, parchment, or paper upon which was written a bill of lading for articles to be exported. Touching the objection that Congress could not constitutionally impose, as by that act was imposed, a tax on inheritances or legacies, this court, speaking by Mr. Justice White, said: "It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, \*which ordained legacy taxes, was adopted at a time when the founders of our government and framers

of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed upon their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority."

Many cases have been cited which hold that the uniform contemporaneous construction by *executive* officers charged with the enforcement of a *doubtful* or *ambiguous* law is entitled to great weight, and should not be overturned unless it be plainly or obviously erroneous. If such respect be accorded to the action of mere executive officers, how much greater respect is due to the legislative department when it has, at different periods in the history of the country, exercised a power as belonging to it under the Constitution, and no one in the course of a century questioned the existence of the power so exercised. Besides, we have here a question of the constitutional power of Congress under the Constitution, and not a question relating merely to the practice of executive officers acting under a law susceptible of different interpretations. No one of the acts of Congress imposing a stamp duty on the vellum, parchment, or paper on which a bill of lading of articles to be exported was written can be classed among laws that are doubtful or ambiguous in their meaning. No person, however skilful in the use of words, who attempts to frame a statute imposing a stamp duty, pure and simple, on such vellum, parchment, or paper, could possibly employ language expressing that thought more distinctly than Congress has done in the several acts relating to stamp duties of that character. The words of those acts are clear, and are capable of but one construction; and the court determines the \*ease up-[323] on the ground alone of want of power in Congress to impose the stamp duty in question.

Without further discussion or citation of authorities, we submit that the denial, at this late day, of the power of Congress to impose what is strictly a stamp duty on the vellum, parchment, or paper upon which is written or printed a bill of lading for goods to be exported to a foreign port or place, involves not only a departure from canons of constitutional construction by which it has been controlled for more than a century, but, in the words of *Prigg v. Pennsylvania*, delivers the interpretation of the Constitution "over to interminable doubt throughout the whole progress of legislation and of national operations." Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has



been exercised since the organization of the government, without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by anyone that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart v. Laird*, and in other cases, the questions should be considered at rest.

In view of the importance of the case, we have deemed it appropriate to state the reasons of our dissent from the opinion and judgment just rendered.

[324] \*MARGARET FRENCH and Others, Plffs.  
in Err.,  
v.

BARBER ASPHALT PAVING COMPANY.

(See S. C. Reporter's ed. 324-370.)

*Constitutional law—assessment for pavement—rule of frontage.*

The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law.

[No. 498.]

Argued February 25, 26, 27, 1901. Decided April 29, 1901.

IN ERROR to the Supreme Court of the State of Missouri to review a decision affirming a judgment for plaintiff in an action to enforce the lien of a tax bill for the cost of paving. *Affirmed.*

See same case below, 58 S. W. 934.

NOTE.—On the constitutionality of frontage rule of assessment—see *Raleigh v. Peace* (N. C.) 17 L. R. A. 330, and note.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to the validity of assessments upon abutting property, made by charging upon each piece the cost of the improvement in front of it—see *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

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Statement by Mr. Justice Shiras:

\*This was a suit instituted in the circuit [325] court of Jackson county, Missouri, by the Barber Asphalt Paving Company, a corporation whose business it was to construct pavements composed of asphalt, against Margaret French and others, owners of lots abutting on Forest avenue in Kansas City, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said avenue.

The work was done conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the owners of a majority of front feet on that part of the street to be improved had the right, under the charter, within thirty days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to divest the common council of the power to make the improvement, and such property owners had the right by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this instance neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and the plaintiff company being the lowest and best \*bidder therefor, a contract was, on [326] July 31, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provided that the work should be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city should not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting on the improvement. The charge against each lot or tract of land was evidenced by a tax bill. The tax bill representing the assessment against each lot was, by the charter, made a lien upon the tract of land against which it was issued, and was prima facie evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction, against the owners of the land charged. No personal judgment was author-

ized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner.

The defendants pleaded and contended that the contract offered in evidence was a contract to construct the pavement and maintain and keep the street in repair for five years, and was contrary to the charter of Kansas City, void, and of no effect; and that the charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge was made and the special tax bills levied, and that such method of apportioning and charging the cost of the pavement was contrary to and in violation of the 14th Amendment to the Constitution of the United States.

[327] The judgment of the circuit court of Jackson county was for the plaintiff company for the amount due on the tax bill, and for the enforcement of the lien. From this judgment an appeal was taken to the supreme court of Missouri, and on November 13, 1900, the judgment of the circuit court was affirmed, and thereupon a writ of error from this court was allowed.

**Mr. Henry N. Ess** argued the cause and filed a brief for plaintiffs in error:

This Kansas City charter is a law to levy this local tax without reference to benefits, and, to the extent of the excess of the cost of the work over the special and peculiar benefits to the abutting property, is a taking of private property for public use without just compensation, and thereby the state of Missouri deprives these plaintiffs in error of their property without due process of law.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hutcheson v. Storrie*, 92 Tex. 688, 45 L. R. A. 289, 51 S. W. 848; *Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886; *Fay v. Springfield*, 94 Fed. 409; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Charles v. Marion*, 98 Fed. 166, 100 Fed. 538; *Lyon v. Tona-wanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 840; *Parker v. Detroit*, 103 Fed. 357; *Bidwell v. Huff*, 103 Fed. 363.

When private property is taken for public use by the state or under its authority, "due process of law" as embraced in the 14th Amendment to the Constitution of the United States requires that just compensation should be paid or secured to the owner.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Benefit alone is the foundation of this tax. Without benefit the tax is confiscation.

*Sheehan v. Good Samaritan Hospital*, 50

Mo. 155, 11 Am. Rep. 412; *Neenan v. Smith*, 50 Mo. 525; *Carondelet v. Picot*, 38 Mo. 125; *State ex rel. Chicago, B. & Q. R. Co. v. Kansas City*, 89 Mo. 34, 14 S. W. 515; *Farrar v. St. Louis*, 80 Mo. 379; *McCormack v. Patchin*, 53 Mo. 33; *Zoeller v. Kellogg*, 4 Mo. App. 163; *St. Louis use of Seibert v. Allen*, 53 Mo. 44; *St. Louis use of Creamer v. Clemens*, 52 Mo. 133; *State ex rel. Mispagel v. Angert*, 127 Mo. 456, 30 S. W. 118; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Newby v. Platte County*, 25 Mo. 258; *Pacific R. Co. v. Chrystal*, 25 Mo. 544; *Louisiana & F. Pl. Road Co. v. Pickett*, 25 Mo. 535; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 468; *Lec v. Tebo & N. R. Co.* 53 Mo. 178; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 303; *State ex rel. Farren v. St. Louis*, 62 Mo. 244; *Springfield v. Selmoock*, 68 Mo. 394; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629; *Combs v. Smith*, 78 Mo. 32; *Jackson County v. Waldo*, 85 Mo. 637; *McReynolds v. Kansas City, C. & S. R. Co.* 110 Mo. 484, 19 S. W. 824; *Daugherty v. Brown*, 91 Mo. 26, 3 S. W. 210; *Ragan v. Kansas City & S. E. R. Co.* 111 Mo. 462, 20 S. W. 234; *St. Louis K. & N. W. R. Co. v. St. Louis Union Stock Yards Co.* 120 Mo. 541, 25 S. W. 399; *St. Louis, O. H. & C. R. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

A law which authorizes assessments for local improvements to be made without reference to benefits either takes property for the public good without compensation, or takes property from one person for the direct benefit of another, and in either aspect is unconstitutional.

*Kirby v. Shaw*, 19 Pa. 258; *Schenly v. Com. use of Allegheny*, 36 Pa. 29; *McGonigle v. Allegheny*, 44 Pa. 118; *Re Washington Avenue*, 69 Pa. 360, 8 Am. Rep. 255; *Pater-son v. Society for Establishing Useful Manu-factures*, 24 N. J. L. 385; *Tide-Water Co. v. Custer*, 18 N. J. Eq. 519, 90 Am. Dec. 634; *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *St. John v. East St. Louis*, 50 Ill. 92; *Lee v. Ruggles*, 62 Ill. 427; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Litchfield v. Vernon*, 41 N. Y. 123.

The earlier cases in Missouri proceeded on the theory that the land is taken to the extent of the assessment levied on it, and that, to the extent of the excess of the cost of the work over and above any special and peculiar benefits, the land is taken for public use without just compensation.

*Newby v. Platte County*, 25 Mo. 258; *Walther v. Warner*, 25 Mo. 277; *North Mis-souri R. Co. v. Lackland*, 25 Mo. 515; *Louis-iana & F. Pl. Road Co. v. Pickett*, 25 Mo. 535; *North Missouri R. Co. v. Gott*, 25 Mo. 540; *Pacific R. Co. v. Chrystal*, 25 Mo. 544; *Palmyra v. Morton*, 25 Mo. 593; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475.

If the benefits to the public, added to the benefits to individuals, be less than the dam-ages assessed, no condemnation can be had



under a law requiring court and jury to ascertain the actual value of the property taken and damages to property not taken, and then to ascertain the amount of benefit to the public in general and the benefit to each piece of property.

*Tyler v. St. Louis*, 56 Mo. 60; *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 243, 562.

Other courts have held the front-foot rule invalid on constitutional objections of inequality of burdens, but all are on the same basis, as in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

*Peay v. Little Rock*, 32 Ark. 31; *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159.

A statute in Missouri authorizing a levy of local taxes of the kind in suit on abutting property according to frontage on the street paved, to pay the cost of such paving, is void if it authorizes a personal judgment, or the distraint or sale of property other than that taxed, or if it creates any other liability than an impost on the property itself.

*Neenan v. Smith*, 50 Mo. 525; *St. Louis use of Seibert v. Allen*, 53 Mo. 44; *Carlin v. Cavender*, 56 Mo. 286; *St. Louis use of Bruennell v. Bressler*, 56 Mo. 350; *Strassheim v. Jernan*, 56 Mo. 104; *Seibert v. Allen*, 61 Mo. 482; *City of Louisiana v. Miller*, 66 Mo. 467; *Higgins v. Ausmuss*, 77 Mo. 351; *Houstonia v. Grubbs*, 80 Mo. App. 433; *Pleasant Hill v. Dasher*, 120 Mo. 675, 25 S. W. 566; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494; *Seibert v. Copp*, 62 Mo. 182; *State ex rel. Mispagel v. Angert*, 127 Mo. 456, 30 S. W. 118; *Stadler v. Roth*, 59 Mo. 409; *Zoeller v. Kellogg*, 4 Mo. App. 163; *Syenite Granite Co. v. Bobb*, 37 Mo. App. 483.

The legislature of the state cannot authorize the local government of the towns and cities in Missouri to tax persons or property or occupations outside the town or city limits. Such taxation is a taking, under the guise of taxation, of private property for private use, against an implied prohibition in the state Constitution to do so.

*Wells v. Weston*, 22 Mo. 384; *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *Cameron v. Stephenson*, 69 Mo. 372; *State v. Addington*, 12 Mo. App. 214, Aff'd in 77 Mo. 110; *Dickey v. Tennison*, 27 Mo. 373.

We test the constitutional validity of a statute by what may be done under it, not by what has occurred.

*St. Louis use of Seibert v. Allen*, 53 Mo. 44; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Collins v. New Hampshire*, 171 U. S. 33, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *Henderson v. New York*, 92 U. S. 268, *sub nom. Henderson v. Wickham*, 23 L. ed. 547; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The effect of the decisions in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; **181 U. S.**

*Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Stanley v. Albany County Supers.* 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234,—extends only to the proposition that regular proceedings upon due notice in a court of competent jurisdiction constitute due process of law.

The law requiring the entire cost of the improvement to be levied upon the property fronting it, according to the front feet, forbids any hearing on the question as to the proper distribution of the assessment.

*State, New York & G. L. R. Co. Prosecutor, v. Kcarney*, 55 N. J. L. 463; *People ex rel. Parker v. Jefferson County Ct.* 55 N. Y. 604; *Lee v. Ruggles*, 62 Ill. 427; *Creote v. Chicago*, 56 Ill. 422; *St. John v. East St. Louis*, 50 Ill. 92; *State, Vreeland, Prosecutor, v. Jersey City*, 43 N. J. L. 135.

The legislative power cannot fix or determine the "just compensation" to which the owner of property taken for public use is entitled.

*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *St. Louis County Ct. v. Griswold*, 58 Mo. 175.

*Mr. William C. Scarritt* argued the cause, and, with Messrs. Edward L. Scarritt, John K. Griffith, and Elliott H. Jones, filed a brief for defendant in error:

The law of the land or due process of law, as this expression is used in the 14th Amendment, means the common law and the statute law existing in the state at the time of the adoption of this amendment, or as subsequently and constitutionally modified by the state.

*State ex rel. Kohne v. Simons*, 2 Speers L. 761; *Louisville v. Cochran*, 82 Ky. 15; *Hurtado v. California*, 110 U. S. 519, 28 L. ed. 233, 4 Sup. Ct. Rep. 111, 292; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

No new rights were created or conferred by the declaration of the 14th Amendment here relied on. Its purpose was to guarantee those already in existence. It is a conservatory, rather than a reformatory force. The writing of these words as positive law limiting the power of states did not enlarge the meaning of the words; they were in the Constitution before.

*Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 116, 41 L. ed. 370, 17 Sup. Ct. Rep. 56; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Alfalfa Irrig. Dist. Directors v. Collins*, 46 Neb. 411, 64 N. W. 1086; *Wulzen v. San Francisco City & County Supers.* 101 Cal. 15, 35 Pac. 353; *Mayo v. Wilson*, 1 N. H. 53; *Weimer v. Bunbury*, 30 Mich. 201.

The methods of special taxation now criticised were developed and established in Missouri statutes and decisions before the 14th Amendment.

*Palmyra v. Morton*, 25 Mo. 593; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Joseph v. Anthony*, 30 Mo. 537.

The decisions of the courts of twenty-seven states of the Union uphold the validity of legislative acts assessing the cost of street improvements against abutting lots according to the frontage or area of the respective lots abutting upon the improvement, and establish the jurisdiction of the legislature so to do.

*Irwin v. Mobile*, 57 Ala. 7; *Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Whiting v. Quackenbush*, 54 Cal. 306; *Whiting v. Townsend*, 57 Cal. 515; *Jennings v. Lebreton*, 80 Cal. 8, 21 Pac. 1127; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Hadley v. Duguc*, 130 Cal. 207, 62 Pac. 500; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *O'Reilly v. Kingston*, 39 Hun. 285; *Hayden v. Atlanta*, 70 Ga. 817; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580; *White v. People ex rel. Bloomington*, 94 Ill. 604; *Craw v. Tolo-no*, 96 Ill. 255, 36 Am. Rep. 143; *Enos v. Springfield*, 113 Ill. 65; *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105; *Indianapolis v. Imberry*, 17 Ind. 175; *Palmer v. Stumph*, 29 Ind. 329; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780; *Gilcrest v. McCartney*, 97 Iowa, 138, 66 N. W. 103; *Allen v. Davenport*, 107 Iowa, 103, 77 N. W. 532; *Burnes v. Atchison*, 2 Kan. 455; *Parker v. Challiss*, 9 Kan. 155; *Blair v. Atchison*, 40 Kan. 353, 19 Pac. 815; *Atchison, T. & S. F. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Broadway Baptist Church v. McAtee*, 8 Bush. 508, 8 Am. Rep. 480; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546; *Dumesnil v. Gleason*, 99 Ky. 652, 37 S. W. 69; *Augusta v. McKibben*, 22 Ky. L. Rep. 1224, 60 S. W. 291; *Shelby v. Levee Comrs.* 14 La. Ann. 437; *Barber Asphalt Pav. Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848; *Barber Asphalt Pav. Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 241; *Springfield v. Gay*, 12 Allen, 612; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778; *Sears v. Boston Bd. of Aldermen*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Williams v. Detroit*, 2 Mich. 560; *Motz v. Detroit*, 18 Mich. 522; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801; *Cass Farm Co. v. Detroit* (Mich.) 7 Det. L. N. 283, 83 N. W. 108; *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97; *State v.*

*Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108; *Smith v. Aberdeen*, 25 Miss. 458; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Joseph v. Anthony*, 30 Mo. 537; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Springfield Central Nat. Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; *Saxton Nat. Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279; *Kansas City v. Huling*, 87 Mo. 203; *Morrison v. Morey*, 146 Mo. 563, 48 S. W. 629; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 S. W. 934; *Hill v. Swingley* (Mo.) 60 S. W. 114; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 263; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521; *Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1050; *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732; *Ernst v. Kunkle*, 5 Ohio St. 520; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Haviland v. Columbus*, 50 Ohio St. 471, 34 N. E. 679; *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *King v. Portland*, 2 Or. 146; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *King v. Portland* (Or.) 63 Pac. 8; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126; *McKeesport Boro use of McKeesport City v. Busch*, 166 Pa. 46, 31 Atl. 49; *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Cleveland v. Tripp*, 13 R. I. 50; *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072; *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447; *Allen v. Drew*, 44 Vt. 174; *Norfolk City v. Ellis*, 26 Gratt. 227; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249; *Weeks v. Milwaukee*, 10 Wis. 243; *State ex rel. Christopher v. Portage*, 12 Wis. 563; *Mcgett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

The legislature has the discretion to determine the benefit district.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

It is within the domain of legislative discretion to provide by general law a definite rule of apportioning the benefits to accrue from paving a street to lots in a defined benefit district.

*Mattingly v. District of Columbia*, 97 U. S. 692, 24 L. ed. 1100; *Bauman v. Ross*, 167



U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

When the benefits to accrue from a local improvement are to be apportioned according to a fixed rule determined in advance by a legislative act, the property owner is not entitled to notice or hearing at the time that assessment is made, or in respect to the amount of that assessment.

*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

The text writers sustain the rule of the Kansas City charter.

Dill. Mun. Corp. 3d ed. §§ 752, 761; 1 Desty, Taxn. § 24; Elliott, Roads & Streets, pp. 303, 369; Guthrie, U. S. Const. 14th Amend. pp. 95, 96; Cooley, Taxn. 2d ed. pp. 640, 661.

The words, "nor shall property be taken for a public use without just compensation," have been uniformly held to apply to the exercise of the right of eminent domain, and not to the exercise of the power of taxation.

*Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *McQuiddy v. Smith*, 67 Mo. App. 205; *Bellingham Bay Improv. Co. v. New Whatcom*, 172 U. S. 320, 43 L. ed. 463, 19 Sup. Ct. Rep. 205.

It is not the rule that legislation with respect to taxes is void unless even and exact justice is done in each instance.

Cooley, Const. Lim. 6th ed. p. 630; *Shaw v. Dennis*, 10 Ill. 405; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Henderson Bridge Co. v. Henderson*, 173 U. S. 613, 43 L. ed. 831, 19 Sup. Ct. Rep. 553.

The same logic applies to, and the same reasons control, the levying of special assessments.

*Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732; *King v. Portland (Or.)* 63 Pac. 8; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 245, 31 L. ed. 746, 8 Sup. Ct. Rep. 846; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

The rule of apportionment of the benefits arising from a public improvement is within the discretionary power of the legislative department of government.

Cooley, Taxn. 2d ed. pp. 622, 646; *Craw v. Tolono*, 96 Ill. 256, 36 Am. Rep. 143; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295; *King v. Portland (Or.)* 63 Pac. 2; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500.

[327] \*Mr. Justice Shiras delivered the opinion of the court:

In its opinion in this case the supreme court of Missouri said that "the method 181 U. S.

adopted in the charter and ordinance of Kansas City, of charging the cost of paving Forest avenue against the adjoining lots according to their frontage, had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. *St. Louis use of Seibert v. Allen*, 53 Mo. 44; *St. Joseph v. Anthony*, 30 Mo. 538; *Neenan v. Smith*, 50 Mo. 528; *Kiley v. Cranor*, 51 Mo. 541; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Farrar v. St. Louis*, 80 Mo. 379.

"In the last-mentioned case Judge Norton for the court said:

"The liability of lots fronting on a street, the paving of which is authorized, to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the "foot-front rule."

"Learned counsel for defendant concede such was the state of the decided law of this state, and that the portion of the Kansas City charter known as the 9th article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed \*similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court." [328]

Accordingly, the supreme court of Missouri held that the assessment in question was valid, and the tax imposed collectable. And, in so far as the Constitution and laws of Missouri are concerned, this court is, of course, bound by that decision.

But that court also held, against the contention of the lotowners, that the provisions of the 14th Amendment to the Constitution of the United States were not applicable in the case; and our jurisdiction enables us to inquire whether the supreme court of Missouri were in error in so holding.

The question thus raised has been so often and so carefully discussed, both in the decisions of this court and of the state courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles. It will be sufficient for our present purpose to collate our previous decisions, and to apply the conclusions reached therein to the present case.

It may prevent confusion and relieve from repetition if we point out that some of our cases arose under the provisions of the 5th, and others under those of the 14th, Amendments to the Constitution of the United States. While the language of those amendments is the same, yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances

of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. *Slaughter-House Cases*, 16 Wall. 36, 77, 80, 21 L. ed. 394, 409.

Thus it was said, in *Davidson v. New Orleans*, 96 U. S. 97-103, 24 L. ed. 616-619:

[329] "It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched \*with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

However, we shall not attempt to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, but shall proceed, in the present case, on the assumption that the legal import of the phrase "due process of law" is the same in both amendments. Certainly, it cannot be supposed that by the 14th Amendment it was intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the 5th Amendment.

Let us, then, inquire as briefly as possible what has been decided by this court as to the scope and effect of the phrase "due process of law," as applied to legislative power.

One of the earliest cases in which was examined the historical and legal meaning of those words is *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372. The question involved was the validity of a sale of real estate made under a distress warrant, authorized by a statute of the United States (3 Stat. at L. 592, chap. 107), against a defaulting collector of [330] customs. It was contended \*that such a proceeding deprived the owner of property without due process of law, contrary to the 5th

Amendment; that by "process of law" was meant a charge, defense, judgment before and by a legally constituted court. The question was thus stated by Mr. Justice Curtis:

"That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Pursuing the lines of inquiry thus indicated, the court reached the conclusions that, in ascertaining and enforcing payment of taxes and of balances due from receivers of the revenue in England, the methods have varied widely from the usual course of the common law on other subjects, and that, as respects such debts, the "law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of examination bearing a very close resemblance to the warrant of distress in the act of Congress in question; that this diversity in the law of the land between revenue defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially \*of the states after the Dec-[331]laration of Independence and before the formation of the Constitution of the United States; that not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it; and that, accordingly, the distress warrant in question was not inconsistent with that part of the Constitution which prohibits a citizen from being deprived of his property without due process of law.

In *Walker v. Sauvinet*, 92 U. S. 90, 23 L. 181 U. S.



ed. 678, there was presented the question whether the 14th Amendment availed to secure to a citizen of Louisiana a right of trial by jury as against an act of that state which provided that in certain circumstances a case enforcing penalties should be tried by the judge; and it was held that "the states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship which the states are forbidden by the 14th Amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 280, 15 L. ed. 376. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States. . . . Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

[332] \**McMillen v. Anderson*, 95 U. S. 37, 41, 24 L. ed. 335, was a case wherein was involved the validity of a law of the state of Louisiana, whereby a tax collector was authorized to seize property and sell it in order to enforce payment of a license tax, and which was alleged to be opposed to the provision of the 14th Amendment of the Constitution, which declares that no state shall deprive any person of life, liberty, or property without due process of law; but it was said by this court:

"Looking at the Louisiana statute here assailed, . . . we feel bound to say that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the states, by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary or unequal or illegal. It must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration  
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does not violate it. It enacts that when any person shall refuse or fail to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment, and the manner of giving this notice is fully prescribed. If at the expiration of this time the license 'be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property' of the delinquent, or so much as may be necessary to pay the tax and costs. . . . Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the 'validity of a tax. And the fact[333] that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, was a case wherein an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted in the state courts, and was by writ of error brought to this court on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the Constitution, as found in Magna Charta and in the 5th and 14th Amendments to the Constitution, were again considered; the cases of *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, and *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335, were cited and approved; and it was held that "neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution."

In *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253, was involved the validity of an act of Congress, June 30, 1864 (13 Stat. at L. 218, chap. 172), whereby lands of A were distrained and sold by reason of his refusal to pay a tax assessed against him; and it was contended that the sale of defendant's real estate, to satisfy the tax assessed upon him, in a summary manner, without first having obtained a judgment in a court of law, was a proceeding to deprive the defendant of his property without due process of law; that by "due process of law" is meant law in its regular course of administration by the courts of justice, and not the execution of a power vested in ministerial officers. But this court, after citing *Den ex dem. Murray v. Hoboken Land & Im-*

prov. Co. as holding that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid, and that the proceeding was "due process of law," said:

[334] "The prompt payment of taxes is always important to the \*public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

In *Missouri v. Lewis*, 101 U. S. 22, sub nom. *Bowman v. Lewis*, 25 L. ed. 989, the 14th Amendment was invoked to invalidate legislation of the state of Missouri regulating the right of appeal and of writs of error, and whereby suitors in the courts of St. Louis and certain other named counties were denied the right of appeal to the supreme court of Missouri in cases where it gave that right to suitors in the courts of the other counties of the state. Speaking for the court Mr. Justice Bradley said:

"If this position is correct, the 14th Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only \$5 could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

"If, however, we take into view the general objects and purposes of the 14th Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that

[335] do \*not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. . . . Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. . . . If every person residing or being in either portion of the state should be accorded the equal protection

of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person, or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line."

In *Mattingly v. District of Columbia*, 97 U. S. 687, 692, 24 L. ed. 1098, 1100, there was called in question the validity of the act of Congress of June 19, 1878 (20 Stat. at L. 166, chap. 309), entitled "An Act to Provide for the Revision and Correction of Assessments for Special Improvements in the District of Columbia and for Other Purposes," and it was said by this court, through Mr. Justice Strong: "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

In *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, it was urged that land which the owner has not laid off into town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this was said to be \*that such taxes are for the benefit of those [336] in a city who own property within the limits of such improvements, and who use or might use them if they chose, while he reaps no such benefit. Cases were cited from the higher courts of Kentucky and Iowa where this principle was asserted, and where those courts have held that farm lands in the city are not subject to the ordinary city taxes. But this court said:

"It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those states and their own city authorities, and afford no rule for construing the Constitution of the United States. . . . The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

"It is not asserted that, in the methods by which the value of his land was ascertained for the purpose of this taxation, there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is sub-



ject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law. The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we [337] cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest. *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor v. Secor*, 23 L. ed. 663; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469."

In *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, a judgment of the court of appeals of the state of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review upon the allegation that the state statute was unconstitutional. In the opinion of this court, delivered by Mr. Justice Gray, the following extract was given from the opinion of the court of appeals:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. . . . The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners; but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, *viz.*, the amount to be realized, and the property especially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open \*to our review. The [338] question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error, and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. . . . The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and, having the power, we cannot criticise the reasons or manner of its action."

This definition of legislative power was approved by this court, and the judgment of the court of appeals was affirmed. The following extract is from the opinion of this court:

"In the absence of any more specific constitutional restriction \*than the general pro-[339]hibition against taking property without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands bene-

fited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

In *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750, where the validity of a city ordinance, providing that the cost of a sewer should be distributed upon the property within the sewer district, and appointing viewers to estimate the proportionate share which each piece of property should bear, was questioned, because the ordinance contained no provision for notice, it was held by the supreme court of Oregon, and by this court on error, that notice by publication is a sufficient notice in proceedings of this nature, and that as the viewers, upon their appointment, gave notice by publication in the official paper of the [340] city of the time and place of their first meeting, such notice was sufficient to bring the proceedings within "due process of law."

In *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, was involved the validity of the irrigation act enacted by the legislature of the state of California. One of the objections urged against the act was that it permitted the whole cost to be levied by a board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred. As to this it was said by this court, through Mr. Justice Peckham:

"Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be

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that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision." Citing *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

Another objection to the validity of the act was the total want of an opportunity to be heard on the question of the expediency of forming the district, on the questions of cost and of benefits received. In respect to this it was said:

"The provision for a hearing in the irrigation act is similar, and the condition therein, that lands which in the judgment of the board are not benefited shall not be included, renders the determination of the board, including them after a hearing, a judgment that such lands will be benefited by the proposed plan of irrigation.

"The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 625; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750."

"It has been held in this court that the legislature has power \*to fix such a district [341] for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay. *Paulsen v. Portland*, 149 U. S. 30, 41, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited.

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer v. Merchant*, 125 U. S. 356, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; and *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192."

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In *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, on appeal from the court of appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted to commissioners \*appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation; and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court,—citing *Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Shoemaker v. United States*, 147 U. S. 282, 302, 37 L. ed. 170, 186, 13 Sup. Ct. Rep. 361. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners,

and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion \*of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

This subject has been recently considered by this court in the case of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, and where it was held, after a review of the authorities, that the enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of \$1.25 per linear foot front against all lots or land abutting on the street, road, or alley in which a water main shall be laid,—was constitutional, and was conclusive alike of the necessity of the work and of its benefit as against abutting property.

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley, Taxn. 447.

"The courts are very generally agreed that the authority to \*require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a

question of legislative expediency." 2 Dill. Mun. Corp. § 752, 4th ed.

This array of authority was confronted, in the courts below, with the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the supreme court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*. That was a case where, by a village ordinance apparently aimed at a single person a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular \*assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the state."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U. S. 45, 56, 42 L. ed. 943, 947, 18 Sup. Ct. Rep. 521; and in *Spencer v. Merchant*, 125 U. S. 345, 357, 31 L. ed. 763, 768, 8 Sup. Ct. Rep. 921.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority

of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

"The work done consisted of paving with asphaltum the roadway of Forest avenue in the said [Kansas] City, 36 feet in width, from Independence avenue to Twelfth street, a distance of ½ mile. Forest avenue is one of the oldest and best-improved residence streets in Kansas City, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement."

"What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the state as consistent with constitutional principles."

*The judgment of the Supreme Court of Missouri is affirmed.*

Mr. Justice **Harlan** (with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**) dissenting:

The special tax bills here in question purport to cover the cost of paving with asphalt a part of Forest avenue in Kansas City, Missouri. The work was done under the orders of the common council of that city, and the tax bills, it is alleged, were made out in conformity with the provisions of the city charter.

By § 2 of article 9 of the city charter it was provided that "the city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regreveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered, or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof, . . . and to pay therefor out of the general fund or by issuing special tax bills as herein mentioned. . . ."

The same section provides that no resolution for the paving, repaving, etc., of any street, alley, avenue, public highway, or part thereof "shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and provided further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have



such street, alley, avenue, public highway, or part thereof paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, or remacadamized with a different kind of material or in a different manner from that [347] specified in such resolution, \*then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax bills shall cease until a sufficient number of persons so remonstrating, or their grantees, shall, in writing, withdraw their names, or the property represented by them, from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident property owners as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made." But by a subsequent section it was provided: "When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize, or remacadamize any street, alley, avenue, public highway, or part thereof, and pay therefor in special tax bills, if the common council shall, by ordinance, find and declare that the resolution provided in § 2 of this article has been published as therein required, and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway, or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and no special tax bill shall be held invalid or affected for the reason that such resolution was not published as therein required, or that a remonstrance or petition sufficiently signed was filed as therein required, or that such petition was not filed or was insufficiently signed." § 4.

By § 3 it was provided that "all ordinances and contracts for all work authorized [348] to be done by § 2 of \*this article shall specify how the same is to be paid for, and in case payment is to be made in special tax bills, the city shall in no event nor in any manner whatever be liable for or on account of the work."

The cost of work done on sidewalks, streets, avenues, alleys, and public highways is provided for in the 5th and 6th sections of the same article, as follows: "The cost of all work on any sidewalk, including curbing and gutter-

ing along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys, and public highways, or parts thereof, shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley, or public highway, or parts thereof improved, according to the frontage thereof. . . . When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax bills, except as hereinafter provided, make out and certify, in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax, according to such apportionment, against each lot or parcel of land to be charged."

By § 18 of the same article every special tax bill issued under its provisions is made "a lien upon the land described therein, upon the date of the receipt of the board of public works therefor, and such lien shall continue for two years thereafter."

It thus appears that under the charter of Kansas City the cost of the paving or the repaving of any street, avenue, alley, or public highway is put upon the abutting property under a rule absolutely excluding any consideration whatever of the \*question of [349] special benefits accruing, by reason of the work done, to such property. It is true the abutting owner, in defense of a suit brought on a special tax bill, may show any mistake or error in the amount of such bill, or that the work was not done in a workmanlike manner; but the cost, set forth in the tax bill, or when ascertained in a suit on the tax bill, must be borne by the abutting property, according to its frontage, even if such cost be in substantial excess of the special benefits, if any, accruing to the property assessed. So the abutting property must bear the cost, according to frontage, even if such cost equals the full or actual market value of the land. Thus, the entire property abutting on the street improved, and subjected by the statute, that is, by the city charter, to a lien in favor of the contractor or his assignee, may be taken from the owner, for the benefit of the general public, to meet the cost of improving a public highway in which the entire community is interested. But that circumstance, it is contended, is not of the slightest consequence; for—so the argument in support of the statute runs—the legislature having determined that the land abutting on a public street shall, according to its frontage, meet the cost, whatever it may be, of improving that street,



the courts cannot inquire whether the owner has received any such special benefit as justifies the putting upon him of a special burden not shared by the general public for whose use the improvement was made, nor inquire whether the cost of the work equals or exceeds the value of the property. I cannot assent to this principle. It recognizes, contrary to the principles announced in *Norwood v. Baker*, 172 U. S. 269, 277, 279, 293, 297, 43 L. ed. 443, 447, 452, 454, 19 Sup. Ct. Rep. 187, the existence in the legislative branch of government of powers which, I take leave to say, cannot be exercised without violating the Constitution of the United States. In that case, upon the fullest consideration, it was held, as had been held in previous cases, that the due process of law prescribed by the 14th Amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use. We also held that an assessment upon abutting property for the cost and expense incurred in opening a street was to be referred [350] to the power of taxation, and that the \*Constitution of the United States forbade an exercise of that power that would put upon private property the cost of a public work in substantial excess of the special benefits accruing to it from such work. Let us see if that was not the decision of the court.

In that case the attempt was made to put upon the abutting property the entire cost incurred in opening a public street through the owner's lands. No inquiry as to special benefits was made; indeed, no inquiry of that character was permissible under the ordinance in virtue of which the street was opened. It was not denied that the ordinance was consistent with the statutes of the state; and the question was distinctly presented whether a special assessment for the cost of opening a street through private property could be sustained under the Constitution of the United States if it was made under a rule excluding all inquiry as to special benefits accruing to the abutting property by reason of such improvement. In that case it was the public, and not the owner of the property, that wished the street to be opened. The judgment of the circuit court enjoining the assessment was affirmed upon the ground—so our mandate expressly stated—that the assessment was “under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation.” The mandate was in harmony with the opinion, for the court said: “It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either

under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property.”

\*As the court in the present case makes [351] some observations as to the scope of the decision in *Norwood v. Baker*, it will be well to ascertain the precise grounds upon which our judgment in that case was based. Those grounds are indicated by the following extracts from the opinion:

“Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County v. Kimball*, 102 U. S. 691, 703, 704, 26 L. ed. 238, 242; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 202, 37 L. ed. 132, 136, 13 Sup. Ct. Rep. 293; *Bauman v. Ross*, 167 U. S. 548, 589, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966, and authorities there cited. And according to the weight of judicial authority the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns which had been judicially determined to be towns benefited by such improvement, it was said: ‘Neither can it be doubted that if the state Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.’ But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature, upon particular \*private property, of the [352] entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country.”

Again: “It is one thing for the legislature



to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Further, in the same case: "The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion; namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

[353] Does the court intend in this case to overrule the principles\* announced in *Norwood v. Baker*? Does it intend to reject as unsound the doctrine that "the principle underlying special assessments . . . to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?" Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—"will, *to the extent of such excess*, be a taking of private property for public use without compensation?" The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determina-

tion as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution, are set forth in *Norwood v. Baker*, and need not be repeated. But I may add a reference to some recent adjudications.

In *Sears v. Boston*, 173 Mass. 71, 78, 43 L. R. A. 834, 837, 53 N. E. 138, 139, which was the case of a special assessment to meet the cost of watering streets, the court said: "It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the 14th Amendment to the Constitution of the United States, inasmuch as it would deprive one of [354] his property without compensation, and so without due process of law. The authority of this case is controlling in all state courts, and if it were not, *it is in accordance with sound principles*, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. *Boston v. Boston & A. R. Co.* 170 Mass. 95, 101, 49 N. E. 95, and cases cited." In *Sears v. Boston Street Comrs.* 173 Mass. 350, 352, 53 N. E. 876, which was the case of charges upon land to meet the cost of certain sewerage work done under municipal authority, Mr. Justice Knowlton, delivering the unanimous judgment of the court, said: "If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the Constitution of this commonwealth and under the Constitution of the United States, *only* when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then *only to an amount not exceeding such special and peculiar benefits*. . . . The fact that the charges to be determined are for the construction, maintenance, and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the charges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case



largely exceed such benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law," citing *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Barnes v. Dyer*, 56 Vt. 469, and *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535. In *Deater v. Boston*, 176 Mass. 247, 251, 252, 57 N. E. 379, 380, the court said: "It is now settled law in this court, [355] as it is in the \*Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits." To the same effect are *Hutcheson v. Storrie*, 92 Tex. 688, 45 L. R. A. 289, 51 S. W. 848; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Fay v. Springfield*, 94 Fed. Rep. 409; *Loeb v. Columbia Twp.* 91 Fed. Rep. 37; *Charles v. Marion*, 98 Fed. Rep. 166; *Cowley v. Spokane*, 99 Fed. Rep. 840.

The court, after referring to the declaration of the supreme court of Missouri to the effect that the 14th Amendment was not applicable to this case, proceeds, in order to "prevent confusion and relieve from repetition," to refer to some of the cases arising under that and the 5th Amendment. In the same connection the court, referring to the 5th and 14th Amendments, says that "while the language of those amendments is the same [in respect of the deprivation of property without due process of law], yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." As the court expressly declines to formulate any rule to determine for all cases "what it is for a state to deprive a person of life, liberty, or property without due process of law," I will not enter upon a discussion of that question, but content myself with saying that the prohibition against the deprivation of property without due process of law cannot mean one thing under the 5th Amendment and another thing under the 14th Amendment, the words used being the same in each amendment. If the court intends to intimate the contrary in its opinion, I submit that the intimation is not sustained by any former decision, and is not justified by sound principle.

The first case to which the court refers as arising under the 14th Amendment is *Davidson v. New Orleans*, 96 U. S. 97, 103-105, 24 L. ed. 616, 619, 620. From that case

sentences are quoted which were \*intended to [356] remove the impression, then supposed to exist with some, that under that Amendment it was possible to bring "to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." But the court in the present case overlooks another part of the opinion in *Davidson v. New Orleans*, which was pertinent to the issue in that case, and is pertinent to the present discussion. After speaking of the difficulty of an attempt to lay down any rule to determine the full scope of the 14th Amendment, and suggesting that the wise course was to proceed by the gradual process of judicial inclusion and exclusion, the court said: "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." Here is a direct affirmation of the doctrine that a tax, assessment, servitude, or other burden may be imposed by a state, or under its authority, consistently with the due process of law prescribed by the 14th Amendment, if the person owning the property upon which such tax, assessment, servitude, or burden is imposed is given an opportunity, in some appropriate way, to contest the matter. In the present case no such opportunity was given to the plaintiffs in error, and the state court held that they had no right to show, in any tribunal, that their property was being taken for the cost of improving a public street in substantial excess of any special \*benefits ac-[357] cruing to them beyond those accruing to the general public owning and using the street so improved.

Reference is made by the court to *McMillen v. Anderson*, 95 U. S. 38, 41, 42, 24 L. ed. 335, 336, in which will be found certain observations as to the words "due process of law." In that case the only question was whether a statute of Louisiana imposing a license tax, which did not give a person an opportunity to be present when the tax was assessed against him, or provide for its collection by suit, was in violation of the 14th Amendment. The court, after referring to the provision requiring, in case the license tax was not paid, that the collector should give ten days' written or printed notice to the delinquent, and if at the expiration of



that time the license was not fully paid the tax collector might, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent, or so much as might be necessary to pay the taxes and costs, said: "Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum, as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void. Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, *stay the proceedings for its collection by process of injunction*. See Fouqua's Code of Practice of Louisiana, arts. 296-309, inclusive. *The act of 1874 recognizes this right to an injunction, and regulates the* [358] *proceedings "when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction."* Here we have, contrary to the intimation given in the opinion of the court in this case, a recognition of the principle that the 14th Amendment does apply to cases of taxation under the laws of a state. And it is to be observed that the court in *McMillen v. Anderson* takes care to show that under the laws of Louisiana the taxpayer was given an opportunity to be heard in respect of the validity of the tax imposed upon him.

Among the cases cited in support of the conclusions announced by the majority are: *Mattingly v. District of Columbia*, 97 U. S. 687, 692, 24 L. ed. 1098, 1100; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; and *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

It seems to me quite clear that the particular question before us was not involved or determined in any of those cases.

In *Mattingly v. District of Columbia* it was said that the legislature may direct special assessments for special road or street improvements "to be made in proportion to the frontage, area, or market value of the

adjoining property, at its discretion." But that falls far short of deciding that an assessment in proportion to frontage could be sustained if it exceeded the value of the property or was for an amount in excess of the special benefits accruing to the property assessed. Besides, no question was made in that case as to the cost of the work exceeding special benefits.

In *Kelly v. Pittsburgh* the only point involved or adjudged was that the 14th Amendment did not stand in the way of the legislature of a state extending the limits of a city or township so as to include lands fit for agricultural use only, and make them subject to taxation for the local purposes of the extended city or town, although the owners did not enjoy the advantages of the municipal government to the same extent as those who resided in the thickly settled parts of the city or town. It was not a case in which the property of particular persons was specially assessed by a rule not applicable to all "other assessments. On the con-[359] trary it was admitted in that case that the methods adopted to ascertain the value for purposes of local taxation of the lands there in question were such as were usually employed, and that the manner of apportioning and collecting the tax was not unusual or materially different from that in force in all communities where land was subject to taxation. It was held that it was not the function of the court to correct mere errors in the valuation of lands for purposes of taxation.

In *Spencer v. Merchant* no question arose as to an excess of the cost of the improvement there in question over special benefits. The question before the court was as to the constitutionality of a statute validating what had been judicially determined to be a void assessment. This court so declared when it said that the plaintiff, who questioned the validity of the statute, contended "that the statute of 1881 was unconstitutional and void because it was an attempt by the legislature to validate a void assessment without giving the owners of the lands assessed an opportunity to be heard upon *the whole amount of the assessment*." The court held that the statute itself was, under the circumstances of that case, all the notice and hearing the owners of the lands required. There was no occasion for any general declaration as to the powers of the legislature which would cover cases of void assessments validated by legislative enactment where the amount assessed upon particular property was in substantial excess of special benefits accruing to it. Referring to *Spencer v. Merchant*, this court said in *Norwood v. Baker*: "The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In *Paulsen v. Portland* the only point ad-



[360] judged was that notice, by publication in a newspaper, of the time and place of the meeting of viewers appointed to estimate the proportionate share which each piece should bear of the amount to be assessed upon the property in a sewer district for the cost of a sewer, was sufficient "to bring the proceedings within due process of law." The court in that case took care to say that it did not question the proposition that "notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property." That case cannot be held to support the views of the supreme court of Missouri, for that court in this case held in substance that, under legislative authority, property fronting on a public street could all be taken to pay the cost of improving the street, leaving nothing whatever to the owner, and that, too, without any notice and without any right in the owner, in any form, to show that the amount required to be paid exceeded, not only any special benefits accruing to the property, but even the value of the property assessed.

In *Bauman v. Ross* we had a case in which a special assessment was made, under an act of Congress, imposing upon the lands benefited one half of the amount awarded by the court as damages for each highway or reservation, or part thereof, condemned and established under the act. The assessment was directed to be "charged upon the lands benefited by the laying out and opening of such highway or reservation or part thereof," and the jury was directed "to ascertain and determine what property is thereby benefited." The same act directed the jury to assess against each parcel which it found to be so benefited its proportional part of the sum assessed, provided that as to any tract, part of which only had been taken, due allowance should be made for the amount, if any, "which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract." In such a case the owner of the property being given full right to be heard before an authorized tribunal upon the question of special benefits, no question could arise such as is presented in the present one.

In *Parsons v. District of Columbia* the question was as to the validity of an act of Congress which provided for establishing, in this District, "a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and of water mains." It was provided that assessments [361] "levied for water mains should be at the rate of \$1.25 per linear foot against all lots or land abutting upon the street, road, or alley in which a water main is laid. This court, among other things, said: "Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the assessment. But this objection overlooks the fact that the laying of this main was part

of the *water system*, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to *maintain and repair the system*." But the court took care to add, "and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." The words thus added are significant, and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; if the amount assessed had been substantially or materially in excess of the cost of the work or of the value of the property assessed or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights.

The court, in its opinion, quotes certain passages from Cooley's *Treatise on Taxation*, in which the author refers to the different modes in which the cost of local public work may be met; namely: (1) a general tax to cover the major part of the cost, the smaller portion to be levied upon the estates specially benefited; (2) a tax on the land specially benefited to meet the major part of the cost, the smaller part to be paid by the general public; and (3) a tax for the whole cost on the lands in the immediate vicinity of the work. In respect of each of these methods the court cites these words of Cooley: "In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general \*charge, and levy no special assessment what-[362] ever. The question is legislative, and like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley, *Taxn.* 447, chap. 20, § 5; *Id.* 2d ed. 637, § 5.

But in the *same chapter* from which the above extract was made the author discusses fully the underlying principles of special assessments, saying: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be *especially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds*; and, in addi-



tion to the general levy, they demand that special contributions, *in consideration of the special benefit*, shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." Cooley, Taxn. 416, chap. 20, § 1; Id. 2d ed. 606, § 1. To this we may add the declaration of the author when, speaking for the supreme court of Michigan in *Thomas v. Gavin*, 35 Mich. 155, 162, 24 Am. Rep. 535, 538, he said: "It is generally agreed that an assessment levied *without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses.*"

[363] The court overlooked other passages in the same chapter of "Cooley's Treatise on Taxation. Referring to the rule of assessment by the front foot upon property abutting on a local improvement, where no taxing district has been established over which the cost could be distributed by some standard of benefit, actual or presumptive, Cooley says: "But it has been denied, on what seem the most conclusive grounds, that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army or any portion of it should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the 181 U. S.

sense of those terms as applied to the exercise of powers by any enlightened or responsible government." Cooley, Taxn. 453, chap. 20, § 53; Id. 2d ed. 646, 647.

The author also says what I do not find in the opinion of the court in this case: "There can be no justification for any proceeding which charges the land *with an assessment greater than the benefits; it is a* [364] *plain case of appropriating private property to public uses without compensation.*" Cooley, Taxn. 2d ed. 661.

The court also cites from Dillon's Treatise on Municipal Corporations certain passages to the effect that whether the expense of making local improvements "shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." 2 Dill. Mun. Corp. 4th ed. p. 912, § 752. These views need not be controverted in this case, and of their soundness I have no doubt when we are ascertaining the general rule to be applied in the particular classes of cases referred to by the author. But the above quotation from Dillon by no means indicates his opinion as to the application of the general rule announced by him. In the same chapter from which the court quotes I find the following principles announced by the author as deduced from an extended reference to numerous adjudged cases: "Special benefits to the property assessed; that is, benefits received by it *in addition to those received by the community at large*, is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again: "When not restrained by the Constitution of the particular state, the legislature has a discretion commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York (*People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266), have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, *is to hold that* [365] *the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority.*" 2



Dill. Mun. Corp. 4th ed. p. 934, § 761. Further, the author says: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvements, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property *was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary*, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just and reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*" 2 Dill. Mun. Corp. 4th ed. p. 935, § 761.

I agree with the court in saying that Cooley and Dillon are text writers of high authority for learning and accuracy. But I cannot agree that the extracts from their [366] treatises found in \*its opinion correctly or fully state their views upon the particular question now before us.

The declaration by the court that the decision in *Norwood v. Baker* was placed upon the ground that the burdens imposed upon Mrs. Baker's property amounted to *confiscation* is, I submit, an inadequate view of our decision. The word "confiscation" is not to be found in the opinion in that case. The affirmance of the judgment in that case was upon the sole ground that the assessment was made under a rule that absolutely *excluded any inquiry as to special benefits*. Such a rule was held to be void because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public.

If it may be inferred from what is said in the opinion of the court in this case that a special assessment resulting in the *confiscation* of the entire property assessed might not

be sustained I have to say that manifestly confiscation does occur when the property specially assessed is all taken to meet the cost of a public improvement supposed to be specially beneficial to the owner. So if the property is assessed beyond the special benefits accruing there is *confiscation to the extent of such excess*. But if confiscation, in any form, will not be tolerated, what becomes of the broad declarations in the opinions in some of the cited cases to the effect that the legislature may prescribe the extent to which private property is specifically benefited by a local public improvement, and that its action in that respect cannot be questioned by the owner of the property assessed even if it appeared that the amount assessed exceeded the special benefits, or even if it appeared that the cost of the improvement exceeded the value of the property assessed? Are we to understand from the interpretation now placed upon the decision in *Norwood v. Baker* that the courts may, for the protection of the property owner, interfere when a legislative determination amounts to confiscation, pure and simple, but that they cannot interfere when the amount assessed is in substantial excess of the benefits received?

\*In my judgment, some of the cases referred to in the opinion of the court contain general declarations as to the powers of the legislature in the matter of special assessments which went far beyond what was necessary to be said in order to dispose of the respective cases. Those declarations, literally interpreted, seem to recognize the legislature in this country as possessing absolute, arbitrary power in the matter of special assessments imposed to meet the cost of a public improvement,—indeed, all the powers, in the matter of taxation, that belong to the Parliament of Great Britain. The opinions in some of these cases recall the wise observations of Chief Justice Marshall, when, speaking for this court, he said: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, 290. We live under a Constitution which is the supreme law of the land. It enumerates the powers of government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens. Some of these limitations and restrictions apply equally to the Congress of the United States and to the legislatures of the states. If it be true that the only ground upon which a special assessment can be legally imposed



upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public,—and no one, I take it, will dispute the soundness of that principle,—and if it be true that the property cannot be made to bear a proportion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any [368] legislative rule or requirement \*that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute, unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent? In other words, Is there to be a difference, so far as the powers of the courts are concerned, between confiscation, under the guise of taxation, of the entire property of the citizen, and confiscation of only a part of it?

I have spoken of special assessments where the amount assessed was in substantial excess of special benefits. The words "substantial excess" have been used because, in the language of this court in *Norwood v. Baker*, already cited, exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a substantial character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. I do not doubt—indeed, the opinion in *Norwood v. Baker* concedes—that the legislature has a wide discretion in cases of special assessments to meet the cost of improving or opening public highways. But I deny that the owner of abutting property can be precluded from showing that the amount assessed upon him is in substantial excess of special benefits accruing to his property. To the extent of such excess the burden should be borne by the community for whose benefit the improvement is made. I entirely concur in the views of Church, Ch. J., as expressed in *Guest v. Brooklyn*, 69 N. Y. 506. He said: "The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific [369] benefit conferred upon their property, \*is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the prin-

icipal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding improvements which they may enjoy without expense to themselves." 2 Dill. Mun. Corp. 4th ed. 934, note 1.

At the same time this case was determined the court announced its judgment in *Wight v. Davidson*, 181 U. S. 371, post, 900, 21 Sup. Ct. Rep. 616, on appeal from the court of appeals of the District of Columbia. In its opinion in that case it makes some reference to *Norwood v. Baker* to which it is appropriate to refer in this opinion. The court, in *Wight v. Davidson*, says: "There [in *Norwood v. Baker*] the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the state had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without compensation, and accordingly affirmed the decree of the circuit court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be \*equal to the spe-[370] cial benefits accruing to the property." This language implies that the assessment in *Norwood v. Baker* was without legislative sanction and hence the judgment rendered by this court; whereas, it distinctly and unmistakably appears from the opinion in that case that what the village of Norwood did was under a legislative enactment authorizing it to open the street there in question and assess the cost upon the abutting property, according to its frontage, without regard to special benefits, and without any inquiry upon that subject. And it was because and only because of this rule established by the legislature that the court held the assessment invalid. I submit that this case cannot be distinguished from *Norwood v. Baker* upon the ground that the village of Norwood proceeded without legislative sanction.

In my opinion the judgment in the pres-



ent case should be reversed upon the ground that the assessment in question was made under a statutory rule excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation.

[371]\*JOHN B. WIGHT and Others, Commissioners of the District of Columbia, *Appts.*,  
v.

CHARLES H. DAVIDSON, A. A. Wilson,  
and John B. Lerner, Trustees.

(See S. C. Reporter's ed. 371-388.)

*District of Columbia—assessment for street improvement—sufficiency of notice.*

1. The power of Congress to legislate for the District of Columbia includes the power to provide by the act of March 3, 1899, for the assessment, on abutting lands and lands benefited, of one half or more of the damages for and in respect of land condemned for the opening of streets.
2. The order of publication in newspapers, made by the supreme court of the District of Columbia, is sufficient to give due notice of the filing of a petition and an opportunity to all persons interested to show cause why the prayer of the petition in the matter of a street improvement should not be granted.

[No. 283.]

Argued October 26, 29, 1900. Decided  
April 29, 1901.

**A** PPEAL from the Court of Appeals of the District of Columbia to review a decision reversing a judgment affirming street assessments. *Reversed.*

See same case below, 16 App. D. C. 371.

Statement by Mr. Justice Shiras:

Congress, by an act approved March 3, 1899, entitled "An Act to Extend S Street in

NOTE.—As to necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to the validity of assessments upon abutting property, made by charging upon each piece the cost of the improvement in front of it—see *Davls v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

As to what service of process is sufficient to constitute due process of law—see note to *Pinney v. Providence Loan & Invest. Co.* (Wis.) 50 L. R. A. 577.

the District of Columbia, and for Other Purposes," enacted as follows:

"Sec. 1. That within thirty days from the passage of this \*act the commissioners of the District of Columbia be and they are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: *Provided*, That the owners of the 'Kall' tract dedicate the land in said tract contained within the lines of said streets: *And provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided.

"Sec. 5. That the proceedings for the condemnation of said lands . . . shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways."

"Sec. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets." 30 Stat. at L. 1344, chap. 431.

On March 31, 1899, the commissioners filed a petition in the supreme court of the District, alleging that the owners of the Kall tract had dedicated to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second, and Decatur streets; that a map of the proposed extension of said streets, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, had been prepared and a copy thereof annexed to the petition; and praying the \*court to direct the marshal of the Dis-  
trict to summon a jury to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which said streets were proposed to be extended, might sustain by reason thereof; and that such other and further orders might be made and proceedings had as were contemplated by the said act of Congress and by chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, to the end  
181 U. S.



that a permanent right of way for the public over said lands might be obtained and secured for the extension of said streets.

On April 3, 1899, an order of publication was made by the court directing that all persons interested in the proceedings appear in the court on or before the 22d day of April, 1899, and show cause, if any they have, why the prayer of said petition should not be granted, and that a copy of the order should be published in the Washington Post and the Washington Times newspapers at least six times, and in the Washington Law Reporter once, before the said 22d day of April, 1899.

On July 21, 1899, it was ordered by the court that, whereas notice by advertisement had been duly published, a jury should be summoned to be and appear upon the premises to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend said streets, as prayed in said petition, and directing that of the amount due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less than one half thereof should be assessed by said jury against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which would be benefited by the opening of said streets; and to further proceed in accordance with the act of Congress approved March 3, 1899.

On August 30, 1899, there was filed in the supreme court of the District a return or report by the marshal, setting forth the appointment and qualification of the jurors, and a statement of the proceedings of said jury in taking testimony and hearing arguments of counsel. With the report of the marshal there was also filed a verdict in writing by the jury in the following terms:

[374]\*In the Supreme Court of the District of Columbia, holding a District Court for said District.

*In re* Extension of S, Twenty-second, and Decatur Streets.—No. 549.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on the plat or map filed with the petition in this cause, as set forth in schedule 1, hereto annexed as part hereof; and we, the jury aforesaid, in accordance with the act of Congress, approved March 3, 1899, for the extension of said streets, do hereby assess the sum of \$26,000, being not less than one half of the damages so, as aforesaid, awarded in schedule 1 against the pieces and parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which we find will be benefited by the extension of

said streets, as set forth in schedule 2, hereto annexed as part hereof.

By schedule 1, annexed to the award, it appears that the jury awarded to the owners of parts of lots 41 and 42 of Phelps and Tuttle's subdivision of Widow's Mite, as damages for land within the lines of S and Twenty-second streets extended, the sum of \$36,000, and to the owners of part of lot 41, included in the lines of Decatur Place extended, the sum of \$16,000.

By schedule 2 it is shown that the jury apportioned one half of said damages among the owners of pieces or parcels of land benefited, and that among those found to be benefited were the owners of the Kall tract, and against whose lands there were assessed various sums amounting, in the aggregate, to \$14,000.

On September 19, 1899, the supreme court of the District entered an order confirming the award and assessment, unless cause to the contrary should be shown on or before the 4th day of October, 1899, and directing that a copy of said order should be published once in the Washington Law Reporter and twice in the Evening Star before that date: and further ordering that the marshal should serve a copy of the order personally \*on all the owners of land condemned and all [375] the owners of land assessed in said verdict, with one half of the damages awarded therein, who might be found within the District of Columbia, and if not found therein, then by mailing a copy thereof to the place of abode or last-known place of residence of each owner or owners.

On September 29, 1899, the marshal returned that he had served a copy of the order personally on, among others, the appellees, and had mailed copies to such parties as resided without the District.

On October 4, 1899, the appellees filed exceptions to the confirmation of the award and finding of the jury, as to the owners of the tract of land known in the proceedings as the Kall tract. The exceptions were as follows:

"First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings are had and taken, and by a proper construction thereof no damage can be assessed against said tract of land, or any part thereof, or these respondents as owners of said land.

"Second. Because said act is unconstitutional and void in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such assessment might be made effective, and for other vices and defects apparent on the face of the statute.

"Third. Because the statute under which said assessment is made is a statute relating to a condemnation of land solely, and con-

tains no provision touching the assessment of benefits, and was not intended to provide for such assessment.

"Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land therefor, and the assessment of benefits, is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement [376] as to the \*assessment of benefits against property forming no part of that sought to be condemned.

"Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient, and defective.

"Sixth. Because said award of damages and finding of the jury in that behalf are excessive, unjust, and unreasonable.

"These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be impaneled in accordance with the provisions of the statute in such case made and provided."

On November 18, 1899, after argument, the exceptions were overruled, and the verdict, award, and assessment were in all respects confirmed. Thereupon the cause was taken on appeal to the court of appeals of the District of Columbia. On April 25, 1900, the order and decree of the supreme court of the District were reversed by the said court of appeals, and the cause was remanded to the supreme court of the District, with directions to vacate such order or decree, and for said other proceedings therein, if any, as might be proper and not inconsistent with the opinion of the court of appeals. 16 App. D. C. 371. An appeal was thereupon allowed to this court.

**Messrs. Clarence A. Brandenburg and Andrew B. Duvall** argued the cause and filed a brief for appellants:

The statutory provision relating to the assessment of benefits is the exercise of the power of taxation, and is quite different from the exercise of the right of eminent domain.

*Bauman v. Ross*, 167 U. S. 588, 42 L. ed. 287, 17 Sup. Ct. Rep. 966.

Congress has the right to determine what proportion of the cost of a public improvement shall be assessed against property specially benefited.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Bauman v. Ross*, 167 U. S. 584, 42 L. ed. 286, 17 Sup. Ct. Rep. 966; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 702, 28 L. ed. 570, 4 Sup. Ct. Rep. 663; *Cooley*, Taxn. p. 447.

Congress may itself determine the taxing area, or commit the duty to a tribunal created by it.

2 Dill. Mun. Corp. § 752, 4th ed.; *Cooley*, Taxn. p. 447; *Bauman v. Ross*, 167 U. S. 584, 42 L. ed. 286, 17 Sup. Ct. Rep. 966.

Congress itself may prescribe the rule of

apportionment in the taxing district, or leave it to a tribunal created by it; and if the basis of apportionment is actual benefits received, the act is valid.

*Bauman v. Ross*, 167 U. S. 584, 42 L. ed. 286, 17 Sup. Ct. Rep. 966.

It is not necessary that the act of Congress itself should provide for notice.

*Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Allman v. District of Columbia*, 3 App. D. C. 24; *Lyman v. Plummer*, 75 Iowa, 353, 39 N. W. 527.

Personal notice was not essential to the validity of the assessment.

*Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 625; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 702, 28 L. ed. 570, 4 Sup. Ct. Rep. 663; *State, Vanatta, Prosecutor, v. Runyon*, 41 N. J. L. 103; *State, Malone, Prosecutor, v. Jersey City*, 28 N. J. L. 503; *Re De Peyster*, 80 N. Y. 565; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist. Comrs.* 134 Ill. 398, 10 L. R. A. 285, 25 N. E. 781; *Re Amsterdam*, 126 N. Y. 158, 27 N. E. 272; *Mcgett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566; *Lyman v. Plummer*, 75 Iowa, 353, 39 N. W. 527; *Stewart v. Polk County Supers.* 30 Iowa, 28; *Ricketts v. Hyde Park*, 85 Ill. 110.

Notice given before the assessment became a charge or lien against the appellee's property, with opportunity to contest its validity, was all that "due process of law" required.

*Cooley*, Taxn. p. 266; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Yeomans v. Riddle*, 84 Iowa, 161, 50 N. W. 886; *Cleveland v. Tripp*, 13 R. I. 51; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Re Amsterdam*, 126 N. Y. 158, 27 N. E. 272; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

**Mr. B. F. Leighton** argued the cause and filed a brief for appellees:

A statute which arbitrarily assumes that certain land in the vicinity of public improvements will be benefited in a gross sum, and does not afford the assessed owner, at some time during the progress of the assessment and before its enforcement, an opportunity to be heard upon the question of fact as to whether or not the benefit conferred upon the property is equal to the burden imposed,—is unconstitutional.

*Norwood v. Baker*, 172 U. S. 278, 43 L. ed. 447, 19 Sup. Ct. Rep. 187; *Charles v. Marion*, 100 Fed. 542; *Fay v. Springfield*, 94 Fed. 421; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 849; *Loeb v. Columbia Twp.* 91 Fed. 37; *Lyon v. Tonawanda*, 98 Fed. 361.

To constitute due process of law, the statute authorizing the assessment must contain in itself provision for notice to the parties whose property is to be assessed, either in express terms or by necessary implication; and the notice must be of such a character as to afford the parties whose interests are affected opportunity to be heard before the assessment becomes final.



*Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Re McPherson*, 104 N. Y. 321, 58 Am. Rep. 502; *Remsen v. Wheeler*, 105 N. Y. 579, 12 N. E. 564; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Brown v. Denver*, 7 Colo. 312, 3 Pac. 455; *Baltimore v. Scharf*, 54 Md. 519; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224, 21 Atl. 711; *Allman v. District of Columbia*, 3 App. D. C. 20; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Santa Clara County v. Southern P. R. Co.* 18 Fed. 385; *Cupp v. Seneca County Comrs.* 19 Ohio St. 173; *Chicago & A. R. Co. v. Smith*, 78 Ill. 98; *Powers v. Bears*, 12 Wis. 214, 78 Am. Dec. 733; *Mulligan v. Smith*, 59 Cal. 219; *Owners of Ground v. Albany*, 15 Wend. 375; *Re Middletown*, 82 N. Y. 196; *Bauman v. Ross*, 167 U. S. 588, 42 L. ed. 287, 17 Sup. Ct. Rep. 966.

Statutes derive their vitality and effectiveness from the legislature, and not from the courts. That is not statutory law which derives its effective energy from any other source than the legislative will.

*Rice v. Foster*, 4 Harr. (Del.) 479; *Johnson v. Rich*, 9 Barb. 680; *Thorne v. Cramer*, 15 Barb. 112; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480.

The order of the court of September 19, 1899, directing personal service of the verdict of the jury assessing the appellee's land, to be made upon them, is void and nugatory. Had the statute expressly provided for service of personal notice at this stage of the proceedings and under the conditions existing in this case, it would have failed to impart validity to this assessment. It was too late to be effective.

*Allman v. District of Columbia*, 3 App. D. C. 20.

Where notice is required by law and the mode of service is not specified, the law requires that it shall be personal.

*Chicago & A. R. Co. v. Smith*, 78 Ill. 98; *Pennoyer v. Neff*, 95 U. S. 719, 24 L. ed. 567.

Statutes should receive such a construction as will, if possible, avoid an unjust or absurd conclusion.

*Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Henderson v. New York*, 92 U. S. 259, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.

*Jackson ex dem. Scofield v. Collins*, 3 Cow. 95.

The assessment, in order to be valid, must clearly mark out and identify the property, so that the court can determine, upon inspection, the outlines of the property embraced in the assessment.

*Greene v. Lunt*, 58 Me. 533; *Bensinger v.* 181 U. S.

*District of Columbia*, 6 Mackey, 287; *McClellan v. District of Columbia*, 7 Mackey, 94. See also 1 Blackwell, Tax Titles, §§ 242, 243.

A defective description in an assessment cannot be helped out by parol evidence showing the purpose of those charged with the execution of the laws.

*Orton v. Noonan*, 23 Wis. 102; *Delorme v. Ferk*, 24 Wis. 201.

\*Mr. Justice Shiras delivered the opinion [376] of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia reversing an order or decree of the supreme court of the District confirming an assessment upon lands of the appellees for alleged benefits accruing from the opening of certain streets adjoining such lands, and presents for determination the constitutionality of an act of Congress, approved March 3, 1899, under which the assessment complained of was made.

\*It may well be doubted whether the ap-[377] pellees are in a position to question the validity of the statute. They are the owners of the "Kall" tract mentioned in the 1st section of the act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the streets to be extended; and, it appears by the record, that, in order to procure the desired action of the commissioners, they did dedicate to the District of Columbia for highway purposes the land in said tract contained within the lines of S, Twenty-second, and Decatur streets.

Prior to the filing of the petition of the commissioners the authorities of the District had taken no steps towards the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"Under some circumstances, a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases . . . go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect." *Cooley*, Taxn. 573; *Tash v. Adams*, 10 Cush. 252; *Bidwell v. Pittsburgh*, 85 Pa. 412, 27

Am. Rep. 662; *Lafayette v. Fowler*, 34 Ind. 140; *Shutte v. Thompson*, 15 Wall. 151, 159, 21 L. ed. 123, 126.

However, as we learn from this record that there are others than the appellees concerned in the question of the validity of the act of Congress, and as the decision of the [378] court of appeals, \*by declaring the act void as to the appellees, operates to defeat or suspend proceedings under it, and under other existing acts of Congress in similar terms, respecting public improvements in the District, we prefer to pass by the question whether the appellees are estopped by having made the dedication imposed as a condition precedent to the opening of the streets, and to place our decision upon the question discussed by the court of appeals, and which controlled its decision; namely, that of the constitutionality of the act of Congress under which the proceedings were had.

The principal objections urged against the validity of the act are, first, because, as is alleged, it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of the streets; and, second, because it contains no provision for notifying the owners of the property to be\* assessed, in advance of such assessment, or at any time pending the consideration of the cause by the jury.

In *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, on appeal from the court of appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall [379] be assessed and charged upon \*the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed and the apportionment of the benefits among them to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by

a highway or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. Citing *Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Shoemaker v. United States*, 147 U. S. 282, 302, 37 L. ed. 170, 186, 13 Sup. Ct. Rep. 312. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners; citing the cases hereinbefore mentioned.

By the act of June 17, 1890 (26 Stat. at L. 159, chap. 428), Congress enacted that the commissioners of the District of Columbia \*shall have the power to lay water mains [380] and water pipes and erect fire plugs and hydrants, whenever the same shall be, in their judgment, necessary for the public safety, comfort, or health. By the act of August 11, 1894 (28 Stat. at L. 275, chap. 253), it was provided "that hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of \$1.25 per linear front foot against all lots or lands abutting upon the street, road, or alley in which a water main shall be laid."

On October 5, 1895, Homer B. Parsons filed in the supreme court of the District of Columbia a petition against the District of Columbia and the commissioners thereof, complaining, as illegal, of a certain charge or special assessment against land of the petitioner, as a water-main tax or assessment for laying a water main in the street on which said land abuts. After a hearing upon the petition and return, the petition was dismissed. An appeal was taken to the



court of appeals of the District of Columbia, where the judgment of the supreme court of the District was affirmed. The cause was then brought to this court, and by it the judgment of the court of appeals was affirmed. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. The principal grounds of complaint were that the lot owner was given no opportunity to be heard upon the question of cost or utility or benefit of the work, or of the apportionment of the tax; that the assessment was made without any estimate of the cost of the work to be done, and without regard to the cost of the work or the value of the improvement, and not upon the basis of benefits to the property assessed.

This court held that the legislation in question was that of the United States, and must be considered in the light of the conclusions, so often announced, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia; citing *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; that when, by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the [381] District of Columbia should be at the \*rate of \$1.25 per linear front foot against all lots or land abutting upon the street, road, or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property; that to open such questions for review by the courts, on the petition of any and every property holder, would create endless confusion; that where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard; that the function of the commissioners under the act was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and pipes, and of erecting fire plugs and hydrants, and that their bona fide exercise of such a power cannot be reviewed by the courts.

If, then, the reasoning and conclusions of these cases are to be respected as establishing the law of the present case, it is plain that it was within the power of Congress, by the act of March 3, 1899, to order the opening and extension of the streets in question, and to direct the commissioners of the District to institute and conduct proceedings in the supreme court of the District to condemn the necessary land; and it was also competent for Congress, in said act, to pro- 181 U. S. U. S., Book 45.

vide that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as provided for in the said act, and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury; and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should \*take into [382] consideration the situation of said lots and the benefits that they might severally receive from the opening of said streets.

It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the supreme court of the District, gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel. The return of the marshal shows that some, at least, of the property owners appeared before the jury, produced witnesses, and were heard by counsel. If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame.

The record shows that on September 19, 1899, the court passed an order nisi confirming the verdict, award, and assessment of benefits, unless cause to the contrary should be shown on or before the 4th day of the following month, and directing service of a copy of the order nisi on the owners of the land condemned and on the owners of the land assessed in said verdict. It also appears that the appellees were served with this copy, and that they accordingly filed exceptions to the finding of the jury and to the confirmation of the award, on October 4, 1899.

On the 18th of November, 1899, after hearing, the supreme court of the District passed a decree overruling the exceptions and confirming the verdict of award and assessments made by the jury.

Upon the authorities heretofore cited it would therefore appear that the act of Congress of March 3, 1899, was a valid enactment, and that the proceedings thereunder were regular, and constituted due process of law, unless reasons for a different \*conclusion [383] can be found in the opinion of the court of appeals, which reversed the decree of the 57 905

supreme court of the District, and ordered the dismissal of the petition.

What, then, was the reasoning upon which the court of appeals proceeded? It was thus stated in the opinion:

"The principal questions raised by the assignments of error are two: (1) that of the constitutionality of the act of Congress under which the proceedings have been had; and (2) that of the sufficiency of the notice given to the appellants in respect of the assessments upon their property.

"1. With respect to the first of these questions, we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States, in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

"As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property."

But we think that the court of appeals has not correctly appraised the decision in *Norwood v. Baker*, and that, on examination, that decision and the reasoning on which it is founded will not be found to be applicable to the case now before us.

That case came to this court on an appeal from the circuit court of the United States for the southern district of Ohio, wherein it had been held that for a municipality of a state to condemn land for a street through the property of a single owner, and then assess back upon his abutting property the entire damages awarded, together with the costs and expenses of the condemnation proceedings, is to take private property without due process of law, contrary to the 14th Amendment to the Constitution of the United States. *Baker v. Norwood*, 74 Fed. Rep. 997. In the opinion of this court it was said:

"The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the 14th Amendment providing that no state shall deprive any person of property without due process of law, nor deny to any [384] \*person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio."

It will therefore be perceived that there the court below and this court were dealing with a question arising under the 14th Amendment of the Constitution of the United States, which, in terms, operates only to control action of the states, and does not purport to extend to authority exercised by the government of the United States.

In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not

controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the 5th Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling state legislation.

However, we need not pursue this suggestion, because we think the court of appeals, in regarding the decision in *Norwood v. Baker* as overruling our previous decisions in respect of congressional legislation in respect to public local improvements in the District of Columbia, misconceived the meaning and effect of that decision. There the question was as to the validity of a village ordinance which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the state had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. \*There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without compensation, and accordingly affirmed the decree of the circuit court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found upon due and proper inquiry, to be equal to the special benefits accruing to the property. [385]

That it was not intended by this decision to overrule *Bauman v. Ross* and *Parsons v. District of Columbia* is seen in the opinion, where both those cases are cited, and declared not to be inconsistent with the conclusion reached. *Norwood v. Baker*, 172 U. S. 269, 294, 43 L. ed. 443, 453, 19 Sup. Ct. Rep. 187. Special facts, showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity; and this was thought by a majority of this court to have been the case in *Norwood v. Baker*. But no such facts are disclosed in this record.



The second proposition upon which the circuit court proceeded was that sufficient notice had not been given in respect of the assessments upon the property. This question, we think, has been disposed of by previous decisions, and has been sufficiently discussed in a previous part of this opinion.

*The decree of the Court of Appeals of the District of Columbia is reversed, and the cause remanded to that court with directions to affirm the decree of the Supreme Court of the District of Columbia.*

Mr. Justice **Harlan** (with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**) dissenting:

[386] \*I am of the opinion that the judgment of the court of appeals of the District of Columbia should be affirmed.

Under the act of March 3d, 1899, it was competent for the jury, *without regard to special benefits*, to put upon the lands abutting upon each side of the streets authorized to be opened and extended *not less* than one half of the entire damages found due and awarded in respect of the property taken under the 1st section of that act. It could only consider the question of benefits in respect to "adjacent" pieces or parcels of land. For the reasons stated in my dissenting opinion in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625. I cannot agree that such a statutory regulation or rule is consistent with the Constitution of the United States. My views upon the general subjects of special assessments are expressed in that opinion, and need not be repeated here.

The court in the present case says that Congress has exclusive jurisdiction, municipal and political, in the District of Columbia, and is not controlled by the 14th Amendment, although it is controlled by the 5th Amendment providing, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. "But," the court proceeds, "it by no means necessarily follows that a long and consistent construction put upon the 5th Amendment and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling legislation." These observations were made to sustain the proposition that the principles announced in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, in reference to the validity of state enactments relating to local public improvements, have no necessary application to a case of a like kind arising under a similar act of Congress relating to local public improvements in the District of Columbia. As the court does not pursue this subject, nor express any final view upon the question referred to, I refer to this part of its opinion only for the purpose of recording my dissent from the intimation that what a state might [387] \*not do in respect of the deprivation of prop-

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erty without due process of law, Congress under the Constitution of the United States could, perhaps, do in respect of property in this District. The 5th Amendment declares that no person shall be deprived of property "without due process of law." The 14th Amendment declares that no state shall deprive any person of property "without due process of law." It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the 14th Amendment but not applicable under the 5th Amendment, or upon principles applicable under the 5th and not applicable under the 14th Amendment. It seems to me that the words "due process of law" mean the same in both Amendments. The intimation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischievous in its tendency.

The court withdraws this case from the rule established in *Norwood v. Baker* upon the ground that the legislature of Ohio "had not defined or designated the abutting property as benefited by the improvement." But this is a mistake; for, as plainly stated in the opinion in that case, the state, by statute, had authorized villages to establish streets and highways, and to meet the cost of such improvements by special assessments on the abutting property, according to *frontage, without regard to special benefits accruing to the property so assessed*. And, to repeat what I have said in *French v. Barber Asphalt Paving Co.*, just decided (181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625); it was because, and only because, of this *rule*, prescribed by the legislature, that the state enactment was condemned as unconstitutional. The enactment, under which the council of Norwood proceeded, put upon the abutting property, when the municipality proceeded under the front-foot rule, the *entire* cost of opening a street; precluding, by a *rule* established for such cases, the owner of the property from showing that the cost was in excess of special benefits and was confiscatory to the extent of such excess. *Norwood v. Baker* expressly rejected the theory that the entire cost of a public highway, in which the whole community was interested, could be put, under \*legislative sanction, on the [388] abutting property, where such cost was in substantial excess of the special benefits accruing to the property assessed.

The court in this case says that "special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity." What this means, when taken in connection with what has been said and intimated by the court in *French v. Barber Asphalt Paving Co.*,—especially when considered in the light of the broad declarations in other cited cases as to legislative power,—I confess I am unable to say. What "special facts," in the case of special assessments to meet the cost of a public improvement, would show an abuse of the law? What is meant by the words "an ac-

tual deprivation of property? If private property abutting on a street be assessed for the cost of improving the street in excess of special benefits accruing to such property, is the assessment to the extent of the excess such an abuse of the law or such an actual deprivation of property as would justify the interference of a court of equity? In *Norwood v. Baker* this question was answered in the affirmative. Whether that doctrine is to remain the court does not distinctly say, either in the present case or in any of the cases relating to special assessments just determined.

I submit that if the present case is to be distinguished from *Norwood v. Baker* it should be done upon grounds that do not involve a misapprehension of the scope and effect of the decision in that case. If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended.

[389] \*TOWN OF TONAWANDA and John K. Patton, *Appts.*,  
v.  
JAMES B. LYON.

(See S. C. Reporter's ed. 389-393.)

*Constitutional law—assessment for pavement—rule of frontage.*

The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they receive, may be authorized by the legislature; and this will not constitute a taking of property without due process of law.

[No. 214.]

Argued February 25, 26, 27, 1901. Decided April 29, 1901.

NOTE.—On the constitutionality of frontage rule of assessment—see *Ralegh v. Peace* (N. C.) 17 L. R. A. 330, and note.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to the validity of assessments upon abutting property, made by charging upon each piece the cost of the improvement in front of it—see *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

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APPEAL from the Circuit Court of the United States for the Northern District of New York to review a decree restraining the collection or enforcement of assessments for paving. *Reversed.*

Statement by Mr. Justice Shiras:

This was the case of a bill in equity filed in the circuit court of the United States for the northern district of New York on September 9, 1899, by James B. Lyon, a citizen of the state of New York, against the town of Tonawanda, a municipal corporation of that state, and John K. Patton, supervisor of said town. The object of the bill was to restrain the defendants from enforcing payment of a certain assessment against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The assessment was levied against said tracts of land to meet the expense of grading and paving said street, in pursuance of the provisions of statutes of the state of New York and of an order of the town board of Tonawanda. The principal matter complained of was that the method of meeting the expense of grading and paving the said street was by assessing the same against the lots abutting on the street according to frontage thereon, and that the statutes and proceedings thereunder, which provided for that method, were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation, and he be deprived of his property without due process of law.

\*The case came on for final hearing on bill, [390] answer, and a stipulation of facts, and on January 17, 1900, the circuit court decreed, among other things, as follows:

"That those parts of the acts of the legislature of the state of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the laws of the state of New York for the year 1893, and of chapter 816 of the laws of the state of New York for the year 1895, which authorize and require the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of the said defendant, the town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said

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provisions of said acts of the legislature of the state of New York, and all acts of said defendant, the town of Tonawanda, in levying said assessment in the manner and form aforesaid, are wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States."

And thereupon the town of Tonawanda and John K. Patton as supervisor of said town were forever enjoined and restrained "from in any manner collecting or enforcing payment of such assessments against said complainant or his land or property." 98 Fed. Rep. 361.

On January 17, 1900, an appeal from said decree to this court was prayed for and allowed.

**Mr. John Cunneen** argued the cause and filed a brief for appellants:

The acquiescence of the parties, for so long a period of time, with knowledge that the proceedings were being taken, would be a sufficient waiver of any of the objections which this complainant now seeks to interpose.

*Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; *White v. Joyce*, 158 U. S. 128, *sub nom. White v. Miller*, 39 L. ed. 921, 15 Sup. Ct. Rep. 788; *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. Rep. 520; *Crawfordsville Music Hall Asso. v. Clement* (Ind. App.) 38 N. E. 228; *State, Stewart, Prosecutor, v. Hoboken*, 57 N. J. L. 330, 31 Atl. 278; *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 738; *Re Cooper*, 93 N. Y. 511; *New York v. Manhattan R. Co.* 143 N. Y. 26, 37 N. E. 494; *Sentenis v. Ladew*, 140 N. Y. 466, 35 N. E. 650.

But the affirmative action of those with whom the complainant is in privity, in filing the written petition and consent which led the town board to take the action now complained of, clearly manifested such election and acquiescence that the proceedings be taken as would preclude the complainant from the relief which he seeks, even if his suit had been brought sooner.

*Conde v. Schenectady*, 164 N. Y. 263, 58 N. E. 130; *Daniels v. Toarney*, 102 U. S. 421, 26 L. ed. 189.

As between vendor and purchaser a principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him, and incur expenses by reason of it, and then, upon some pretext of a defect in a matter of form, refuse compliance with its provisions, and thus deprive the purchaser of the benefit of his labor and expenditures. Courts of equity in such cases interfere and compel the vendor to keep his engagements.

*Union P. R. Co. v. McAlpine*, 129 U. S. 305, 32 L. ed. 673, 9 Sup. Ct. Rep. 286.

Will it be a wise exercise of the discretion of the court, upon a mere suspicion of an improbable possibility, to declare this assessment void, and thereby throw this communi-

ty into the confusion and embarrassment which must surely follow?

*Ferguson v. Stamford*, 60 Conn. 445, 22 Atl. 782.

Equity only interferes in assessment cases where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity.

*Dows v. Chicago*, 11 Wall. 111, 20 L. ed. 66.

If the statutes and proceedings are unconstitutional and void, this invalidity appears upon the face of the proceedings, constitutes no cloud upon the plaintiff's title, and any attempt to enforce the assessment would be a trespass for which an adequate remedy at law exists; and therefore a bill in equity for an injunction cannot be maintained.

*Wiggin v. New York*, 9 Paige, 16; *Stuart v. Palmer*, 74 N. Y. 187, 30 Am. Rep. 289; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130; *Townsend v. New York*, 77 N. Y. 546; *Preston v. Smith*, 26 Fed. 885; *Marsh v. Brooklyn*, 59 N. Y. 280; *Guest v. Brooklyn*, 69 N. Y. 506.

The town is perfectly solvent and capable of responding in damages for all the injury which an attempt to enforce the assessment may cause the complainant.

*Schulz v. Albany*, 42 App. Div. 437, 59 N. Y. Supp. 235; *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207; *May v. Traphagen*, 139 N. Y. 478, 34 N. E. 1064; *Bruecher v. Port Chester*, 101 N. Y. 240, 4 N. E. 272. See also *Rickcords v. Hammond*, 67 Fed. 380.

There is no allegation of any error or irregularity by the local authorities. Therefore the single question presented is whether, merely because the legislature ordered that the expense be assessed upon each lot in proportion to its frontage, the statute is unconstitutional and void.

*Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *People ex rel. Crowell v. Lawrence*, 41 N. Y. 141; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098.

The mere fact that the legislature ordered that the expense be assessed upon each lot in proportion to its frontage does not render the statute unconstitutional, where the legislature has delegated to municipal officers the power to apportion the expense of improvement upon parcels of land according to the benefit to each. The mere fact that it was apportioned according to the frontage does not prove that the amount was not levied in proportion to the benefits derived from the improvement.

*Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 346, 56 N. Y. Supp. 976; *O'Reilly v. Kingston*, 114 N. Y. 447, 21 N. E. 1004.

These decisions defining the power of the legislature and sustaining the method of assessment affect property rights and values. They have been so long recognized in our state that to change them now would disturb titles, change values, and disappoint the expectations of those who acted in reliance upon them.

*Burgess v. Seligman*, 107 U. S. 20, 27 L.

ed. 359, 2 Sup. Ct. Rep. 10; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

Acts which purport to be done by public officers in their official capacity and in the scope of their duty will be presumed to have been regular and in accordance with their authority until the contrary appears.

2 Abb. Nat. Dig. title *Evidence*, § 63; *Re Brady*, 85 N. Y. 268; *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625; *Demings v. Supreme Lodge, K. of P.* 131 N. Y. 527, 30 N. E. 572; *Valley Twp. v. King Iron Bridge & Mfg. Co.* 4 Kan. App. 622, 45 Pac. 660; *State, Raymond, Prosecutor, v. Rutherford*, 55 N. J. L. 441, 27 Atl. 175; *Seovern v. State*, 6 Ohio St. 293.

If it be true that the validity of a frontage assessment depends upon a prior determination that the lands were benefited on that basis, the fact that the assessments were made on that basis is presumptive evidence that such determination preceded it.

*Com. v. Kane*, 108 Mass. 425, 11 Am. Rep. 373; *Bank of United States v. Dandridge*, 12 Wheat. 69, 6 L. ed. 554; *Pringle v. Woolworth*, 90 N. Y. 510; *Raleigh v. Peace*, 110 N. C. 40, 17 L. R. A. 330, 14 S. E. 521; *Re Rapid Transit R. Comrs.* 45 N. Y. S. R. 810, 18 N. Y. Supp. 320; *State ex rel. Hamilton v. Hannibal & St. J. R. Co.* 113 Mo. 297, 21 S. W. 14; *Anderson v. Bitzer*, 20 Ky. L. Rep. 1450, 49 S. W. 442; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 544, 38 S. W. 458; *McShane v. School Dist. No. 5*, 70 Mo. App. 624; *Woodruff Place v. Raschig*, 147 Ind. 521, 46 N. E. 990; *Gillette-Herzog Mfg. Co. v. Aitkin County Comrs.* 69 Minn. 297, 72 N. W. 126; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 879.

It is not necessary that every property owner to be affected by a tax statute have notice and opportunity to be heard before the legislature establishes a rule of apportionment. It is sufficient if at any stage of the proceeding he has notice and an opportunity to object.

*Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The legislature being vested with all the power necessary to enable it to make a valid assessment, and there being no allegation in the complaint that the property of the plaintiff was not benefited by the improvement, or that the amount apportioned to his property was in excess of the amount of his benefits, or that he was in any manner dealt unjustly by, equity will not set the proceedings aside simply because the assessment was made by the frontage, even if technically this was improper. Equity looks to the effect, rather than to the form.

*Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 23; *Re Mutual L. Ins. Co.* 89 N. Y. 530; *Bell v. Yonkers*, 78 Hun, 202, 28 N. Y. Supp. 947; *McHenry v. Selva*, 99 Ky. 232, 35 S. W. 645; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. See also *Hoffeld v. Buffalo*, 130 N. Y. 387, 29 N. E. 747.

Not only is there no allegation that the plaintiff was injured by the alleged error,

but there is good authority for contending that the method is equitable.

*Raleigh v. Peace*, 110 N. C. 42, 17 L. R. A. 330, 14 S. E. 521; *Terry v. Hartford*, 39 Conn. 286.

Mr. Tracy C. Becker argued the cause, and, with Messrs. Edward C. Mason and Ralph T. Kellogg, filed a brief for appellee:

A state statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting on the highway so improved, solely in proportion to the foot frontage of such abutting lands, without regard to the value of such lands or the benefit thereto, is in contravention of the provisions of the Constitution of the United States, Amends. 5, 14; and an assessment made in pursuance of such statute is void.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Fay v. Springfield*, 94 Fed. 409; *Loeb v. Columbia Twp.* 91 Fed. 37; *Charles v. Marion*, 98 Fed. 166; *Lyon v. Tonawanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 340; *Hutchenson v. Storrie*, 92 Tex. 688, 45 L. R. A. 289, 51 S. W. 848; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Parker v. Detroit*, 103 Fed. 357; *Bidwell v. Huff*, 103 Fed. 363, 51 Cent. L. J. 243.

Where an assessment is wholly void because levied under an unconstitutional statute, and that statute provides for the sale of the lands assessed on default in payment, and the delivery of a deed conveying the title in fee to the purchaser, and makes the deed conclusive evidence of the validity of the assessment and sale, and conclusive evidence that the proceedings were regular and valid and taken in conformity to law, and such sale is actually threatened and about to occur, an action in equity may be maintained to permanently enjoin the collection thereof.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625; *Vaughn v. Port Chester*, 135 N. Y. 460, 32 N. E. 137; *Fay v. Springfield*, 94 Fed. 409.

To hold the appellee estopped by the acts of a hostile stranger to his title, from whom he has received nothing and in whose place he does not stand, would be a strange perversion of those principles of equity upon which the doctrine *in pais* is founded, and would require an extension of that doctrine far beyond its well-defined limits, purely to accomplish an unnecessary wrong.

*Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Coan v. Osgood*, 15 Barb. 588; *Carver v. Jackson ex dem. Astor*, 4 Pet. 1, 7 L. ed. 761; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

One who consents to an improvement is  
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not estopped from contesting it on the ground that a sufficient number of other consents has not been obtained.

*Re Sharp*, 56 N. Y. 257.

The circuit court rightly decided that the appellee had not been guilty of such laches as should prevent him from maintaining this action.

*Re Lord*, 78 N. Y. 109.

[391] \*Mr. Justice **Shiras** delivered the opinion of the court:

The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the state of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Rep. 266; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682.

What was claimed was that a state statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the state may have held otherwise, it was its duty to follow the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Norwood v. Baker*, the learned judge extended the doctrine of that case beyond its necessary meaning.

[392] It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States. The purpose of that Amendment is to extend to the citizens and residents of the states the same "protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress. The case of *Norwood v. Baker* presented, as the judge in the court in the present case well said, "considerations of peculiar and extraordinary hardships," amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the 14th Amendment.

tion of private property to public use, and bringing the case fairly within the reach of the 14th Amendment.

The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood Case*.

It is unnecessary to enter into an examination of the authorities on this subject, as that has recently been done in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625, in error to the supreme court of the state of Missouri, and in *Wight v. Davidson*, on appeal from the court of appeals of the District of Columbia, in the former of which the effect of the 14th, and, in the latter, that of the 5th, Amendment was considered. 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616.

There were other questions passed upon in the trial court and discussed in the briefs, but the conclusion we now reach renders it unnecessary for us to consider them.

*The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.*

Mr. Justice **Harlan** (with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**) dissenting:

My views touching the general questions arising in this case have been expressed in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625, and in *Wight v. Davidson*, just determined, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616. I adhere to those views, and therefore dissent from the judgment in this case. As stated by the circuit court, the special assessment in question was "in the proportion which the number of front feet \*of each of said lots and [393] parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots so bounding on the portion of said street in front of which said improvement was made." The case, therefore, is one in which, beyond question, private property is specially assessed by the front foot, in the interest of the whole public, for the entire cost of paving a highway, without reference to any special benefits accruing to it, and without the owner of the property being permitted to show that such cost amounts to the confiscation of his property to the extent that it substantially exceeds special benefits, or that it exceeds the value of the property assessed.

The court says that it was not the intention of this court in *Norwood v. Baker* to hold "that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have



been subverted by the 14th Amendment of the Constitution of the United States." The contrary was not asserted by the learned judge of the circuit court, nor has anyone in this case contended that the 14th Amendment subverted the taxing systems of the states. But it was contended, and such is my position, that nothing can be done by or under the authority of a state in violation of that Amendment. After that Amendment became part of the Constitution, the only provisions in the state taxing laws or systems that ceased to have operation were those that were inconsistent with the Amendment. No one, I assume, will dispute that proposition.

The court also says that the purpose of the 14th Amendment "is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress." I assent most cordially to this view, and therefore, in another case, felt obliged to express my objection to the intimation that possibly that might be done by Congress under the due process clause of the 5th Amendment which could not be done by a state under the same clause of the 14th Amendment.

Webster in the district court in and for the county of Cass and state of North Dakota, against the city of Fargo; James M. Fargo, as auditor of said city; D. C. Ross, as treasurer, and G. J. Olson, as auditor, of Cass county, in which the plaintiff sought to enjoin the defendant from enforcing an assessment for grading and paving against certain lots or pieces of land belonging to the plaintiff, and abutting on the streets of the city of Fargo.

It was admitted, and, indeed, alleged, in the complaint, that "each and every of the acts and proceedings required to be done and taken by the statutes of said state of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done," but it was alleged that the state statutes, under which the work was done and the assessment made, were in violation of the 14th Amendment of the Constitution of the United States, in that they prescribed for paying for grading and paving the streets, by an assessment upon abutting lots by the foot-front rule.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and, as the plaintiff declined to amend, entered a judgment dismissing the complaint. From this judgment an appeal was taken to the supreme court of the state of North Dakota, which court affirmed the judgment of the district court dismissing the complaint. A writ\* of error from this court was thereupon allowed by the Chief Justice of the supreme court of the state of North Dakota. [395]

[394] \*MORTIMER WEBSTER, *Plff. in Err.*,  
v.

CITY OF FARGO and Others.

(See S. C. Reporter's ed. 394-396.)

*Constitutional law—assessment for improvements.*

It is within the power of the legislature of a state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or to superficial area or frontage.

[No. 378.]

*Argued and Submitted February 25, 26, 27, 1901. Decided April 29, 1901.*

IN ERROR to the Supreme Court of the State of North Dakota to review a decision affirming a judgment dismissing a complaint in an action for an injunction against an assessment. *Affirmed.*

See same case below, 82 N. W. 732.

Statement by Mr. Justice Shiras:

This was an action brought by Mortimer

NOTE.—On the constitutionality of frontage rule of assessment—see *Raleigh v. Peace* (N. C.) 17 L. R. A. 330, and note.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to the validity of assessments upon abutting property, made by charging upon each piece the cost of the improvement in front of it—see *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

Mr. Seth Newman argued the cause, and, with Mr. Burleigh F. Spalding, filed a brief for plaintiff in error:

The doctrine that special assessments for local improvements are based upon exceptional benefits resulting to property in the vicinity by the construction of such improvements, and must be laid with reference to such benefits, has become the firmly established and universally conceded law of the land, except in North Dakota.

*People ex rel. Griffin v. Brooklyn*, 4 N. Y. 425, 55 Am. Dec. 206; *Chicago v. Larned*, 34 Ill. 203; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *State, Reynolds, Prosecutor, v. Paterson*, 48 N. J. L. 435, 5 Atl. 896; *Re Report of Elizabeth Comrs.* 49 N. J. L. 488, 10 Atl. 363; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 142, 30 Pac. 1041; *Creighton v. Manson*, 27 Cal. 621; *Taylor v. Palmer*, 31 Cal. 254; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 641; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *State ex rel. Cunningham v. Ramsey County Dist. Ct.* 29 Minn. 62, 11 N. W. 133; *State, Hudson County Land Improv. Co. Prosecutor, v. Seymour*, 35 N. J. L. 49; *Dyar v. Farmington*, 70 Me. 515; *Barnes v. Dyer*, 56 Vt. 469; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Ham-*

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*mett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *State ex rel. Burger v. Ramsey County Dist. Ct.* 33 Minn. 306, 23 N. W. 222; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Johnson v. Milwaukee*, 40 Wis. 315; *Re Mead*, 74 N. Y. 221; *Re Roberts*, 81 N. Y. 67; *Neenan v. Smith*, 50 Mo. 525; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Wolf v. Philadelphia*, 105 Pa. 25; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 525; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739.

The mere fact of the difference in the size of the taxing district does not provide a reason or basis for classification as to method of imposing a tax.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722; *Railroad & Teleph. Cas. v. Board of Equalizers*, 85 Fed. 303; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 169.

Whether each particular piece of property within the taxing district is exceptionally benefited, and the amount of such exceptional benefit, require inquiry into the value of property and the amount of increase of such value by the improvement. The basis of the determination of the amount of the exceptional benefit is the difference between the value of the property without the improvement and with it.

*People ex rel. Howlett v. Syracuse*, 63 N. Y. 299; *Cooley, Taxn.* 1st ed. 459, 2d ed. 660.

Such investigation and determination are purely judicial in their nature, and cannot be assumed or made by the legislature.

*Monongahela Nav. Co. v. United States*, 148 U. S. 327, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; *Dill. Mun. Corp.* 4th ed; *Cooley, Taxn.* 2d ed. 788; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

The courts of Pennsylvania, Rhode Island, and Minnesota deny the legislative power to impose front-foot assessments except in densely populated districts,—a recognition that the power is not a legislative prerogative.

*Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Sperry v. Flygare*, 80 Minn. 325, 49 L. R. A. 757, 83 N. W. 177; *Cleveland v. Tripp*, 13 R. I. 61. See also *Newby v. Platte County*, 25 Mo. 272; *Sedgw. Stat. & Const.* L. 169, 174, 175, 177; *Norfolk City v. Ellis*, 26 Gratt. 242.

Under the constitutional limitation that all property shall be taxed uniformly according to its value, and in the absence of any provision for or recognition of special assessments, taxes for local improvements can only be laid on property on a money valuation.

*McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308; *Stinson v. Smith*, 8 Minn. 366, 181 U. S.

*Gil.* 326; *Bidwell v. Coleman*, 11 Minn. 78, *Gil.* 45; *Comer v. Folsom*, 13 Minn. 219, *Gil.* 205.

Under a constitution recognizing or authorizing special assessments, they must be levied on the ground of special benefits received by specific property assessed.

*Violett v. Alexandria*, 92 Va. 579, 31 L. R. A. 382, 23 S. E. 909; *Morrison v. Morey*, 146 Mo. 561, 48 S. W. 629.

An assessment of benefits for public improvements can only be imposed in proportion to, and not exceeding, the exceptional benefit accruing to the property assessed in enhanced value by reason of the improvement, not common to other property not so assessed, within the limits of the taxing district. An imposition of the entire cost of the improvement by special assessment without regard to benefits is void.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The right to a hearing at some stage in the proceedings is universally recognized where the apportionment of the tax involves the exercise of an act judicial in character; for instance, an assessment according to benefits.

*Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; *Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43; *Baltimore v. Scharf*, 54 Md. 499; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Dietz v. Nee-nah*, 91 Wis. 422, 64 N. W. 299; *Cooley, Taxn.* 655; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

The case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, has been followed by all Federal courts and by most state courts in cases of this character since decided.

*Ramsey County v. Robert P. Lewis Co.* (Minn.) 85 N. W. 207; *State v. Pillsbury* (Minn.) 85 N. W. 175; *Fay v. Springfield*, 94 Fed. 409; *Loeb v. Columbia Twp.* 91 Fed. 37; *Charles v. Marion*, 98 Fed. 166, 100 Fed. 539; *Lyons v. Tonawanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 840; *Hutcheson v. Storrie*, 92 Tex. 688, 45 L. R. A. 289, 51 S. W. 848; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Parker v. Detroit*, 103 Fed. 357; *Bidwell v. Huff*, 103 Fed. 363.

The assessment in question proceeds upon a rule that is arbitrary and necessarily produces injustice and oppression, and amounts to a deprivation of the property of a citizen without due process of law.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Whenever any department of the state government exercises a function not properly belonging to it, if its action affects private rights the 14th Amendment is violated, and the state authority loses its force.

*Gelpcke v. Dubuque*, 1 Wall. 176, 17 L. ed. 520; *Kilbourn v. Thompson*, 103 U. S. 190, 26 L. ed. 386.

The right to be heard in cases of this character is a constitutional one, and indefeasible. The law in question makes no provision for a hearing, and gives the plaintiff in error no opportunity to be heard as to the justice of his assessment. It is therefore within the 14th Amendment.

*Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Walston v. Nevin*, 123 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

**Mr. S. B. Pinney** submitted the cause for defendants in error. *Messrs. John E. Greene and H. F. Miller* were with him on the brief:

The legislature has the power to prescribe the method of apportioning special assessments of the kind involved in this case.

*Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Sheley v. Detroit*, 45 Mich. 432, 8 N. W. 52; *Cleveland v. Tripp*, 13 R. I. 50; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; 2 Dill. Mun. Corp. § 752; *Cooley, Taxn. p. 661*, 2d ed.; *Cooley, Const. Lim. 631, 632; Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159.

When the legislature directs that the cost of the improvement be assessed to the abutting property, by whatever rule, it will be presumed that it has determined that the cost will not exceed the benefits.

*Re Roberts*, 81 N. Y. 62; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Cooley, Taxn. 2d ed. p. 646; State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *Schenley v. Com. use of Allegheny*, 36 Pa. 29, 78 Am. Dec. 359.

[395] \***Mr. Justice Shiras** delivered the opinion of the court:

It is conceded in this record that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the state or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, all special assessments upon the basis of frontage are in violation of the 14th Amendment to the Constitution of the United States, in that they may result in the taking of property without due process of law.

But we agree with the supreme court of North Dakota in holding that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or

in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court, in *Norwood v. Baker*, to hold otherwise.

It is unnecessary to enter upon an examination of the authorities, as that has recently been done in the case of *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625; and, upon the authority of that case, the judgment of the Supreme Court of North Dakota is affirmed.

For dissenting opinion, see *Cass Farm Co. v. Detroit*, 181 U. S. 396, post, 914, 21 Sup. Ct. Rep. 645.

CASS FARM COMPANY, Limited, and  
Others, *Plffs. in Err.*,  
v.

CITY OF DETROIT and Others.

(See S. C. Reporter's ed. 396-398.)

*Constitutional law—assessment for improvements.*

An assessment of the cost of paving upon abutting property in proportion to the frontage of such property, when authorized by the city charter and ordinances, is not in violation of the Constitution of the United States.

[No. 508.]

*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*

IN ERROR to the Supreme Court of the State of Michigan to review a decision reversing a decree for an injunction against paving a portion of an avenue. *Affirmed.* See same case below, 7 Det. L. N. 283, 83 N. W. 108.

The facts are stated in the opinion.

**Mr. Henry M. Campbell** argued the cause and filed a brief for plaintiffs in error:

The modern authorities are agreed that a special assessment does not fall within the category of general taxes, and cannot be sustained upon the principles applicable to them.

*Cooley, Taxn. 2d ed. 606; Cooley, Const. Lim. 497; 2 Dill. Mun. Corp. §§ 761-763; Illinois C. R. Co. v. Deatur*, 147 U. S. 197, 37 L. ed. 134, 13 Sup. Ct. Rep. 293; *Thomas v. Gain*, 35 Mich. 162, 24 Am. Rep. 535.

The only theory upon which a special tax or assessment can be sustained is that the property against which it is levied is enhanced in value by the improvement, and that a charge to the extent to which the property is benefited by the improvement imposes no burden upon it. In this respect there is no difference in principle between a tax or assessment for the cost of opening a

NOTE.—On the constitutionality of frontage rule of assessment—see *Raleigh v. Peace* (N. C.) 17 L. R. A. 530, and note.



street, and a tax or assessment for the cost of improving a street already opened.

*Cooley*, Taxn. 2d ed. 611, 612; *Bauman v. Ross*, 167 U. S. 593, 42 L. ed. 289, 17 Sup. Ct. Rep. 966; *Kansas City v. Smart*, 128 Mo. 294, 30 S. W. 773.

The legislative power is not unlimited, and assessments must be apportioned by some rule capable of producing reasonable equality; and a rule which imposes a burden in excess of the actual benefit received is an arbitrary exaction which it is beyond the power of the legislature to make.

*Thomas v. Gain*, 35 Mich. 162, 24 Am. Rep. 535; *Sears v. Boston Street Comrs.* 173 Mass. 352, 53 N. E. 876; *Hammett v. Philadelphia*, 65 Pa. 152, 3 Am. Rep. 615; *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Barnes v. Dyer*, 56 Vt. 469; 2 Dill. Mun. Corp. § 761.

The question is settled by *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

*Loeb v. Columbia Twp.* 91 Fed. 37; *Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 98 Fed. 166, 100 Fed. 538; *Lyon v. Tonawanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 840; *Parker v. Detroit*, 103 Fed. 357; *Bidwell v. Huff*, 103 Fed. 362; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379.

In some of the state courts where the question has arisen, the rule of *Norwood v. Baker* is recognized, but it is held that the statutes involved contain such provisions for notice as to bring them within the principle of the decision.

*Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *State ex rel. Wheeler v. Ramsey County Dist. Ct.* 80 Minn. 293, 83 N. W. 183.

Due process of law is a restraint on the legislative, as well as on the executive and judicial, powers of the government.

*Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 276, 15 L. ed. 374; *Ulman v. Baltimore*, 72 Md. 592, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709.

Due process of law is not confined to judicial proceedings. It extends to every case which may deprive the citizen of life, liberty, or property, whether the proceeding be judicial, legislative, or executive in its nature.

*Weimer v. Bunbury*, 30 Mich. 201; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Dietz v. Neenah*, 91 Wis. 428, 64 N. W. 299; *Cooley*, Const. Lim. 355.

An act of the legislature arbitrarily taking property for the public good and fixing the compensation to be paid could not be upheld. It would in such case be the absence of that due process of law which both the Federal and the state Constitutions guarantee to every citizen. The legislature can no  
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more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing.

*Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *Re Union College*, 129 N. Y. 308, 29 N. E. 460.

Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential.

*Campbell v. Dwiggin*, 83 Ind. 482.

Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard.

*Parsons v. District of Columbia*, 170 U. S. 52, 42 L. ed. 946, 18 Sup. Ct. Rep. 521.

Parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property.

*Thomas v. Gain*, 35 Mich. 164, 24 Am. Rep. 535.

The rule of the Detroit charter is clearly arbitrary.

*Charles v. Marion*, 98 Fed. 166, 100 Fed. 538; *Fay v. Springfield*, 94 Fed. 409; *Barnes v. Dyer*, 56 Vt. 469.

Messrs. **Timothy E. Tarsney** and **C. D. Joslyn** argued the cause for defendants in error.

For contentions of these counsel see their briefs as reported in *Detroit v. Parker*, post, 917.

\*Mr. Justice **Shiras** delivered the opinion[396] of the court:

A bill in equity was filed in September, 1898, in the circuit court for the county of Wayne, state of Michigan, by the Cass Farm Company, Limited, and others, owners of lands lying and abutting upon Second avenue in the city of Detroit, against said city, the board of public works, and the Alcatraz Asphalt Paving Company, whereby it was sought to enjoin the city of Detroit from paving a portion of Second avenue, and to have the proceedings taken with reference to said paving declared void.

There was a decree in the circuit court in favor of complainants, and thereupon the case was taken to the supreme court of the state of Michigan, where the decree of the trial court \*was reversed, and a decree was[397] entered dismissing the complainants' bill, with costs of both courts.

We learn from a statement in the opinion of the supreme court that, among other grounds of relief stated in the bill, was the following:

"That the provisions of the charter and of the paving ordinances of the city, in so far

as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States and the amendments thereof, and therefore null and void."

The state supreme court disposed of this contention in the following language:

"In paving cases the rule has been settled in this state by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage. . . .

"It was said by Mr. Justice Cooley in *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52:

"We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation, have collected the cases and have recognized the principle as settled; and if the question were new in this state we might think it important to refer to what they say; but the question is not new. It was settled for us thirty years ago."

"We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, inasmuch as it was based upon the 14th Amendment of the Constitution of the United States, if that were a paving case; but that was a street-opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we [398] shall \*feel bound to follow our own decisions." *Cass Farm Co. v. Detroit* (Mich.) 7 Det. L. N. 283, 83 N. W. 108.

We have recently held that it was not the intention of the 14th Amendment to subvert the systems of the states pertaining to general and special taxation; that that Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*. *French v. Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625; *Tonawanda v. Lyon*, 181 U. S. 389, ante, 908, 21 Sup. Ct. Rep. 609; *Wight v. Davidson*, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616.

We are not convinced, by anything ap-

pearing in this record, that the complainants have entitled themselves to the interference of this court. As held by the supreme court of their own state, the proceedings to enforce the payment of their proportion of a common burden have been conducted in due regard to the forms and provisions of the statutes and ordinances applicable to the facts of the case, and disclose no departure, actual or intended, from constitutional principles.

*The judgment of the Supreme Court of the State of Michigan is affirmed.*

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CASS FARM COMPANY, Limited, and Others,  
*Plffs. in Err.,*  
v.

CITY OF DETROIT and Others (No. 508).

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CITY OF DETROIT and Others, *Appts.,*  
v.

RALZEMOND A. PARKER (No. 411).

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MORTIMER WEBSTER, *Plff. in Err.,*  
v.

CITY OF FARGO and Others (No. 378).

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JOHN L. SHUMATE, *Plff. in Err.,*  
v.

AUGUST HEMAN (No. 550).

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JAMES L. WORMLEY, *Plff. in Err.,*  
v.

DISTRICT OF COLUMBIA (No. 101).

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ANNA P. HOOVER ALLEN and Others, *Plffs. in Err.,*  
v.

DISTRICT OF COLUMBIA (No. 102).

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THOMAS F. FARRELL *et al., Plffs. in Err.,*  
v.

WEST CHICAGO PARK COMMISSIONERS (No. 201).

Mr. Justice **Harlan** (with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**) dissenting:

The controlling question in each of the above cases is the same as is presented in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625, *Wight v. Davidson*, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616, and *Tonawanda v. Lyon*, 181 U. S. 389, ante, 908, 21 Sup. Ct. Rep. 609, just decided. For the reasons stated in my opinion in those cases, I dissent from the opinions and judgments of the court in the above cases.



[399]\*CITY OF DETROIT and Others, *Appts.*,  
v.

RALZEMOND A. PARKER.

(See S. C. Reporter's ed. 399-401.)

*Constitutional law—assessments for im-  
provements.*

An assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment.

[No. 411.]

*Argued February 25, 26, 27, 1901. Decided  
April 29, 1901.*

**A**PPEAL from the Circuit Court of the United States for the Eastern District of Michigan to review a decision granting an injunction against assessments and tax sales. *Reversed.*

See same case below, 103 Fed. Rep. 357.

The facts are stated in the opinion.

**Mr. Timothy E. Tarsney** argued the cause and filed a brief for appellants:

In the exercise of the taxing power, where not restrained by constitutional limitations, the legislatures of the various states have adopted or authorized different methods of defraying the expenses of such improvements, and such different methods have been sustained by the highest courts in the land.

*Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Lockwood v. St. Louis*, 24 Mo. 20; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 23 Pac. 272, 675; *Creighton v. Scott*, 14 Ohio St. 438; *Daily v. Swope*, 47 Miss. 367; *Wallace v. Shelton*, 14 La. Ann. 503; *Wright v. Boston*, 9 Cush. 233; *Downer v. Boston*, 7 Cush. 277; *Snow v. Fitchburg*, 136 Mass. 183; *Strowbridge v. Portland*, 8 Or. 67; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Cooley, Taxn.* 648, 649; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Hagar v. Reclamation Dist. No. 103*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Again, legislation which directs that all the expense of the improvements be collected out of the abutting property is sustained by the courts.

*Parkersburg v. Tavenner*, 42 W. Va. 486,

NOTE.—On the constitutionality of frontage rule of assessment—see *Raleigh v. Peace* (N. C.) 17 L. R. A. 330, and note.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to the validity of assessments upon abutting property, made by charging upon each piece the cost of the improvement in front of it—see *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

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26 S. E. 179; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Dorgan v. Boston*, 12 Allen, 223; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

The front-foot rule has also been upheld by numerous authorities.

*Pennock v. Hoover*, 5 Rawle, 291; *McGonigle v. Allegheny*, 44 Pa. 118; *Magee v. Com. use of Pittsburgh*, 46 Pa. 358; *Spring Garden v. Wistar*, 18 Pa. 195; *Stroud v. Philadelphia*, 61 Pa. 255; *Covington v. Boyle*, 6 Bush. 204; *State, Hand, Prosecutor, v. Elizabeth*, 30 N. J. L. 365, 31 N. J. L. 547; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *Ernst v. Kunkle*, 5 Ohio St. 520; *Upington v. Oviatt*, 24 Ohio St. 232; *Burnes v. Atchison*, 2 Kan. 455; *Parker v. Challiss*, 9 Kan. 155; *St. Joseph v. Anthony*, 30 Mo. 537; *Fowler v. St. Joseph*, 37 Mo. 228; *Neenan v. Smith*, 50 Mo. 525; *Chambers v. Satterlee*, 40 Cal. 497; *Palmer v. Stumph*, 29 Ind. 329; *Cooley, Taxn.* p. 451; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Raleigh v. Peace*, 110 N. C. 40, 17 L. R. A. 330, 14 S. E. 521; *Norfolk City v. Ellis*, 26 Gratt. 224; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Moale v. Baltimore*, 61 Md. 224; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126; *McKeesport Boro, use of McKeesport City, v. Busch*, 166 Pa. 46, 31 Atl. 49.

It is settled law in Michigan that it is competent for the legislature to authorize the cost of local improvements upon the abutting property according to frontage.

*Williams v. Detroit*, 2 Mich. 560; *Woodbridge v. Detroit*, 8 Mich. 274; *Motz v. Detroit*, 18 Mich. 495; *Sheley v. Detroit*, 45 Mich. 431, 8 Atl. 52; *Kalamazoo v. Françoise*, 115 Mich. 554, 73 N. W. 801; *Cass Farm Co. v. Detroit* (Mich.) 7 Det. L. N. 283, 83 N. W. 108.

The legislature has the power to determine the percentage of the cost of the work to be raised by local assessment.

*Norfolk City v. Ellis*, 26 Gratt. 224; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

Authorities are not wanting which hold that the element of benefits is not the controlling factor in the validity of a local assessment, but that assessments may be sustained without reference to such benefits.

*McQuiddy v. Smith*, 67 Mo. App. 205; *Warren v. Henly*, 31 Iowa, 31; *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126; *Morrison v. Hershire*, 32 Iowa, 271; *Weeks v. Milwaukee*, 10 Wis. 242; *Lent v. Tillson*, 72 Cal. 428, 14 Pac. 71; *Cooley, Taxn.* p. 622.

Provisions of the state Constitution requiring a uniform rate of taxation and cash valuation in the assessment of property have no application to local assessments for local improvements, such as grading and paving a street, but relate only to the valuation of property and its taxation for general purposes.

*Motz v. Detroit*, 18 Mich. 495; *Woodbridge v. Detroit*, 8 Mich. 274; *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

If the legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is pecuniarily benefited, its action must, in general, be deemed conclusive.

*Baltimore v. Hughes*, 1 Gill. & J. 480; *Litchfield v. Vernon*, 41 N. Y. 123; *People ex rel. Crowell v. Lawrence*, 41 N. Y. 140; *Philadelphia v. Field*, 58 Pa. 320; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Kelly v. Cleveland*, 34 Ohio St. 468; *Bigelow v. Chicago*, 90 Ill. 49; *Cooley, Taxn.* 640; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

State laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property without due process of law, within the meaning of the 14th Amendment.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

There is no right to a hearing where the assessment involves only a mathematical calculation,—as, where a fixed sum is to be apportioned and levied according to a fixed rule; for a hearing in such case would not avail the party, as no alteration could be made.

*Cleveland v. Tripp*, 13 R. I. 60; *Amery v. Keokuk*, 72 Iowa, 704, 30 N. W. 780; *Gillette v. Denver*, 21 Fed. 824; *Com. v. Lehigh Valley R. Co.* 129 Pa. 456; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675.

The owner of land who sits by while improvements are being made under statutory authority, knowing that the only method of compensating those who perform the labor is by an assessment, cannot, after the benefit has been reaped, resort to a court of equity for redress.

*Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Twiss v. Port Huron*, 63 Mich. 528, 30 N. W. 177; *Lundbom v. Manistee*, 93 Mich. 170, 53 N. W. 161; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Atwell v. Barnes*, 109 Mich. 10, 60 N. W. 583; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130.

*Mr. C. D. Joslyn* argued the cause and filed a brief for appellant the city of Detroit:

The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grad-

ing, or the repair of a street, to be assessed upon the owners of land benefited thereby.

*Bauman v. Ross*, 167 U. S. 589, 42 L. ed. 288, 17 Sup. Ct. Rep. 966; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 133, 13 Sup. Ct. Rep. 293; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Ulman v. Baltimore*, 165 U. S. 719, 41 L. ed. 1184, 17 Sup. Ct. Rep. 1001.

The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

*People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The provision of the charter for the inspection of the assessment roll, and for its confirmation by the common council, has been construed by the Michigan supreme court to give taxpayers the chance to be heard.

*Beecher v. Detroit*, 92 Mich. 274, 52 N. W. 731; *Voigt v. Detroit*, 123 Mich. 547, 82 N. W. 253.

If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question as to what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *David-*



*son v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Notice by publication is sufficient.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 1001.

Mr. Elbridge F. Bacon argued the cause and filed a brief for appellee:

The only theory upon which an assessment for a local improvement can be sustained is that the property assessed is peculiarly benefited beyond the benefits received by the community at large.

Cooley, Taxn. 606; 2 Dill. Mun. Corp. § 761; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500; *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Re Market Street*, 49 Cal. 546.

The benefit to property which will authorize a special assessment to be made for a local improvement must be a direct and immediate benefit, and one which increases the market value of the lands.

Cooley, Taxn. 660; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *State, Protestant Foster Home Soc., Prosecutor, v. Newark*, 35 N. J. L. 157, 10 Am. Rep. 223; *Hale v. Kenosha*, 29 Wis. 599; *Hartford v. West Middle Dist.* 46 Conn. 462; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739.

Special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property, to the extent of the special benefit, should pay for the improvement.

Cooley, Taxn. 606; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 133, 13 Sup. Ct. Rep. 293; *Brooks v. Baltimore*, 48 Md. 265; *Hale v. Kenosha*, 29 Wis. 599; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Jenkins v. Andover*, 103 Mass. 94.

Property which is not benefited by the improvement cannot be assessed.

*Elliott, Roads & Streets*, 392; *Oregon & O. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452; *Zoeller v. Kellogg*, 4 Mo. App. 163; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Dietz v. Neenah*, 91 Wis. 432, 64 N. W. 299, 65 N. W. 500.

The assessments can in no case exceed the amount of the special benefits accruing to the property by reason of the improvement.

Cooley, Taxn. 661; *Hare, Am. Const. Law*, 390; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Crawford v. People*, 82 Ill. 557; *Barnes v. Dyer*, 56 Vt. 460; *Dyar v. Farmington*, 70 Me. 515; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Gamble v. McCrady*, 75 N. C. 509; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114.

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If the assessment is in any instance in excess of the value of the special benefit conferred, it is, as to such excess, private property unjustly taken for public use without compensation to the owner.

Cooley, Taxn. 661; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

The excess of the cost of an improvement beyond the amount of the special benefits to the property assessed is a benefit to the municipality at large, and it must be borne by the general treasury.

Cooley, Taxn. 663; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Chicago v. Larned*, 34 Ill. 203; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; Dill. Mun. Corp. § 761.

The right to levy an assessment for local improvements upon the property benefited being based solely upon the benefit, and the amount of the assessment being limited by the benefit to each particular piece of property, the amount of benefits in each instance becomes a question of fact, and the taxpayer has a constitutional right to a hearing upon the question of the amount to be assessed for benefits before the tax becomes a fixed liability upon his property.

Cooley, Taxn. 363; *Elliott, Roads & Streets*, 415; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *San Mateo County v. Southern P. R. Co.* 7 Sawy. 517, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. 385; *Murdock v. Cincinnati*, 39 Fed. 891; *Meyers v. Shields*, 61 Fed. 713; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Kemsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *Re Union College*, 129 N. Y. 308, 29 N. E. 460; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Hutson v. Woodbridge Protection Dist. No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549.

Taxes, whether general or special, can only be levied for public purposes, and while the legislature may determine for itself whether a given purpose is or is not public, such determination is not conclusive, and the taxpayer always has a right to contest the matter, and, if it is made to appear that the purpose of the tax is not public, the right of the individual is clear.

Cooley, Taxn. 103; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *People v. Parks*, 58 Cal. 624; *State ex rel. Griffith v. Osawakee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Jenkins v. Andover*, 103 Mass. 94.



The tax must pertain to the district taxed; if it does not, the legislature must be held to have assumed an authority not conferred in the general grant of the legislative power, and it is therefore unconstitutional and void.

Cooley, Taxn. 141; *Durack's Appeal*, 62 Pa. 491; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Crane v. West Chicago Park Comrs.* 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943; *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561; *Wells v. Weston*, 22 Mo. 384.

The legislature cannot pass conclusive rules of evidence, so as to make the showing by one party to a controversy, whether the public or a private citizen, conclusive of the truth of the facts shown.

Cooley, Taxn. p. 298; *Zeigler v. South & N. R. Co.* 58 Ala. 594; *Lothrop v. Stedman*, 42 Conn. 583.

The legislature cannot arbitrarily fix the valuation of property for assessment, or determine the amount of tax to be levied, or the amount of a special assessment to be levied upon a district for a local improvement.

Cooley, Taxn. 410; *Harris*, Am. Const. Law, 315; *San Mateo County v. Southern P. R. Co.* 7 Sawy. 517, 8 Sawy. 238, 13 Fed. 722; *Peay v. Little Rock*, 32 Ark. 31; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Re Union College*, 125 N. Y. 308, 29 N. E. 460; *State v. Pillsbury* (Minn.) 85 N. W. 175; *Brady v. King*, 53 Cal. 44; *Johnson v. Milwaukee*, 40 Wis. 315.

The proceedings to ascertain and fix the amount of benefits in any particular instance involve an inquiry into facts that cannot be duly ascertained without the production of witnesses and the consideration of their testimony, as well as the consideration of all the facts and circumstances surrounding each improvement. This is a judicial act, and transcends the legislative province, which is to lay down rules, and not to determine what persons or things are within their scope.

Dill. Mun. Corp. 802a; *Hare*, Am. Const. Law, 312; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Sinking-Fund Cases*, 99 U. S. 700, sub nom. *Union P. R. Co. v. United States*, 25 L. ed. 496; *Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167; *Norfolk City v. Ellis*, 26 Gratt. 242; *Newland v. Marsh*, 19 Ill. 376; *Brown v. Keener*, 74 N. C. 714; *Tyson v. Halifax Twp. School Directors*, 51 Pa. 9.

The prohibition contained in the 14th Amendment to the Constitution of the United States, "nor shall any state deprive any person of life, liberty, or property without due process of law," is a limitation upon the powers of the legislature in taxation as well as in all other respects.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *San Mateo County v. Southern P. R. Co.* 7 Sawy. 517, 8 Sawy. 238, 13 Fed. 722; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Cheaney v. Hooser*, 9 B. Mon. 330.

The legislature cannot fix, or authorize

the municipality to fix, an arbitrary basis for an assessment to be imposed upon the property without regard to benefits; and any law which requires or permits the municipal authorities to assess the whole or any specified part of the cost of an improvement upon property in a district, without giving to the taxpayer the right to contest the amount of his benefits, deprives the taxpayer of his property without due process of law.

2 Dill. Mun. Corp. § 761; *Elliott, Roads & Streets*, 392; *Hare*, Am. Const. Law, 310, 312, 315; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Deater v. Boston*, 176 Mass. 247, 57 N. E. 379; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 N. W. 848; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Ramsey County v. Robert P. Lewis Co.* (Minn.) 85 N. W. 207; *State v. Pillsbury* (Minn.) 85 N. W. 175; *Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; *State, Baldwin, Prosecutor v. Fuller*, 39 N. J. L. 576; *Morford v. Unger*, 8 Iowa, 82; *St. John v. East St. Louis*, 50 Ill. 92; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; 2 Dill. Mun. Corp. § 762; *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Greeley v. People*, 60 Ill. 19; *Zoeller v. Kellogg*, 4 Mo. App. 163.

The principles established in the decision of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, have been applied to assessments for paving under statutes requiring the assessment to be made by the front foot, similar to the one in the case at bar, in the following cases in the circuit courts of the United States.

*Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 100 Fed. 538; *Lyon v. Tonawanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 840; *Bidwell v. Huff*, 103 Fed. 362.

The charter does not provide the taxpayer with sufficient notice of hearing to constitute due process of law.

*Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Charles v. Warren*, 100 Fed. 538.

The legislature, in adopting the front-foot rule for the making of these assessments, adopted an arbitrary basis for determining the amount of benefits, without exercising any judgment whatever upon that question.

*Ramsey County v. Robert P. Lewis Co.* (Minn.) 85 N. W. 207.

The defendant in error was not a petitioner for the improvement, and his silence or delay in objecting to the proceedings cannot in any way prejudice his rights.

Cooley, Const. Lim. 224; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Columbus v. Agler*, 44 Ohio St. 486, 8 N. E. 302; *Wyandotte County Comrs. v. Kansas City, Ft. S. & M. R. Co.* 5 Kan. App. 43, 47 Pac. 326.

Where the basis of an assessment is illegal, as in this case, it is not necessary, as a condition of granting relief to complainant, to tender any sum as representing what might be the excess of cost over any benefits accruing to the property.



*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hayes v. Douglas County*, 92 Wis. 429, 31 L. R. A. 213, 65 N. W. 482; *Solomon v. Oscoda Twp.* 77 Mich. 365, 43 N. W. 990; *Auditor General v. Prescott*, 94 Mich. 190, 53 N. W. 1058.

[399] \*Mr. Justice Shiras delivered the opinion of the court:

This was the case of a bill in equity filed in the circuit court of the United States for the eastern district of Michigan by Ralze-mond A. Parker, a citizen of the state of Michigan, against the city of Detroit and certain officers of said city, seeking to set aside certain assessments and tax sales of complainant's land for the paving of Woodward and Blaine avenues in the city of Detroit. The paving in question was done in pursuance of certain statutes of the state of Michigan, constituting the charter of the city of Detroit, and of ordinances of the common council of said city.

[400] There was no allegation or proof that, in the proceedings \*which resulted in the making of the improvements and in assessing complainant's lots for a portion of the costs thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of the other lot owners. Nor was it alleged that the portion or share of the cost of making the improvements assessed against complainant's property in point of fact exceeded the benefits accruing to each property by reason of such paving.

The only foundation of the bill was the allegation that "the said statutes and ordinances providing for the paving and grading of streets are in violation of the rights of the complainant under the 14th Amendment of the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessments, but that the same shall be made arbitrarily according to the foot front."

The case was thus disposed of by the learned judge in the circuit court:

"It is the claim of complainant that the charter, in the provisions mentioned (that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or the relation to the cost of the improvement), is in conflict with the 14th Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of the village of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, is the foundation for this position, and seems fully to sanction it. . . . The supreme court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for as-

sessments per foot front, on the ground that the ruling in *Baker v. Norwood* must be confined to the facts of that case and have no application to an assessment for paving. With all respect for that learned tribunal, I am constrained under the \*cases cited to a [401] different opinion of the decision, and to follow the Supreme Court of the United States upon the construction of the 14th Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, and a perpetual injunction was issued. *Parker v. Detroit*, 103 Fed. Rep. 357.

This court has recently decided, in the case of *Cass Farm Co. v. Detroit*, affirming a judgment of the supreme court of Michigan, that "it was not the intention of the 14th Amendment to subvert the systems of the states pertaining to general and special taxation; that that Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress; and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*." 181 U. S. 396, ante, 914, 21 Sup. Ct. Rep. 645.

Like conclusions were reached, after a full consideration of the authorities, in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625, and in *Wight v. Davidson*, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616.

The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

For dissenting opinion see *Cass Farm Co. v. Detroit*, 181 U. S. 396, ante, 914, 21 Sup. Ct. Rep. 645.

\*JAMES L. WORMLEY, Plff. in Err., [402]  
v.

DISTRICT OF COLUMBIA.

ANNA P. HOOVER ALLEN and Others,  
Plffs. in Err.,

v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 402.)

Constitutional law — assessments for im-  
provements.

[Nos. 101 and 102.]

Submitted November 12, 1900. Decided  
April 29, 1901.

IN ERROR to the Court of Appeals of the  
District of Columbia to review decisions  
sustaining assessments. Affirmed.

See same cases below, 15 App. D. C. 58, 70.

**Mr. D. W. Baker** submitted for plaintiff in error. *Messrs. John C. Gittings and Malcolm Hufty* were with him on the brief:

Special assessments are void and unconstitutional where made without any regard to the benefit conferred on the property.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Charles v. Marion*, 100 Fed. 538; *Lyon v. Tonawanda*, 98 Fed. 361.

The legislature has no power to assess property for a local improvement without giving the property owners an opportunity to be heard on the question whether the improvement for which the assessment is levied is a benefit to the property.

*Hutchison v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Loeb v. Columbia Twp.* 91 Fed. 37; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164.

*Messrs. Andrew B. Duvall and Clarence A. Brandenburg* submitted for defendant in error:

While it is true that the act of Congress did not in terms expressly provide for notice to the owners of property to be assessed, it is not invalid for that reason.

*Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Allman v. District of Columbia*, 3 App. D. C. 24; *Lyman v. Plummer*, 75 Iowa, 353, 39 N. W. 527.

The legislature has the right to determine the amount of taxes to be raised, the property to be assessed and upon which they are to be apportioned, and the rule of apportionment.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 702, 28 L. ed. 570, 4 Sup. Ct. Rep. 663; *Cooley, Taxn.* p. 447; *Bauman v. Ross*, 167 U. S. 584, 42 L. ed. 286, 17 Sup. Ct. Rep. 966; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; 2 Dill. Mun. Corp. 4th ed. § 752.

This court has sustained the validity of laws enacted by Congress, authorizing similar assessments for the same kind of work in the District of Columbia.

*Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098.

Had this court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, regarded the assessment in that case as falling under the head of taxation, even though somewhat in excess of the actual benefit to the property assessed, it would not have interfered.

*Davidson v. New Orleans*, 96 U. S. 97, 24

L. ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The right to pass a reassessment law has been repeatedly exercised in various jurisdictions, and the validity thereof repeatedly sustained.

*Welty, Assessments*, 383; *Tift v. Buffalo*, 82 N. Y. 204; *Thomson v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *O'Brien v. Baltimore County Comrs.* 51 Md. 24; *People ex rel. Albany & S. R. Co. v. Mitchell*, 35 N. Y. 552; *Howell v. Buffalo*, 37 N. Y. 267; *Re Van Antwerp*, 56 N. Y. 261; *Howard Sav. Inst. v. Newark*, 52 N. J. L. 1, 18 Atl. 672; *Tuttle v. Polk*, 84 Iowa, 12, 50 N. W. 38; *Dean v. Borchsenius*, 30 Wis. 247; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

#### \*PER CURIAM:

And now, April 29, 1901, the judgments in the foregoing cases are affirmed, with costs, on the authority of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, and *French v. Barber Asphalt Paving Co.* 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625.

For dissenting opinion, see *Cass Farm Co. v. Detroit*, 181 U. S. 396, ante, 914, 21 Sup. Ct. Rep. 645.

JOHN L. SHUMATE, *Plff. in Err.*,  
v.

AUGUST HEMAN.

(See S. C. Reporter's ed. 402, 403.)

*Constitutional law—assessment for improvements.*

This case is determined by the decision in *French v. Barber Asphalt Paving Company*, 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625.

[No. 550.]

*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*

**I**N ERROR to the Supreme Court of the State of Missouri to review a decision affirming a judgment enforcing payment of a special tax bill for construction of a sewer. *Affirmed.*

See same case below, *sub nom. Heman v. Allen*, 156 Mo. 534, 57 S. W. 559.

The facts are stated in the opinion.

**Mr. G. B. Webster** argued the cause, and, with *Messrs. Hiram J. Grover* and *Hamilton Grover*, filed a brief for plaintiff in error:

There can be no valid tax without a valid assessment.

*St. Louis & S. F. R. Co. v. Apperson*, 97 Mo. 306, 10 S. W. 478; *State ex rel. Wyatt*

**NOTE.**—On assessment of the cost of the construction of sewers—see notes to *Re Kingman* (Mass.) 12 L. R. A. 417; and *Proprietors of Cemetery v. Cambridge* (Mass.) 4 L. R. A. 836.  
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v. *Wabash R. Co.* 114 Mo. 1, 21 S. W. 26; *Worthington v. Whitman*, 67 Iowa, 190, 25 N. W. 124; *San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694; *Graves v. Bruen*, 11 Ill. 431; *Cooley*, Taxn. 2d ed. 352.

The assessment must be made in the manner provided by the statute which authorized the taxation, and a departure in any material part is fatal.

*Blackwell*, Tax Titles, 2d ed. 255; *Dill. Mun. Corp.* 4th ed. § 769; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; *Campbell County Judge v. Taylor*, 8 Bush, 206; *Westfall v. Preston*, 49 N. Y. 353; *St. Louis & S. F. R. Co. v. Apperson*, 97 Mo. 306, 10 S. W. 478.

This is especially true of special assessments for local improvements.

2 *Desty*, Taxn. p. 1331; *Cooley*, Taxn. 2d ed. p. 659; *Re Cameron*, 50 N. Y. 502; *Sharp v. Speir*, 4 Hill, 76; *Warren v. Grand Haven*, 30 Mich. 24; *Corington v. Casey*, 3 Bush, 698; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910.

Where a board is required to make the assessment, that duty cannot be performed by an individual member or an employee.

*Metcalf v. Messenger*, 46 Barb. 325; *Midletown v. Berlin*, 18 Conn. 197; *People v. Hagar*, 49 Cal. 229; *Oteri v. Parker*, 42 La. Ann. 374, 7 So. 570; *Belfast Sav. Bank v. Kennebec Land & Lumber Co.* 73 Me. 404.

These liens are creations of law, and to establish them every step prescribed by law must be taken. Proceedings for the enforcement of such liens are *in invitum* and must be strictly construed.

*Leach v. Cargill*, 60 Mo. 316; *Kiley v. Oppenheimer*, 55 Mo. 374; *Church v. People ex rel. Kochersperger*, 179 Ill. 205, 53 N. E. 554; *Stockton v. Whitmore*, 50 Cal. 554.

Any assessment of special taxes under a law which does not afford the property owner an opportunity to be heard on the question of benefits and the fairness of the apportionment of the tax, and does not empower the municipal authorities to consider this question in fixing the assessment, is a nullity; and any law which excludes from the assessment of such taxes the question of corresponding benefits is unconstitutional and void.

2 *Dill. Mun. Corp.* 4th ed. pp. 932, 936; *Asberry v. Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Wced v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hutcheson v. Storrrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 98 Fed. 166; *Cowley v. Spokane*, 99 Fed. 840; *Lyon v. Tonawanda*, 98 Fed. 361; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164; *Parker v. Detroit*, 103 Fed. 357; *Bidwell v. Huff*, 103 Fed. 362; *Adams* 181 U. S.

v. *Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114.

The decision and opinion of this court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, was binding on the supreme court, and it was error on the part of the court to decline to follow it.

U. S. Const. art. 6, § 2; *Black v. Lusk*, 69 Ill. 70; *Lebanon Bank v. Mangan*, 28 Pa. 452; *Cabunne v. Lindell*, 12 Mo. 189.

*Messrs. Robert E. Collins and David Goldsmith* argued the cause, and, with *Mr. H. P. Rodgers*, filed a brief for defendant in error:

An assessment for the construction of sewers is similar to one for the construction of sidewalks.

*Protestant Orphan Asylum's Appeal*, 111 Pa. 135, 3 Atl. 217; *Smith v. Kingston*, 120 Pa. 363, 14 Atl. 170; *Cooley*, Taxn. 2d ed. p. 590.

Restrictions upon the legislative or municipal power of assessments for street improvements proper do not apply to assessments for the construction of sidewalks.

*James v. Pine Bluff*, 49 Ark. 202, 4 S. W. 760; *Wilson v. Philippi*, 39 W. Va. 82, 19 S. E. 553; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 423, 18 Am. Rep. 729; *Macon v. Patty*, 57 Miss. 406, 34 Am. Rep. 451; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *Palmer v. Way*, 6 Colo. 106.

An assessment of the cost of sewers against property in the sewer district, made according to area, and not based upon value, benefits, or improvements, is valid.

*Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

Wherever the frontage rule of assessment has come into question in other states its validity has been sustained.

*Speer v. Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802; *Fort Wayne v. Cody*, 43 Ind. 197; *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566; *White v. People ex rel. Bloomington*, 94 Ill. 604; *Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242; *English v. Williams*, 2 Marv. (Del.) 63, 37 Atl. 158; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Cleveland v. Tripp*, 13 R. I. 50; *Whiting v. Townsend*, 57 Cal. 519; *Daily v. Swope*, 47 Miss. 367; *Parker v. Challiss*, 9 Kan. 155; *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97; *Preston v. Rudd*, 84 Ky. 154; *Davis v. Lynchburg*, 84 Va. 370, 6 S. E. 230; *Parkersburg v. Tavcner*, 42 W. Va. 489, 26 S. E. 179; *Allen v. Drew*, 44 Vt. 174; *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *McKeesport Boro, use of McKeesport City, v. Busch*, 166 Pa. 46, 31 Atl. 49; *Warren v. Henly*, 31 Iowa, 31.

The conclusiveness and validity of fixed legislative assessments are maintained by the prior decisions of this court.

*Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston*

*v. Nevins*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

A citizen is not entitled to notice where there is no hearing, and there is none when a local assessment is made, pursuant to legislative prescription, according to frontage or area.

*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Parsons v. District of Columbia*, 170 U. S. 54, 42 L. ed. 947, 18 Sup. Ct. Rep. 521; *Williams v. Eggleston*, 170 U. S. 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617.

Irrespective of this rule, a sufficient hearing and notice are provided for.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *St. Louis v. Richeson*, 76 Mo. 470; *Saxton Nat. Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279.

[403] \*Mr. Justice Shiras delivered the opinion of the court:

This was a suit brought in the circuit court of the city of St. Louis by August Heman to enforce payment of a special tax bill issued in his favor by that city for the construction of a sewer in what is called Euclid avenue sewer district. The plaintiff recovered a judgment, and the defendants, who were owners of property assessed for the cost of making said sewer, appealed to the supreme court of Missouri, where the judgment of the trial court was affirmed, the case being reported as *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, and after such affirmance the defendant brought the case to this court by writ of error.

The only question which is open to our consideration upon this record is the contention of the plaintiff in error that the provisions of the charter of the city of St. Louis, the ordinances of the municipal assembly, the contract with the defendant in error, made thereunder, and the assessment against the property of the plaintiff in error for the cost of the construction of said sewer, were null, void, and of no effect for the reason that they were repugnant to the 14th Amendment of the Constitution of the United States, as construed and applied in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

This contention has been considered and determined, under a similar state of facts, by this court, in the recent case of *French v. Barber Asphalt Paving Co.* in error to the supreme court of the state of Missouri (181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625), and upon the authority of that case the judgment of the Supreme Court of Missouri is affirmed.

For dissenting opinion, see *Cass Farm Co. v. Detroit*, 181 U. S. 396, ante, 914, 21 Sup. Ct. Rep. 645.

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\*THOMAS F. FARRELL et al., Plffs. in[404] Err., v.

WEST CHICAGO PARK COMMISSIONERS.

(See S. C. Reporter's ed. 404.)

Constitutional law — assessments for improvements.

This case is determined by the decision rendered in the case of *French v. Barber Asphalt Paving Company*, 181 U. S. 324, ante, 879, 21 Sup. Ct. Rep. 625.

[No. 201.]

Argued March 18, 19, 1901. Decided April 29, 1901.

IN ERROR to the Supreme Court of the State of Illinois to review a decision sustaining assessments for the improvement of an avenue or boulevard. Affirmed.

See same case below, 182 Ill. 250, 55 N. E. 325.

The facts are stated in the opinion.

Mr. George W. Wilbur argued the cause and filed a brief for plaintiffs in error:

The original proceeding having failed, the institution of a new assessment for the purpose of obtaining the cost of the improvement previously constructed by imposing a charge therefor against abutting and contiguous property is in conflict with the Constitution of the United States.

*Lyon v. Tonawanda*, 98 Fed. 361; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Under the established laws of Illinois no valid assessment can be made and levied against private property for the purpose of obtaining the cost of an improvement, unless the construction of such improvement is preceded by a sufficient and valid ordinance providing for a special tax or a special assessment to charge the property affected thereby.

*Carlyle v. Clinton County*, 140 Ill. 512, 30 N. E. 782; *Weld v. People ex rel. Kern*, 149 Ill. 258, 36 N. E. 1006; *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934.

Under the Constitution and laws of Illinois the manner of charging private property by special assessment and of charging by a special tax upon contiguous property are entirely different.

*Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372.

The ordinance of March 28, 1893, which was the only ordinance preceding the construction of the improvement, was wholly void as to its provision for a special assessment or special tax.

*Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812; *Farrell v. West Chicago*, 162 Ill. 280, 44 N. E. 527; *White v. West Chicago*, 164 Ill. 196, 45 N. E. 495; *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074; *Steenberg v. People ex rel. Kochersperger*, 164 Ill. 478, 45 N. E. 970; *People ex rel. Kochersperger v. Mark-*

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*ley*, 166 Ill. 51, 46 N. E. 742; *O'Neil v. People ex rel. Kochersperger*, 166 Ill. 565, 46 N. E. 1096; *Walker v. People ex rel. Kochersperger*, 169 Ill. 474, 48 N. E. 694; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. 10.

If construed not to be wholly void, then a petition based upon it and addressed to the county court, asking the levy of a special assessment, would confer jurisdiction upon the county court, and its judgment would not be void.

*Galena & C. U. R. Co. v. Pound*, 22 Ill. 414; *Mulford v. Stalzenback*, 46 Ill. 307; *Davis v. Litchfield*, 155 Ill. 392, 40 N. E. 354; *Harvey v. Tyler*, 2 Wall. 328, 17 L. ed. 871; *Van Fleet*, Collateral Attack, 82.

When the trial court and the supreme court of Illinois determined that the ordinance of March 28, 1893, was void, but nevertheless that it was a sufficient basis for a new special assessment or special tax for work previously done, it imposed upon the owners of property affected thereby a charge without due process of law.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 559, 42 L. ed. 854, 18 Sup. Ct. Rep. 445; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 19 Sup. Ct. Rep. 583; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Guthrie*, 14th Amendment, p. 45.

An act of the legislature of Illinois in force July 1, 1895, assuming to confer authority to pass a new ordinance for a special assessment after the work had been done, so as to charge the cost of it on private property, is in conflict with the Constitution of the United States.

*St. Louis, use of Creamer, v. Clemens*, 52 Mo. 133; *Brady v. King*, 53 Cal. 44; *Cooley*, Taxn. 1st ed. p. 227; *Cooley*, Const. Lim. 2d ed. pp. 407, 420, 421; *Spencer v. Merchant*, 125 U. S. 351, 31 L. ed. 765, 8 Sup. Ct. Rep. 921; *New Orleans v. Clark*, 95 U. S. 655, 24 L. ed. 523.

An ordinance which provides that the entire cost of an improvement shall be charged upon contiguous and abutting property, while it makes no provision with respect to actual benefits to be derived therefrom, is forbidden by the Constitution of the United States.

*Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 137.

When this proceeding was begun, the law being that the ordinance was void, and the court having so decided, its later decisions in terms to the contrary will not be conclusive upon this court.

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*Thompson v. Perrine*, 103 U. S. 816, 26 L. ed. 617.

If the judicial authorities of the state deny any litigant the equal protection of the laws, or by judgments charge him or his property without due process of law, it is as much the act of the state as if done by the legislature.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 228, 41 L. ed. 982, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 559, 42 L. ed. 854, 18 Sup. Ct. Rep. 445; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 19 Sup. Ct. Rep. 583; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Guthrie*, 14th Amendment, 45.

*Messrs. Newton A. Partridge and George W. Wilbur* filed a brief for plaintiffs in error in support of a motion for a rule to show cause why defendants in error should not be punished for contempt.

*Mr. Robert A. Childs* argued the cause, and, with *Mr. Charles Hudson*, filed a brief for defendants in error.

For contentions of these counsel, see their brief as reported in *Lombard v. West Chicago Park Comrs. ante*, 731.

*Mr. Francis A. Riddle* filed a brief in opposition to the motion for a rule to show cause why defendants in error should not be punished for contempt, and a brief in support of a motion to vacate the supersedeas order.

\**Mr. Justice Shiras* delivered the opinion [404] of the court:

This case originated in proceedings to create and improve an avenue or thoroughfare known as Douglas boulevard, in the town of West Chicago.

The full history of those proceedings, contained in the statement of facts made by this court in the case of *Lombard v. West Chicago Park Comrs.* recently decided, 181 U. S. 33, *ante*, 731, 21 Sup. Ct. Rep. 507, renders it unnecessary to repeat them here. And the legal questions involved were so fully discussed in that case, and in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, *ante*, 879, 21 Sup. Ct. Rep. 625, and *Wight v. Davidson*, 181 U. S. 371, *ante*, 900, 21 Sup. Ct. Rep. 616, cognate cases decided at the present term of this court, that we are relieved from their further consideration.

The judgment of the Supreme Court of the State of Illinois is affirmed.

For dissenting opinion, see *Cass Farm Co. v. Detroit*, 181 U. S. 396, *ante*, 914, 21 Sup. Ct. Rep. 645.

[405] \**GERMAN NATIONAL BANK et al., v.*

A. J. SPECKERT, Jacob Frankel, Harriet Frankel, *et al.*

(See S. C. Reporter's ed. 405-409.)

*Appeal—decision not final—order for remanding of case to state court.*

A decision of the circuit court of appeals reversing a decree of the circuit court which denied a motion to remand a case to the state court, and ordering the circuit court to remand the case, is not appealable to the Supreme Court of the United States under the act of Congress of March 3, 1891, chap. 517, as such a decision is not a final judgment.

[No. 192.]

*Argued March 12, 1901. Decided May 13, 1901.*

**A** PPEAL from a decision of the United States Circuit Court of Appeals for the Sixth Circuit reversing a decree of the Circuit Court denying a motion to remand a case to a state court. *Dismissed.*

See same case below, 38 C. C. A. 682, 98 Fed. Rep. 151.

The facts are stated in the opinion.

Mr. Alexander Pope Humphrey argued the cause, and, with Messrs. John G. Carlisle and William M. Smith, filed a brief for appellants.

Mr. John L. Dodd argued the cause, and, with Messrs. Aaron Kohn, David W. Baird, T. W. Spindle, and J. C. Dodd, filed a brief for appellees.

[405] \*Mr. Justice Gray delivered the opinion of the court:

This was a bill in equity, commenced in a court of the state of Kentucky, and removed, on petition of the defendant, into the circuit court of the United States for the district of Kentucky. The circuit court of the United States denied a motion to remand the case to the state court (85 Fed. Rep. 12), and afterwards dismissed the bill upon its merits. The plaintiff appealed to the circuit court of appeals, which reversed the decree and ordered the circuit court to remand the case to the state court. 38 C. C. A. 682, 98 Fed. Rep. 151. From the order of the circuit court of appeals the plaintiffs appealed to this court.

In *Chicago & A. R. Co. v. Wiswall* (1874) 23 Wall. 507, 23 L. ed. 103, a case was removed from a state court into a circuit court of the United States; the circuit court, being satisfied that it had no jurisdiction, ordered the case to be remanded to the state

[406] court; and \*a writ of error to review the or-

der remanding it was dismissed by this court, upon the ground that "the order of the circuit court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

By the act of March 3, 1875, chap. 137, § 5, it was provided that an order of the circuit court, dismissing or remanding a cause to the state court, should be reviewable by this court on writ of error or appeal. 18 Stat. at L. 472. Under that statute, many cases were brought to this court by appeal or writ of error for the review of such orders.

But by § 6 of the act of March 3, 1887, chap. 373, as re-enacted by the act of August 13, 1888, chap. 866, that provision was expressly repealed; and by § 2 it was enacted that whenever the circuit court of the United States should decide that a cause had been improperly removed, and order it to be remanded to the state court from which it came, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. at L. 553, 555; 25 Stat. at L. 435, 436.

Under that statute it has been constantly held that this court has no power to review by appeal or writ of error an order of a circuit court of the United States remanding a cause to a state court.

In the first case Chief Justice Waite said: "It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." *Morey v. Lockhart* (1887) 123 U. S. 56, 31 L. ed. 68, 8 Sup. Ct. Rep. 65. And it was held that the act prohibited a writ of error after that statute took effect to review an order of remand made while the act of 1875 was in force. *Sherman v. Grinnell* (1887) 123 U. S. 679, 31 L. ed. 279, 8 Sup. Ct. Rep. 260.

By the act of February 25, 1889, chap. 236, it was provided that "in \*all cases where [407] a final judgment or decree shall be rendered in a circuit court of the United States, in which there shall have been a question involving the jurisdiction of the court," the losing party should be entitled to an appeal or writ of error to this court, without reference to the amount of the judgment, but limited, when that amount did not exceed \$5,000, to the question of jurisdiction. 25 Stat. at L. 693. It was held that this act did not authorize an appeal from an order of the circuit court of the United States remanding a case to the state court for want of jurisdiction, because "the words 'a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior

NOTE.—As to finality of judgments and decrees for purposes of review on error or appeal in the Federal appellate courts—see notes to *Central T. Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Gibbons v. Ogden*, 5 L. ed. U. S. 302.



statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the circuit court proceeded." *Richmond & D. R. Co. v. Thouron* (1890) 134 U. S. 45, 33 L. ed. 871, 10 Sup. Ct. Rep. 517. A similar decision was made in *Gurnee v. Patrick County* (1890) 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34.

In the case of *Re Pennsylvania Co.* (1890) 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141, it was held that the acts of 1887 and 1888 took away the remedy by mandamus, as well as that by writ of error or appeal, in the case of an order of remand; and Mr. Justice Bradley, in delivering judgment, after quoting § 2 of those acts, said: "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of error and appeal would have had the section, yet the use of the words 'such [408] remand shall be immediately\*carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 454, 34 L. ed. 740, 11 Sup. Ct. Rep. 142.

In *Chicago, St. P. M. & O. R. Co. v. Roberts* (1891) 141 U. S. 690, 35 L. ed. 905, 12 Sup. Ct. Rep. 123, the cases of *Morey v. Lockhart* and *Richmond & D. R. Co. v. Thouron* were followed; and it was held that § 5 of the judiciary act of March 3, 1891, chap. 517, giving a writ of error from this court "in any case in which the jurisdiction of the court is in issue," does not authorize a writ of error to review an order of the circuit court, remanding a case for want of jurisdiction, because such order is not a final judgment.

In *Missouri P. R. Co. v. Fitzgerald* (1896) 160 U. S. 556, 580-583, 40 L. ed. 536, 542, 543, 16 Sup. Ct. Rep. 389, 395, 396, in a careful opinion of the Chief Justice, reviewing the statutes and decisions, it was again stated as well settled that an order of the circuit court of the United States ordering a suit to be remanded to the state court was not a final judgment or decree; and that such an order could not be reviewed in this 181 U. S.

court by any direct proceeding for that purpose; and it was also held that "as under the statute a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under § 709, in respect of such an order, where the state court has rendered no decision against a Federal right, but simply accepted the conclusion of the circuit court."

In the present case, the remand to the state court was denied by the circuit court of the United States, but, on appeal from its decree dismissing the bill, was ordered by the circuit court of appeals.

If the circuit court had ordered the case to be remanded, its order could not, according to the decisions above cited, have \*been [409] reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the state court.

It would be an extraordinary result if, while an order of remand by the circuit court, of its own motion, is not subject to review in any form, an order of remand by that court, by direction of the circuit court of appeals, were subject to a further appeal to this court.

The appeal in this case is taken under the last paragraph of § 6 of the act of March 3, 1891, chap. 517, by which "in all cases not hereinbefore in this section made final," and when the matter in controversy exceeds \$1,000, there is of right a review of the judgment of the circuit court of appeals by this court on appeal or writ of error. [26 Stat. at L. 828.]

Such appeal or writ of error, of course, can only be taken from a final judgment. But an order of remand is not a final judgment, according to the cases above cited, especially *Chicago & A. R. Co. v. Wiswall*, *Richmond & D. R. Co. v. Thouron*, *Chicago, St. P. M. & O. R. Co. v. Roberts*, and *Missouri P. R. Co. v. Fitzgerald*. Therefore no appeal lies from the order of remand.

*Appeal dismissed for want of jurisdiction.*

PUT-IN-BAY WATERWORKS, LIGHT, & RAILWAY COMPANY, Appt.,

v.

CHARLES W. RYAN and William J. Ryan, Partners as Arbuckle, Ryan, & Company, et al.

(See S. C. Reporter's ed. 409-434.)

*Courts—conflict of jurisdiction—of state and Federal courts—sufficiency of amount in controversy.*

1. A replevin suit in a state court, affect-

NOTE.—As to conflict of jurisdiction between Federal and state courts—see *Louisville Trust* 927



ing only certain articles of personal property, and arising out of a controversy between a railway company and its vice president, cannot draw into the jurisdiction and control of that court the railroad and franchises of the railway company, so as to preclude creditors of the company from instituting proceedings in a Federal court.

2. The jurisdiction of a Federal court in a controversy between citizens of different states, in which the matter in dispute is alleged to be over the sum or value of \$2,000, is not terminated by *ex parte* affidavits denying that the property is of the value alleged, unless this fact is made to appear to the satisfaction of the court.

[No. 332.]

*Submitted February 25, 1901. Decided May 13, 1901.*

**A**PPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio on a certificate of a question of jurisdiction. *Jurisdiction sustained.*

Statement by Mr. Justice Shiras:

- [410] \*In September, 1892, the Electric Supply Company, a corporation and citizen of the state of Connecticut, filed in the circuit court of the United States for the northern district of Ohio a bill of complaint against the Put-in-Bay Waterworks, Light, & Railway Company, a corporation and citizen of the state of Ohio. It was alleged in the bill that the plaintiff company had, in June, 1872, sold and delivered to the defendant company certain materials and supplies to be used in the erection of the lighting apparatus, powerhouse, station, and railway of the defendant, of the value of \$2,787.04, and that said supplies and material were used in the construction of the lighting apparatus and railway of said defendant, situated in Put-in-Bay island, in Ottawa county, Ohio, and that the entire amount of said claim was due and unpaid.

The bill further alleged that on September 7, 1892, the plaintiff company had filed with the recorder of Ottawa county an affidavit containing an itemized statement of the amount and value of the materials and supplies furnished under said contract of sale, with a statement of the account and terms of payment to be made thereunder and a description of the premises upon which said lighting apparatus and railway were located, which said statement and all connected therewith were duly recorded by said recorder in a book kept for that purpose; that the plaintiff has a lien on the premises and all the property of defendant company from the 7th day of June, 1892, for the amount due with interest; and that, in the premises, the plaintiff was entirely without remedy according to the strict rules of the common law, and could only have relief in a court of

equity, where matters of such a nature were properly cognizable and reviewable.

The bill further alleged that the Railway Equipment Company, a corporation and citizen of the state of Illinois; John Arbuckle, Charles Ryan, and W. J. Ryan, citizens of the state of Ohio; James K. Tillotson, a citizen of the state of Ohio; \*the Cleveland [411] Electrical Manufacturing Company, a corporation and citizen of the state of Ohio; the Industrial & Mining Guaranty Company, a corporation and citizen of the state of New York; John P. Carrothers, a citizen of the state of New York; and H. H. Warner, a citizen of the state of New York,—claimed to have some interest in the premises upon which the plaintiff claimed the aforesaid lien; and the bill prayed that each of said parties should be required to appear and set up their respective claims, or be forever barred from setting up the same against the plaintiff. The bill prayed for an account with the defendant company, and for a decree of sale of said premises, etc.

On September 10, 1892, an answer and cross bill were filed by J. K. Tillotson. In this cross bill it was alleged that said Tillotson had built and equipped the railroad of the defendant company, and had received in payment therefor the stock of said company and mortgage bonds to the amount of \$125,000; that he had contracted with John P. Carrothers and H. H. Warner, as owners and controllers of the Industrial & Mining Guaranty Company of New York (named as defendants in the bill of complaint), to sell and dispose of said stock and bonds, but that said Carrothers and Warner had not sold or accounted for the said stock or bonds, but that said Carrothers, claiming to be the owner of the capital stock of said defendant company, had elected himself president thereof, and had taken possession of said railroad, etc. It was thereupon prayed, in said cross bill, that a restraining order should be issued against said Carrothers and Warner and the said Industrial & Mining Guaranty Company, forbidding them, during the pendency of this suit, from selling or disposing of said stock and bonds, and that the court should appoint a receiver to take charge and custody of the railway and property in plaintiff's bill of complaint described, with instructions to care for and operate the same under the order of the court, and as, in the judgment of the court, might be for the interest of all parties concerned.

Thereupon, on September 10, 1892, a subpoena was issued summoning said Carrothers, Warner, and the Industrial & Mining Guaranty Company to appear and answer said cross \*bill. On the same day a temporary restraining order was issued against said Carrothers and Warner as prayed for in the cross bill, and one L. S. Baumgardner

Co. v. Cincinnati, 22 C. C. A. 356, and note. And see note to J. I. Case Plow Works v. Flunks, 26 C. C. A. 50.

As to jurisdiction as affected by possession of the subject-matter—see Adams v. Mercantile Trust Co. 15 C. C. A. 6, and note.

As to jurisdiction of United States circuit court as dependent upon amount—see Auer v. Lombard, 19 C. C. A. 72, and note; Tennent-Stirling Shoe Co. v. Roper, 36 C. C. A. 455, and note.



was appointed receiver, who gave a bond as such receiver in form and amount approved by the United States district judge.

The United States marshal made return that he had served the restraining order and subpoena on said John P. Carrothers, and that said H. H. Warner and the Industrial & Mining Guaranty Company were not found.

Subsequently, on September 26, 1892, the Put-in-Bay Waterworks, Light, & Railway Company filed an answer to the bill of complaint, admitting that on June 7, 1892, the defendant had entered into a contract with the complainant company, whereby the latter company was to sell and deliver certain materials to be used in the construction of defendant's railway in Ottawa county, Ohio. The said answer contained the following allegations:

"This defendant says that it is not true that Exhibit 'A' attached to complainant's bill contains a true and correct statement of the material so sold by the complainant to this defendant as aforesaid. And it is not true that all of said supplies and materials contained in said Exhibit 'A' were used in the construction of the said railway. But, on the contrary, this defendant says that a large part of said materials were sold and delivered to said J. K. Tillotson, defendant, for the purpose of being used, and which were used, in the construction of certain property known as Hotel Victory on South Bass island. This defendant says that it is not true that the material sold to this defendant by said complainant as aforesaid were of the value of \$2,787.04, as set forth in said Exhibit 'A,' but, on the contrary, this defendant is informed and believes, and so states the fact to be, that the material so sold by said complainant to this defendant, through its vice president, the defendant Tillotson, for the purpose of being used in the construction of said railway, and which were so used, amounted in value to about the sum of \$700, and no more. . . . This defendant further says that the said complainant, when it sold the said Tillotson the material set forth in Exhibit 'A' of said com-

[413]plaint, well knew that a \*large part of said material was so sold and delivered for the purpose of being used, and were used, in the construction of Hotel Victory, of which the said Tillotson was president, and which had no connection whatever with this defendant's railroad. And this defendant alleges that said complainant, at the request of said Tillotson, procured a lien to be filed with the recorder of Ottawa county against this defendant's property, on the day previous to the filing of the complainant's complaint herein, and for the entire amount of the material sold to this defendant and also sold to said Tillotson for the use of said Hotel Victory. And said lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court.

"And this defendant prays that this honorable court may take an account of material sold by complainant to and for the use of  
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the defendant, to be used in the construction of said railway, and the amount of said material so sold, which has actually been used in the construction thereof. And that the court may determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant."

On September 26, 1892, the Put-in-Bay Waterworks, Light, & Railway Company filed an answer to the cross bill of Tillotson, admitting some and denying many of the allegations thereof, and containing the following allegation:

"This answering defendant further says that on or about the 3d day of September, 1892, the said defendant Tillotson, attempting to interfere with the said company in the operation of its said railway, and to prevent the said company from the peaceable enjoyment of its said property, the common pleas court of Ottawa county, Ohio, on the petition of said Put-in-Bay Waterworks, Light, & Railway Company, issued a restraining order enjoining the said defendant James K. Tillotson from interfering or attempting to interfere in any manner with the said company in the operation of its railway, and which said restraining order is still in full force and effect."

It also appears that the defendant company sued out of the \*court of common pleas [414] a writ of replevin against Tillotson, but it is not shown what the property levied on was.

Afterwards, on September 30, 1892, the answer and cross bill of Arbuckle, Ryan, & Company, who had been named as defendants in said suit, was filed, in which it was, among other things, alleged that said firm had furnished a large amount of machinery and of labor for the said Put-in-Bay Waterworks, Light, & Railway Company, which went into the construction of said railroad and powerhouse of said company, on which there was unpaid and due to the said Arbuckle, Ryan, & Company a balance of \$11,153.60, and for which they had filed, on August 17, 1892, with the recorder of Ottawa county, Ohio, an affidavit and itemized account, by virtue of which proceeding they had obtained a lien upon the property and railroad of the defendant, the said railroad company. They therefore prayed for an account, and for an order directing the sale of the said property and railroad, and for the payment of their claim out of the proceeds of such sale.

On October 15, 1892, L. S. Baumgardner, theretofore appointed receiver, filed a petition showing cause why certain expenditures incident to the care and preservation of the railroad and its property since they had come into his hands, and other expenditures necessary to be made, required him to raise a sum of not less than \$5,000, and prayed for leave to issue receiver's certificates for that purpose. This was followed by an order of the court authorizing the receiver to issue certificates to the amount of \$5,000, and declaring said certificates to be a first lien



upon all the property of said railway company in the hands of said receiver.

Afterwards, on October 29, 1892, a motion to discharge the receiver was made on behalf of the defendant railway company, which was accompanied by an affidavit of J. P. Carrothers, as president of said company, in which, among other things, it was stated that on September 3, 1892, the affiant, as president of said company, was compelled to and did institute replevin proceedings to obtain possession of the personal property of said company, and that by virtue of said action the property of said company was turned over to affiant as president [415] thereof, excepting \*the books, papers, muniments of title, and certain other of the personal property belonging to said company which were taken away and secreted by said Tillotson; and that said railway company obtained from the court of common pleas of Ottawa county a restraining order enjoining Tillotson from interfering with the company's peaceable enjoyment of the possession and control of said Put-in-Bay Waterworks, Light, & Railway Company, its property and business, such order to take effect upon the plaintiff giving an undertaking, as provided by law, in the sum of \$5,000, to the satisfaction of the clerk of said court.

Afterwards, on November 12, 1892, an affidavit of one F. S. Terry, as manager and attorney of complainant company, was filed in the present case, in which, among other things, it was stated that the Electric Supply Company was induced to include all sums due for material furnished for use of the Hotel Victory Company in its account against said railroad; that the amount actually used in the construction of the Put-in-Bay Waterworks, Light, & Railway Company amounted to \$861.23; that the balance of said material, to the amount of \$1,925.81, was used inside of said Hotel Victory; that all of said material was ordered by said defendant Tillotson, as vice president of said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Waterworks, Light, & Railway Company.

On December 22, 1892, the court overruled the motion to dismiss the receiver and to modify the order to said receiver to issue certificates; and an order was made, on the further petition of the receiver, allowing him to issue additional certificates to the amount of \$5,000.

On January 20, 1893, an appeal from the decree of the circuit court overruling the motion to discharge the injunction and to modify the order authorizing the receiver to issue certificates, and retaining jurisdiction, was taken by the Industrial & Mining Guaranty Company, a corporation of New Jersey, and one of the defendants in the cause, to the circuit court of appeals for the sixth circuit; and, on June 22, 1893, that court reversed the decree of the circuit court, the in- [416] junction was dissolved, \*and the cause was remanded to the circuit court, with directions for further proceedings in conformity

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with the opinion of the circuit court of appeals. 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. Rep. 732, 746.

On December 14, 1893, the circuit court, in pursuance of the mandate from the circuit court of appeals, dissolved the injunction theretofore granted on the cross bill of Tillotson, and, on December 28, 1893, appointed Irvin Belford a special master commissioner for the purpose of examining the accounts of the receiver, with particular reference to the disposition made by him of the proceeds of the certificates, and also to report the expenses found by the master to have accrued to the defendants, or any of them, and the reasonable compensation to which the receiver was entitled, etc.

On March 31, 1894, Irvin Belford, the special master, filed his report in the circuit court, in which he found that the receipts of the receiver from all sources amounted to the sum of \$12,230.90, whereof \$8,776.10 were from proceeds of receiver's certificates, and his expenditures amounted to the sum of \$11,969.58, leaving a balance of cash on hand of \$261.32. The master further found that the reasonable compensation to which the receiver was entitled was \$2,200; of which \$1,200 were for his personal services, and \$1,000 for his attorney's fees. He also found that the expenses and costs incurred by the defendant, the Industrial & Mining Guaranty Company, consisting principally of attorney's fees, amounted to the sum of \$8,795.25.

Subsequently, on June 12, 1894, the circuit court made the following order:

"This day this cause came on for further hearing upon the motion of the Industrial & Mining Guaranty Company, the Put-in-Bay Waterworks, Light, & Railway Company, and John P. Carrothers, to dismiss this cause for want of jurisdiction. And the court, having heard the evidence and the arguments of counsel, and being now fully advised in the premises, does grant said motion conditionally.

"It is therefore ordered, adjudged, and decreed that, upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates, duly paid and \*canceled on or before [417] the 30th day of June, 1894, and the payment to the clerk of this court of the costs in this case, including the compensation of the receiver, which is now taxed at the sum of \$1,200.00, and the compensation of receiver's counsel, which is now taxed at the sum of \$1,000, said cause be, and the same is, hereby dismissed."

On December 5, 1894, Arbuckle, Ryan, & Company moved the court to dismiss the cause in compliance with the order previously made that said cause be dismissed when the receiver's certificates were paid, because, as alleged, that said certificates have been paid in full, but that Walker P. Hall and James E. Hutton, the holders of said certificates, have failed and refused to bring the same into court to have them canceled, etc.

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On March 1, 1895, the following order was entered:

"This cause came on to be heard on the motion of Arbuckle, Ryan, & Company to compel the holders of the receiver's certificates heretofore issued under the orders of this court herein to deliver them up to be canceled, and to dismiss said cause; the order to Walker P. Hall and James E. Hutton to show cause why said receiver's certificates should not be canceled; the answer of Walker P. Hall to said citation to show cause, and the evidence; and was argued by counsel; and the court, being fully advised in the premises, finds that the said Walker P. Hall purchased said certificates for full value and in good faith, relying upon the orders of this court, and is the present owner and holder thereof; that the same have not been paid, nor has anything been paid to the said Walker P. Hall on account thereof, and that they are still a first lien upon all of the property and franchises of the defendant company, the Put-in-Bay Waterworks, Light, & Railway Company, and that said cross petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full."

On October 5, 1895, a motion was made by the Put-in-Bay Waterworks, Light, & Railway Company to dismiss said action, and to direct the receiver theretofore appointed to forthwith deliver the property of the company in his possession and under his control, etc.

[418] \*On May 6, 1896, Judge H. F. Severens entered an order fixing May 14 for the hearing of said motion, and further ordering that any other party or parties who might be interested in the action of the court to be taken upon said motion should have leave to intervene and be heard at said hearing.

On June 4, 1896, Judge Severens entered an order containing, among other things, the following:

"I am further of the opinion that the motion heretofore made upon the petition of the Put-in-Bay Waterworks, Light, & Railway Company, directing the receiver to surrender the property in his hands and dismissing the suit, should be denied, my opinion being that there are certain charges incurred in the receivership, the extent of which is not now determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered. This order, however, to be without prejudice to a renewal of a like application and motion when the situation of the case shall be ripe for a dismissal."

On June 25, 1896, the defendant company filed another petition, renewing its motion that the receiver should be directed to surrender to the company the property in his possession, which petition contained, after certain recitals, the following paragraphs:

"Your petitioner further represents that it is ready and willing and hereby tenders to the court a good and sufficient bond for the payment of all charges incurred in said receivership that may be finally determined a first and prior lien upon the property of your petitioner.

ceivership that may be finally determined a first and prior lien upon the property of your petitioner.

"Wherefore your petitioner prays that an order may be entered in this cause directing the receiver to forthwith deliver to your petitioner all of the property of your petitioner of every kind and description now in his custody or under his control by virtue of his appointment as receiver aforesaid, upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the court. . . . Your petitioner further prays that a reference be had for the purpose of ascertaining the amount of the charges incurred by the receiver herein with particular reference as to the disposition made by the receiver \*of the proceeds of the [419] receiver's certificates heretofore issued in this action, the purposes for which, the persons to whom, and the dates the same were made; that said reference shall include the ascertainment of any other changes made in said receivership and the purposes for which the same were created."

Whereupon, on July 15, 1896, Judge Severens entered an order granting the railway's petition for restoration of property upon giving a bond of \$20,000, to be approved by the clerk of the court, for the use and benefit of the parties who might hereafter be entitled thereto, and providing that the obligors of said bond should bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which might finally be determined to be a lien upon the property of said railway company, and should, in giving this bond, submit themselves to the jurisdiction of the court to the end that the court might make such bond effectual for the collection of said charges by order or decree in this cause, etc.

On April 17, 1897, the following order was entered:

"It appearing under the decree entered herein on July 15, 1896, providing for a restoration of the property in the hands of the receiver, L. S. Baumgardner, heretofore appointed in this cause, to the defendant, the Put-in-Bay Waterworks, Light, & Railway Company, upon the said company filing a bond as provided in said decree, and further under the decree of January 6, 1897, extending the time for the filing of said bond to March 1, 1897, that said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, has not filed said bond: Now, therefore, it is hereby ordered and decreed that the said decree of July 15, 1896, be and it is hereby set aside and held for naught."

Several further motions were made not necessary now to mention, and finally on January 31, 1898, the court filed an opinion finding that there was not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and other necessary charges, and that it was necessary to sell the railroad and other real estate and fixtures belonging to the works of the Put-in-Bay Waterworks, Light, & Railway Company, in order to raise a fund nec-



[420] necessary to completely \*satisfy the charges, and accordingly directed notice to be given to the several intervening parties.

Pending these proceedings the Atlantic Trust Company, a corporation and citizen of the state of New York, on March 7, 1898, asked and obtained leave to file an intervening petition or complaint against the defendant railway company, wherein it was alleged that said intervening company was the holder as trustee of certain bonds of said railway company aggregating \$125,000, secured by a deed of trust or mortgage, bearing date June 16, 1892, on all the property, railroad, and franchises of said railway company; that said bonds were in default and unpaid; and thereupon prayed that said mortgage be declared a lien on said property and be foreclosed.

On November 21, 1898, the Put-in-Bay Waterworks, Light, & Railway Company filed a demurrer to the intervening petition of the Atlantic Trust Company, which demurrer was on January 31, 1899, overruled.

On December 12, 1899, the circuit court, Hon. Horace H. Lurton, circuit judge, and Hon. Henry F. Severens, present, entered an order containing, among other things, the following:

"It appearing to the court that there has been filed in this cause no plea or answer to the intervening petition of the defendant Atlantic Trust Company, or to its amendment thereto, and that each and every of the defendants and the complainant are in default thereof: Now, therefore, on this 12th day of December, 1899, came the said Atlantic Trust Company, by its solicitors, H. Van Campen, Jr., and Swayne, Hayes, and Tyler, and on its motion it is ordered that the said intervening petition and amendment thereto be taken *pro confesso* as to all parties to this action, reserving, however, to the defendant, the Bodefield Belting Company, without further pleading herein, the right to present for the further consideration of the court and its orders thereon all or any question as to the priority of the lien claimed by said the Bodefield Belting Company over the said lien of said Atlantic Trust Company."

And thereupon, on the same day, Irvin Belford was appointed as special master to ascertain and report the number and ownership \*of bonds secured by said mortgage, and the amount of principal and interest due thereon.

On December 15, 1899, the circuit court, present Hon. Horace H. Lurton, circuit judge, and Hon. Henry F. Severens, district judge, entered the following decree or order of sale:

"It being made to appear to the court that there is now past due and unpaid on the receiver's certificates heretofore issued under the order and direction of the court in this case the sum of \$7,996.10, which amount represents the balance due on all of said certificates now outstanding up to this date and shall bear interest hereafter at 7 per cent, all of which certificates have been deposited with the clerk of this court, and which amount and the costs of this case taxed and

taxable against the defendant, the Put-in-Bay Waterworks, Light, & Railway Company, to wit, the sum of \$—, the court finds are the first and best lien on all the property of the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, and there being no income or moneys available in the hands of the receiver sufficient to provide for the payment of said certificates and costs, it is accordingly ordered, adjudged, and decreed that unless said defendant or some party in interest pay or cause to be paid to the clerk of this court the amounts so as aforesaid found due for receiver's certificates and the costs, as aforesaid, together with the sum of \$15,033.44, being the amount due as found by this court in a prior order in this case on the amended intervening petition of Arbuckle, Ryan, & Company, with interest computed to the date of this decree, and the sum of \$784.85, being the amount found due in a prior order of this court on the intervening petition of Barbour & Starr, with interest computed to the date of this decree, and the sum of \$486.88, being the amount found due in a prior order of this court on the intervening petition of the Bodefield Belting Company, with interest computed to the date of this decree, within thirty days from the date of this decree, all of the property of the defendant, the Put-in-Bay Waterworks, Light, & Railway Company, herein-after more specifically described, and all of the right, title, and interest, and equity of redemption of said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, and each and every party to \*this action [422] in and to the said property and in and to all property which has since the date of the filing of the petition herein been acquired by said the Put-in-Bay Waterworks, Light, & Railway Company or by the receiver appointed by this court or which may hereafter be acquired prior to the sale hereinafter provided for, shall be offered for sale and sold by and under the direction of Mathias A. Smalley, who is hereby appointed special master for the purpose, in the manner hereinafter directed, to satisfy the amounts due, as aforesaid, for said receiver's certificates, and costs, and also to satisfy the amounts found due as aforesaid, on the amended intervening petition of Arbuckle, Ryan, & Company and the intervening petitions of Barbour & Starr and the Bodefield Belting Company, and that the property ordered to be sold under this decree shall be sold in accordance with the course and practice of this court at public sale to the highest bidder for cash, at the courthouse of Ottawa county, Ohio, at Port Clinton, in said county, being the county in which said property is situate, and that notice of the time and place of such sale shall be given by said Mathias A. Smalley, special master, as aforesaid, by advertisement thereof published once a week for at least four weeks prior to said sale in at least one newspaper printed, regularly issued, and having a general circulation in said Ottawa county, which said notice shall describe the property to be sold.

"It is further ordered, adjudged, and de-



creed that the said special master in making such sale shall first offer for sale all the right, title, and interest of the defendant, the Put-in-Bay Waterworks, Light, & Railway Company, in and to the railroad, so called, of the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, including therein the line of railway cars, motors, apparatus, tracks, side tracks, switches, turnouts, poles, wires, and other apparatus, together with the franchises, easement, and rights of way connected therewith or appurtenant thereto, not part of, however, or belonging to the powerhouse property, so called, hereinafter described, provided that no bids for said above-described property, when thus offered separately, shall be received for less than a sum equal to the amounts found due, as aforesaid, upon receiver's certificates, and the costs hereinbefore provided; and provided further. \*however, and it is hereby ordered, that if within thirty days from the date of this decree the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, or any party in interest herein, pay or cause to be paid to the clerk of this court the amount so, as aforesaid, found due on said receiver's certificates, together with the costs of this action, as hereinbefore adjudged, then said marshal shall not expose or offer for sale under this decree the railroad property as above described. In case said railroad property, so called and above described, shall be separately offered for sale under the above terms of this decree and the amount bid therefor shall equal the amount of said receiver's certificates and costs aforesaid, then said special master shall sell the aforesaid property to the highest and best bidder therefor, and thereupon shall next offer for sale and sell to the highest and best bidder for cash all the right, title, and interest of the defendant, the Put-in-Bay Waterworks, Light, & Railway Company, in and to the remainder of the property of the said the Put-in-Bay Waterworks, Light, & Railway Company, to wit, the powerhouse property, so called, being lots numbers four hundred and seventy-one (471), four hundred and seventy-two (472), four hundred and seventy-three (473), four hundred and seventy-four (474), and four hundred and seventy-five (475) of Victory Park addition, in Put-in-Bay or South Bass island, Ottawa county and state of Ohio, together with all the buildings and appurtenances thereon, including the plant, machinery, apparatus, and fixtures attached to or contained in said buildings or either of them, provided that no bid for said powerhouse property as above described shall be received for less than \$10,000.

"It is further ordered that if in accordance with the terms of this decree, as hereinabove set forth, separate offer of the aforesaid railroad company, so called, and as hereinabove described, shall be made, and the sum bid therefor shall not, however, be equal to the amount found due, as aforesaid, upon said receiver's certificates and the costs aforesaid, then separate sale thereof shall not be made, but in lieu of said offer of the remainder of

the property of said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, as provided by the terms of this \*decree, [424] hereinabove set forth, said special master shall forthwith offer for sale and sell for cash to the highest and best bidder therefor all the property of the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company above described, including both the railroad property, so called, and the powerhouse property so called, as hereinabove described, as a unit, but no bid therefor as a unit shall be received for less than \$16,500.

"It is further ordered, adjudged, and decreed that the said special master return the proceeds of said or any of said sales into the registry of this court, to be there held subject to the further order of this court.

"It is further ordered and directed that the said special master make report of his acts and doings under this decree with all convenient speed after said sale or sales shall have taken place.

"The court hereby reserves for further consideration, as between Atlantic Trust Company and the Bodefield Belting Company, any and all questions arising between them as to the priority of their respective liens, and the court further expressly reserves for its further consideration all matters not herein expressly provided for."

On March 2, 1900, the report of M. A. Smalley, special master in chancery, was filed, showing that on February 24, 1900, he had sold to J. W. and C. W. Ryan, at public auction, for the sum of \$16,501, all the property of the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company; and on March 8, 1900, the court approved the said report and sale nisi; and on March 26, 1900, no exceptions or objections to the sale having been filed by any of said parties, it was ordered that the said order confirming said sale was made absolute, and the special master directed to immediately execute a deed for the property so sold by him to the purchasers.

On June 8, 1900, an order or decree of distribution was made, containing, among other things, the following:

"This day came Arbuckle, Ryan, & Company, the Bodefield Belting Company, Barbour & Starr, the Put-in-Bay Waterworks, Light, & Railway Company, Walker P. Hall, L. S. \*Baumgardner, receiver, and Atlantic Trust Company, by their respective counsel, [425] and thereupon this cause was heard upon the motion of Walker P. Hall for an order releasing the bond by him heretofore given, conditioned for the repayment of any moneys by him received from the receiver herein should he be ultimately found not entitled thereto.

"In consideration whereof the court, being duly advised in the premises, doth find that the condition of said bond has been fully satisfied, and that the same should be canceled and discharged, but retained in the custody of the court.

"It is therefore ordered and adjudged by the court that said bond be, and the same

hereby is, canceled and discharged, and the said Walker P. Hall and his surety are hereby released from any and all liability thereon.

"And thereupon this cause was further heard upon the motion of the said Walker P. Hall for an order of the court directing the clerk to pay the said Walker P. Hall out of the moneys in the registry of the court and arising from the sale of the property of said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, the sum of \$2,400 claimed to have been paid by him on the 28th day of July, 1894, to said L. S. Baumgardner, as receiver, in liquidation of the allowances theretofore made said receiver and his counsel, together with certain expenditures by said receiver made, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises, doth find that said motion is not well taken and should be denied.

"It is therefore ordered and adjudged by the court that said motion be, and the same hereby is, overruled at the costs of said Walker P. Hall.

"Thereupon this cause was further heard upon the fifth and final report of said receiver, L. S. Baumgardner, heretofore appointed herein, and was submitted to the court.

"In consideration whereof and upon examination thereof the court finds the same to be, in all respects, true and correct, and it is therefore ordered and adjudged by the court that the same be, and it is hereby, approved and confirmed.

[426] \* "And the court doth further find that all the property of the said defendant, the Put-in-Bay Waterworks, Light, & Railway Company, has been sold and delivered to the purchaser thereof, and that there is no further need for a receiver herein.

"The court does further find that said receiver and his counsel, Doyle & Lewis, have performed valuable services in the care and preservation of the property of said defendant since the last allowance made them herein. It is therefore ordered and adjudged by the court that out of the funds in his hands said receiver be allowed, and he is hereby authorized to pay unto himself, in full of his compensation for such services, the sum of \$200; to Doyle & Lewis, his said counsel, the sum of \$300, in full payment for the services rendered him as such receiver; and to the clerk of this court the balance remaining in his hands, to wit, the sum of \$269.18, to be applied by said clerk in part payment of the costs herein incurred.

"It is further ordered and adjudged by the court that upon making said payment of said sum to said clerk, and upon filing with the clerk of this court proper receipts, evidencing the disbursements by him made, as set forth in his said final account, said receiver shall stand discharged from all further duties and obligations as such receiver, and that the condition of said bond by him heretofore filed herein as such receiver be satis-

fied, and said receiver and his surety be relieved from all liability thereon.

"And thereupon this cause was further heard upon the petition of Arbuckle, Ryan, & Company, one of the interveners herein, for an order of the court distributing the proceeds arising from the sales of the property of the Put-in-Bay Waterworks, Light, & Railway Company, heretofore made in accordance with the former order of this court, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises, doth find that the prayer of said petition should be granted.

"It is therefore ordered and adjudged by the court that the clerk of this court be, and he hereby is, ordered and directed to forthwith distribute the moneys in the registry of the court and arising from said sales aforesaid in the following manner, to wit:

"1. To the clerk of this court the costs of [427] this suit and remaining unpaid, including the sum of \$175 to the special master commissioner hereby allowed as his compensation for his services by him rendered in selling said property, and the further sum of \$54.30, hereby allowed him for the expenses and expenditures by him incurred in connection therewith, which said amount shall be paid said master commissioner.

"2. To the owner or owners of receiver's certificates, heretofore issued herein, upon the surrender and cancelation thereof, the amount heretofore found to be due thereon, to wit, \$7,966.10, together with interest thereon, at the rate of 7 per cent per annum, from the 13th day of December, 1899, to the date when this order shall finally take effect.

"3. To the county treasurer of the county of Ottawa and state of Ohio the sum of \$591.66, being the taxes and assessments levied and assessed against the property of said the Put-in-Bay Waterworks, Light, & Railway Company for the year 1899.

"4. 100-165 part of the balance remaining to Arbuckle, Ryan, & Company, the Bodefield Belting Company, and Barbour & Starr, *pro rata*, in proportion to the amounts heretofore found due them respectively.

"The balance, after the payments aforesaid, to wit, the sum of \$—, shall be retained in the registry of the court to await its further and final order.

"And thereupon this cause was further heard, upon the motion of the Atlantic Trust Company, trustee, for leave to withdraw its petition filed herein for allowance of compensation; which leave is given, and the same is accordingly done, without prejudice, however, to the right of said trustee to hereafter file its petition therefor.

"To all the foregoing order and decree the said the Put-in-Bay Waterworks, Light, & Railway Company, by its counsel, excepts on the ground that the court is without jurisdiction in the premises, for the reason that it appears by the record herein that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and the



[428] parties to said suit were improperly and collusively \*joined for the purpose of creating a case cognizable by said circuit court under the act of Congress of March 3, 1875, as to which question of jurisdiction an appeal has been taken by the said the Put-in-Bay Waterworks, Light, & Railway Company to the Supreme Court of the United States, at Washington."

On June 2, 1900, an appeal was allowed in the following terms:

"The former appeal prayed by the above-named appellant, the Put-in-Bay Waterworks, Light, & Railway Company, and allowed by me on the 23d day of February, 1900, having been discontinued, and the said appellant having now presented a new petition praying for the allowance of an appeal from the decrees of this court made on the 12th, 13th, and 15th days of December, 1899, said petition is now granted and the appeal is allowed.

"And thereupon, on the request of Walter L. Granger, of counsel for the appellant, I do hereby certify to the Supreme Court of the United States that upon the hearing of the said cause, wherein the said decrees so appealed from were entered, as well as upon various interlocutory hearings during the progress of the cause, the said appellant denied the jurisdiction of the court over said cause, and contended that the court was without jurisdiction upon the grounds that the amount in controversy was in truth and in fact much less than the sum of two thousand dollars (\$2,000), exclusive of interest and costs, and that the case had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing; which contention, so far as related to the receiver's certificates and the intervening petitions, was overruled.

"And it is accordingly certified that the appeal herein allowed is granted for the single purpose of presenting to the said Supreme Court the question whether the circuit court had jurisdiction to entertain the said cause and render the decrees so appealed from.

[429] "The clerk is therefore directed to certify to the United States Supreme Court at Washington, the portions of the record in said cause appertaining to said jurisdictional question \*upon the appellant executing a bond for costs in the sum of five hundred dollars (\$500).

"H. F. Severens, Circuit Judge."

**Mr. Joseph B. Foraker** submitted the cause for appellant. **Mr. Walter L. Granger** was with him on the brief:

Under the act of March 3, 1875, § 5, there was an absolute want of power in the circuit court to adjudicate anything, or make any order, except one for an unqualified dismissal of the suit, and, perhaps, for the payment of costs.

*Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Williams v. Nottawa*, 104 U. S. 181 U. S.

S. 209, 26 L. ed. 719; *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

The restraining order and the appointment of the receiver were a positive violation of § 720 of the Revised Statutes.

*Diggs v. Wolcott*, 4 Cranch, 179, 2 L. ed. 587; *Peck v. Jenness*, 7 How. 625, 12 L. ed. 846; *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

The words "writ of injunction," as used in U. S. Rev. Stat. § 20, include every process or order, irrespective of the form, the effect of which is to stay proceedings in the state court.

*Ex parte Schulenburg*, 25 Fed. 211.

The words of the statute are not merely an inhibition against an injunction, but against preventing a party from conducting his proceedings in a state court, which the appointment of receiver herein certainly did.

*Fisk v. Union P. R. Co.* 6 Blatchf. 362, Fed. Cas. No. 4,827.

The state court having placed the property in the possession of the officers of the railway company as against the claim of Tiltonson, by a writ of replevin, the United States circuit court in this case had no jurisdiction to issue an injunction, or to appoint a receiver by means of which the company and its officers were prevented from using and operating the railway property which the state court had directed its officers to place in their hands.

*Domestic & F. Missionary Soc. v. Hinman*, 2 McCrary, 543, 13 Fed. 161.

The case was plainly one for the application of the rule that the court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, and to take possession and control of the subject-matter of the investigation, to the exclusion of all interference by other courts of co-ordinate jurisdiction.

*Judd v. Bankers' & M. Teleg. Co.* 24 Blatchf. 420, 31 Fed. 182; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Buck v. Colbath*, 3 Wall. 341, 18 L. ed. 260; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135.

There is nothing in the circumstances of this case which would shield the assessment of costs as ordered, as being within the statutory expression, "such order as to costs as shall be just."

*Inglee v. Coolidge*, 2 Wheat. 263, 4 L. ed. 261; *Nashville v. Cooper*, 6 Wall. 247, 18 L. ed. 851; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Elk v. Wilkins*, 112 U. S. 98, 28 L. ed. 644, 5 Sup. Ct. Rep. 41; *Smith v. Whitney*, 116 U. S. 175, 29 L. ed. 603, 6 Sup. Ct. Rep. 570; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

**Mr. J. K. Hamilton** submitted the cause for appellees:

Under Ohio Rev. Stat. §§ 5814-5831, the bond given by the plaintiff takes the place of the property itself, and the property thus delivered to the plaintiff becomes his absolutely, without regard to the subsequent decision of the replevin action.

*Jennings v. Johnson*, 17 Ohio, 154, 49 Am. Dec. 451; *Smith v. McGregor*, 10 Ohio St. 461; *Lugenbeal v. Lemert*, 42 Ohio St. 1.

The pendency of the injunction proceedings was no bar to the jurisdiction of the Federal court.

*M'Kim v. Voorhies*, 7 Cranch, 279, 3 L. ed. 342; Story, Eq. § 900; Story, Const. § 1757; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Merritt v. American Steel Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228; *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. ed. 383; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429; *Rodgers v. Pitt*, 96 Fed. 677; *Ryan v. Seaboard & R. R. Co.* 89 Fed. 407; *Brendel v. Charch*, 82 Fed. 262; *Gamble v. San Diego*, 79 Fed. 500; *Shaw v. Lyman*, 79 Fed. 3; *Deming v. Orient Ins. Co.* 78 Fed. 4; *Marks v. Marks*, 75 Fed. 332; *Short v. Hepburn*, 21 C. C. A. 252, 41 U. S. App. 520, 75 Fed. 113; *North Muskegon v. Clark*, 10 C. C. A. 591, 22 U. S. App. 522, 62 Fed. 698; *Wilcox & G. Guano Co. v. Phœnix Ins. Co.* 61 Fed. 200; *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 389; *Sharon v. Terry*, 1 L. R. A. 572, 13 Sawy. 392, 36 Fed. 337; *Pierce v. Feagans*, 39 Fed. 587.

The cross bill of Tillotson in the suit at bar prayed for relief much more far-reaching than any possible to him as a defendant in the cases in the state court. When such is the case a former suit is no bar to the second.

*Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666.

Even if we concede his right to file a cross bill in either or both of said actions, praying for the relief prayed for in this suit, he was not bound to take such action, but had the right also to bring his independent action in another tribunal having jurisdiction.

*Washburn & M. Mfg. Co. v. Scutt*, 22 Fed. 710; *Rapier v. Gulf City Paper Co.* 64 Ala. 330; *Osborn v. Cloud*, 23 Iowa, 104, 92 Am. Dec. 413.

In the absence of the possession by the state court of the property to which the controversy relates, and in the exercise by that court of jurisdiction in *personam*, no exclusive right of such court is recognized.

*Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Latham v. Chafee*, 7 Fed. 520; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666.

In all cases, to sustain a plea of the pendency of another action in abatement of a second suit, two things must generally concur: First, that the second suit should be by the same plaintiff and against the same defendant; second, that it should be for the same cause of action.

*Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 936

257; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Seymour v. Malcolm McDonald Lumber Co.* 7 C. C. A. 593, 16 U. S. App. 245, 58 Fed. 957; *Walsworth v. Johnson*, 41 Cal. 61; *New England Screw Co. v. Bliven*, 3 Blatchf. 240, Fed. Cas. No. 10, 156; *Barr v. Chapman*, 5 Ohio C. C. 69; *Washburn & M. Mfg. Co. v. Scutt*, 22 Fed. 710; *Rapier v. Gulf City Paper Co.* 64 Ala. 330.

On its face this bill gave jurisdiction.

*Farmers' Bank v. Hoeff*, 7 Pet. 168, 8 L. ed. 646; *Sewall v. Chamberlain*, 5 How. 6, 12 L. ed. 25; *Hulscamp v. Teel*, 2 Dall. 358, Fed. Cas. No. 6,862; *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900; *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660; *Vance v. W. A. Vandercook Co.* 170 U. S. 478, 42 L. ed. 1115, 18 Sup. Ct. Rep. 645; *Peeler v. Lathrop*, 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 780; *Riggs v. Clark*, 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 560; *Texas & P. R. Co. v. Kuteiman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 574.

Merely to deny the amount of complainant's claim did not oust the Federal court's jurisdiction; nor did the partial admission that complainant's claim was valid to the extent of \$700.

*Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 593; *Rae v. Grand Trunk R. Co.* 14 Fed. 402; *Lozano v. Wehmer*, 22 Fed. 755.

**Mr. William C. Cochran** submitted the cause for appellee Walker P. Hall:

The fact that the answer disputes the amount claimed does not divest the court of jurisdiction. It is the amount in dispute which gives jurisdiction.

*Schunk v. Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

Whether the defendants could lawfully recover it against the plaintiff in this case was a matter affecting the merits, and not the jurisdiction.

*Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696.

Admitting that part of the amount claimed is due, without paying or offering to pay, does not deprive the court of jurisdiction.

*Fuller v. Metropolitan L. Ins. Co.* 37 Fed. 164. See also *Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 39; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 593; *Pine v. New York*, 103 Fed. 337.

The benefit of the doubt must be in favor of the jurisdiction, and when the judge is not persuaded, even in his own mind, that there is a want of jurisdiction, he has no business to dismiss a case because a suspicion has been raised by an *ex parte* affidavit.

*Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

\*Mr. Justice **Shiras** delivered the opinion [420] of the court:

The contention in the brief on behalf of  
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the appellant, that "by the service of the writ of replevin issued from the state court the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises, the state court having placed the property in the possession of the officers of the railway company as against the claim of Tillotson, by a writ of replevin, the United States circuit court in this case had no jurisdiction to issue an injunction or to appoint a receiver, by means of which the company and its officers were prevented from using and operating the railway property, which the state court had directed its officers to place in their hands," seems to answer itself.

By the operation of the writ of the state court certain personal property of the Put-in-Bay Waterworks, Light, & Railway Company was taken from the possession of one Tillotson and restored to that of the company, and by a restraining order Tillotson was prohibited from interfering with the use and operation by the company of its railway property. Whatever, then, may have been the nature or merits of the questions between the railway company and Tillotson, it is conceded that the actual possession of the property, whether real or personal, was in the railway company at the time when, in the suit of the Electrical Supply Company, the receiver was appointed by [430] the circuit court of the \*United States. It is too plain for argument that the replevin suit, affecting only certain articles of personal property, and arising out of a controversy between the railway company and Tillotson, its vice president, could not draw into the jurisdiction and control of the state court the railroad and franchises of the railway company, so as to preclude creditors of the company from instituting proceedings in the Federal court. As respects the restraining order, if such were even issued, it does not appear that Tillotson ever disobeyed it, and, if he did, he personally would be answerable to the state court. It may be further observed that it is not made to appear that the restraining order ever became operative as an injunction by the filing of a bond in \$5,000. which was imposed as a condition for its issuance. At all events, and conclusively as to the merits of this contention, the property and franchises which are the subject-matter of the present suit were not, either actually or constructively, in the possession of the state court when the Federal court appointed its receiver.

Our inspection of this record has not constrained us to hold that the circuit court lost its apparent jurisdiction of the case by reason of disclosures made subsequently in the progress of the case. The mere denial that the materials sold by the complainant to the railway company were of the value alleged in the bill did not, of itself, deprive the court of jurisdiction. Thereby was presented a question of fact into which the court had ju-  
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risdiction to inquire. Within the letter of the statute there was a controversy between citizens of different states, in which the matter in dispute was over the sum or value of \$2,000.

The 5th section of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), provided that if "any suit commenced in a circuit court, . . . it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, . . . the said circuit court shall proceed no further therein; but shall dismiss the suit."

And it has been several times decided by this court that a\* suit cannot properly be dis- [431] missed by a circuit court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

It is not clearly shown in this record that, at any time after the suit was brought, it was made to appear, to the satisfaction of the circuit court, that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court. On the contrary, it appears that the circuit court was not so satisfied, but overruled complainant's motion to dissolve the preliminary injunction and to discharge the receiver. Thereupon the cause was taken on appeal to the circuit court of appeals, and that court directed that the preliminary injunction granted by the circuit court should be dissolved, but held that, on that appeal, the circuit court of appeals had no jurisdiction to proceed further, and was without power to direct a dismissal of the bill or to vacate the order appointing a receiver.

It is true that observations were made by the judges of that court, based on affidavits made in the court below, that jurisdiction had been collusively obtained by reason of false statements of the amount of materials sold by the complainant to the defendant company; and they seem to have thought that by such affidavits the circuit court had been made to know that its equitable jurisdiction had been improperly invoked. *Industrial & Min. Guaranty Co. v. Electrical Supply Co.* 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. Rep. 733, 744.

But such observations of the learned judges did not have the force of a decision, nor did they undertake to direct the circuit court to dismiss the bill for want of jurisdiction.

It further appears that, upon the filing of the mandate of the court of appeals in the circuit court, the counsel of complainant filed a motion to dismiss the bill, and claimed that the court of appeals had decided that the circuit court had no jurisdiction. This and subsequent to the same effect



were overruled by the circuit court, and the circuit court of appeals denied an application for a writ of mandamus. 32 C. C. A. 611, 54 U. S. App. 781, 90 Fed. Rep. 831.

[432] \*Pending these proceedings, and before the final decree of sale, the Atlantic Trust Company filed an intervening petition, alleging its ownership as trustee of 125 mortgage bonds of the defendant company; that there was the sum of \$40,250 due and unpaid on account of said indebtedness; and praying for an account and for a decree of foreclosure, and that the lien of said trust company should be decreed to be a lien prior to those of the other creditors. As already stated, the circuit court overruled the defendant's demurrer to this intervening petition, and on December 12, 1899, the court entered an order that said intervening petition should be taken *pro confesso*, and appointing a master to ascertain and report the amount and ownership of the outstanding mortgage bonds. And subsequently, on December 15, 1899, the final decree or order of sale was entered, in which the court reserved for further consideration, as between the Atlantic Trust Company and the Bodefield Belting Company, any and all questions arising between them as to the priority of their respective liens. A sale of all the property of the defendant railway company, in pursuance of said decree, was made on February 24, 1900; and, no objections or exceptions to the sale having been filed by any of the parties, on March 26, 1900, the sale was confirmed absolutely, and the master directed to execute a deed for the property so sold by him to the purchasers.

It appears that, under the intervening petitions of other creditors than the complainant, there were involved, before and at the time of the decree of sale, liens and claims against the defendant's property largely in excess of the amount necessary to confer plenary jurisdiction on the circuit court. Jurisdiction having attached under the allegations of the original bill, and the court having proceeded, in a proper exercise of its discretionary power, to appoint a receiver and to authorize a large expenditure of money raised by certificates, in order to protect and preserve the property in its custody, and the court having also, in the exercise of its power as a court of equity, allowed the intervention of other creditors, as between some of whom and the defendant company there was jurisdiction in the court, both as respects diversity of citizenship and [433] amount of claims, \*we think its jurisdiction did not fail by reason of anything that appeared in *ex parte* affidavits filed on behalf of the defendant company, denying the truth of the allegations contained in the original bill in respect to the amount in dispute.

In *Krippendorf v. Hyde*, 110 U. S. 283, 28 L. ed. 148, 4 Sup. Ct. Rep. 30, it was said: "The equitable powers of courts of law over their own process, to prevent abuse, oppression, and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in

the custody of the law. *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470. And when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several states, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls, in *Clarke v. Mathewson*, 12 Pet. 172, 9 L. ed. 1044, a dependent bill."

Circuit Judge Severens, in his opinion in the present case, aptly referred to the case of *Gumbel v. Pitkin*, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379, as containing an elaborate exposition of the principles upon which a court of equity may proceed when the rights of intervening creditors are to be dealt with, and upon which principles the circuit court proceeded in this case.

We fail to perceive any equities in the position of the appellant company. All its creditors, as well the original complainant as the several intervening creditors, have acquiesced in the action of the circuit court, and have availed themselves of the remedy afforded by the sale of the defendant's property. Having failed and declined to accept the opportunity afforded by an interlocutory order to regain possession of its property, by giving a bond to pay such charges as the court should determine \*to be just and prop- [434] er, and not having offered, at last, to pay the claims and liens adjudged to be just and proper, the defendant company seems to us to have suffered no injustice. However this may be, the case is before us only on the question whether the circuit court had jurisdiction to entertain the said cause and render the decrees so appealed from, and this we answer in the affirmative, and direct the appeal to be dismissed, with costs.

Let it be so certified.

UNITED STATES RUBBER COMPANY,  
L. Candee & Company, and Metropolitan  
National Bank, *Petitioners*,

v.

AMERICAN OAK LEATHER COMPANY  
*et al.*

(See S. C. Reporter's ed. 434-453.)

*Creditors' bills—fraudulent preferences by insolvent corporation—right of creditors to share pro rata.*

*Preferences by confessed judgments and assignments, which are constructively, but not act-*  
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ually, fraudulent against other creditors of an insolvent corporation, though set aside in a suit by the other creditors, will not preclude those who have taken the invalid preferences from sharing with the unsecured creditors *pro rata*.

[No. 150.]

*Argued January 25, 28, 1901. Decided May 13, 1901.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision reversing a decree setting aside fraudulent preferences to creditors of an insolvent corporation. *Reversed*.

See same case below, 37 C. C. A. 599, 96 Fed. Rep. 891.

Statement by Mr. Justice Shiras:

On September 11, 1896, the American Oak Leather Company, a corporation of the state of Ohio, filed in the circuit court of the United States for the northern district of Illinois a bill of complaint against C. H. Fargo & Company, a corporation of the state of Illinois; the United States Rubber Company, a corporation of the state of New Jersey; L. Candee & Company, \*a corporation of the state of Connecticut; John W. Arnold, United States marshal for the northern district of Illinois, and the Metropolitan National Bank, a national banking association.

[435] The bill alleged that the complainant was a judgment creditor of C. H. Fargo & Company, an insolvent corporation; that judgments by confession against said C. H. Fargo & Company had been entered in the circuit court of the United States on August 6, 1896, for large amounts in favor of the United States Rubber Company and L. Candee & Company; that, on the same day, an assignment was made by C. H. Fargo & Company of all its book accounts to said rubber companies; that a judgment by confession had been entered on August 6, 1896, for a large amount, in favor of the Metropolitan National Bank, and on the same day deeds to said bank had been executed by Fargo & Company, conveying its factory at Dixon, Illinois; that executions had been issued on said judgments and levied upon all the tangible assets of C. H. Fargo & Company; that said judgments were illegal because given and taken with intent to defraud the complainant and other creditors of C. H. Fargo & Company. The bill prayed that the said judgments, executions, assignment, and deeds should be set aside, and that the assets of C. H. Fargo & Company should be applied, through a receiver, to the payment of its bona fide creditors.

Subsequently other creditors to a large amount filed intervening petitions, and joined in the complainant's prayer for relief. Answers were filed by the several defendants, denying the allegations of fraud; and thereupon the court referred the case to Henry W. Bishop, as a master in chancery, "to take proofs herein and report the same, together with his conclusions thereon, as to 181 U. S.

the facts only." An order was also entered appointing a receiver, and upon appeal to the circuit court of appeals for the seventh circuit this order was affirmed. 27 C. C. A. 118, 53 U. S. App. 444, 82 Fed. Rep. 248.

On April 17, 1899, after taking a large amount of testimony, and a protracted hearing, the master filed a report, of which the important portions were as follows:

"There was due January 6, 1896, to Candee & Company, upon the notes of C. H. Fargo & Company (given in settlement in November, 1895), the sum of \$44,900, and on the same \*date there was due from the Fargo [436] Company to the United States Rubber Company on open account for proceeds of sale of consigned goods the sum of \$141,537.13.

"It is shown by the testimony, and I so find, that about January 2, 1896, the C. H. Fargo Company, anticipating difficulty in meeting its regular obligations maturing during that month, applied to one Charles L. Johnson, who represented both the Candee Company and the United States Rubber Company, for a loan of \$50,000, representing that the Fargo Company was perfectly solvent, and that this accommodation would relieve it from its temporary embarrassments and enable it to go on with its business.

"This application was granted, and on January 6, 1896, Johnson agreed, acting for L. Candee Company, to lend the Fargo Company the sum of \$50,000 for six months, upon the understanding that this loan and the indebtedness of \$44,900 upon the notes previously given as aforesaid, and the balance due the United States Rubber Company, and which might become due it, should be secured in such way as might be satisfactory to their counsel, Mr. Beale, of the law firm of Isham, Lincoln, & Beale.

"The proposition was accepted on the 6th day of January, 1896, and it was agreed and was arranged between the parties as follows:

"First. That the \$50,000 should be advanced to the Fargo Company by L. Candee & Company, partly on that date and during the succeeding two weeks.

"Second. That the Fargo Company should that day execute and deliver its three judgment notes, one for \$45,000, payable on demand to the order of L. Candee & Company, to secure that company with respect to its liability as indorser or guarantor upon the notes for \$44,900 given previous to January, 1896; one for \$51,500, payable on demand to L. Candee & Company, as collateral security to plain notes of the Fargo Company, which were given as evidence of the advance of \$50,000 then to be made, and one for \$140,000, payable on demand to the order of the United States Rubber Company, as collateral security to the then existing and to any future indebtedness \*of the Fargo Company [437] to the United States Rubber Company as aforesaid.

"Third. That in case the Fargo Company should at any time find it necessary to suspend business it would assign as additional security all its accounts and bills receivable; that it should not give any judgment notes

to other creditors which would impair the security to the Rubber Companies, and that the \$50,000 advance should be used by the Fargo Company in reduction of its general indebtedness as it matured; and

"Fourth. That the four employees of the Fargo Company who were on the board of directors, and also E. A. Fargo, should retire from the board, and there should be elected in their places by the stockholders of the company five persons, to be nominated by said Beale, in whom he had confidence, one of whom should become secretary and treasurer, and that the directors so to be elected at Beal's nomination should not hamper or interfere with the proper carrying on of the ordinary business of the company.

"I find that the attention of the general creditors was never called to this arrangement, and they had no knowledge of it. The Metropolitan National Bank first learned of it at or about the time a judgment note was given it to secure the payment of its claim of \$50,000 as hereinafter stated.

"I find that in pursuance of this arrangement, and on January 6, 1896, a meeting of the board of directors of the C. H. Fargo & Company was had before any change in said board, when a resolution was passed authorizing the borrowing of the \$50,000, the giving of judgment notes, as in said agreement provided for, and assignment of the accounts, bills, and choses in action upon the contingencies agreed upon; and upon the same day the three judgment notes referred to were executed and delivered by Charles E. Fargo, president of the company, Frank M. Fargo, vice president and treasurer, and E. A. Fargo, secretary, and the loan of \$50,000 was perfected, \$10,000 being advanced at the time and the balance of \$50,000 during the succeeding two weeks.

"This action was ratified on the 8th day [438] of January, 1896, \*by the unanimous vote of the stockholders of C. H. Fargo & Company, all the shares being represented.

"I find that in pursuance also of said arrangement, and as a part of it, at a meeting of the stockholders of C. H. Fargo & Company, held January 9, 1896, George C. Madison, Tiffany Blake, Buell McKeever, Frederick B. Fuller, Gilbert E. Porter, Charles E. Fargo, and F. M. Fargo were duly elected directors for the ensuing year.

"The first five, except Blake, were employees in the office of William G. Beale, and said Blake was assistant corporation counsel of the city of Chicago, of which William G. Beale was then corporation counsel, and all five were elected by the stockholders at the suggestion of said Beale. Subsequently, at a meeting of the newly constituted board, at which Charles E. Fargo was re-elected president of the company, Frank M. Fargo was re-elected vice president of the company, and Buell McKeever was elected secretary and treasurer of the company, the by-laws of the company were amended, providing against the giving of judgment notes or preferential security without special authorization of the board of directors.

erential security without special authorization of the board of directors.

"I also find that the change of the board of directors and officers, and the changes of the by-laws of said company, and the resolution thereof authorizing judgment notes and assignments of accounts if necessary, were all for the purpose of giving preferential security to the rubber companies, and the matter was kept secret in order to allow the Fargo Company an opportunity of getting through embarrassments apparently temporary, but not with a fraudulent intent as to the other creditors of the company. The only purpose and object of changing the board of directors as aforesaid, and of amending the by-laws, was to protect the rubber companies against the giving by the Fargo Company of preferential security or judgment notes to other of its creditors which should be superior to the security of the rubber companies.

"I further find that the arrangement as made was carried out in good faith by the parties, and that the directors elected at the suggestion of said Beale took no part in the active management of the Fargo Company after their election, and that \*no stock-[439] holders' or directors' meetings of the Fargo Company were held after January 9, 1896, until August 5, 1896.

"I find that on January 9, 1896, which was the date of the meeting of the new directors, the authorized capital stock of the said corporation of C. H. Fargo & Company was \$400,000 and the debts of the corporation on January 6, 1896, as follows:

Amount owing United States Rubber Company.....	\$141,537 13
Amount owing Candee & Company.....	44,900 00
Amount owing Metropolitan National Bank.....	50,000 00
Amount owing other creditors .....	210,216 20
Total.....	\$446,653 33

"I find that the value of the assets of C. H. Fargo & Company at that time had not been definitely ascertained, but I find, as a matter of fact, as the results of efforts since made in collecting the same in liquidation and from other sources of information disclosed by the testimony, that on the 6th day of January, 1896, the assets of said company were not sufficient to discharge its indebtedness, of which fact the defendants, the rubber companies, are shown to have been ignorant, relying upon the representation of the Fargos that there was a large excess of assets over liabilities. The fact that Johnson, representing the rubber companies, made no detailed examination of the assets of the company, but consented to advance the money which was applied for, is evidence to my mind that he believed in the assurances which were given him by the Fargos of the condition of their company.

"I further find that between January 6, 1896, and August 6, 1896, the new liabilities incurred by said corporation to creditors.



other than the rubber companies and the bank were \$246,660.54 (of which there was due and unpaid on August 6, 1896, \$142,690.95), and that during the same period the Fargo Company paid out more than \$300,000 to its general creditors in the regular course of business, paying substantially all of the indebtedness of January 6, 1896, which was largely to the same persons who are now creditors.

[440] "I further find that between January 6 and August 6, 1896, the Fargo Company continued its business as before, reducing its general indebtedness to a considerable extent with its general creditors; that during said time it paid Candee & Company \$44,900, the amount of its indebtedness prior to January 6, 1896, and \$13,470 on account of the advance of \$50,000 as aforesaid; that during said time it paid to the United States Rubber Company \$15,000 on account of the indebtedness to that company existing January 6, but it also sold consigned goods of that company to the amount of \$24,534.04, of which it remitted only \$5,495.40; and that on August 6, 1896, there was due to the United States Rubber Company the sum of \$142,424.81, and to L. Candee & Company the sum of \$36,530.

"I further find from the testimony that the indebtedness of the Fargo Company, which was incurred after January 9, 1896, up to the time of the entry of judgment upon the judgment notes referred to, was incurred in ignorance of the giving of the judgment notes and the change of directors, and of the change of officers, and of the arrangement existing between the rubber companies and the Fargo Company, and that the amount of the claims that were thus contracted and is still unpaid exceeded \$110,000.

"I find that while Johnson and Sadler, representing the rubber companies, were here from January 2 to January 6, 1896, that it was then agreed that separate books showing sales of consigned goods should be kept, and the proceeds of the sales thereof should be kept in a separate bank account, which was done.

"I find that the advance of \$50,000 on January 6, 1896, and the giving of the judgment notes and security referred to, was the result of an evident feeling upon the part of all the parties to the transaction, and was in the belief and expectation on their part, that through the assistance which was in this way afforded the Fargo Company it would be enabled to continue its business successfully and become ultimately relieved of its financial embarrassment, and that said arrangement was entered into in good faith and without any fraudulent intent.

[441] "I find that the testimony does not show that the parties \*were influenced in making the arrangement aforesaid upon a belief of the insolvency of the Fargo Company at that time, and the conduct of the corporation afterwards and until about the time of the entering up of the judgment notes, in my judgment, clearly indicated the hope and expectation that the Fargo Company would be finally relieved of its troubles."

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"In support of this conclusion I find that in the meantime and between January 6, 1896, and August, 1896, in the regular course of its business the Fargo Company reduced, to a large extent, the indebtedness which existed January 1, 1896, increasing the capacity of their manufacturing business, reducing its stock and discharging, to a large extent, its general liabilities, except with the United States Rubber Company and the Metropolitan National Bank, with an evident purpose and expectation of continuing its business; during which time nothing is shown to have occurred with these parties inconsistent with this theory.

"I find that during this period the general creditors were substantially the same as before, with the exception of the Eagle Tanning Works of Chicago, whose claim of \$2,500.24 has been established, for the goods purchased on credit between April 1, 1896, and July 15, 1896, and Wilder & Company, and the Pfister & Vogel Leather Company, hereinafter mentioned.

"And I also find that during this time upon the letter heads of the C. H. Fargo Company the printed names of the Fargos, treasurer and secretary, appeared as before, without anything to show any change in the construction or management of said corporation, nor were such changes in any way mentioned, or their real condition disclosed.

"I further find that during many years prior to January 6, 1896, the C. H. Fargo Company had been doing business with the Metropolitan National Bank of this city, its banker, resulting in the creation from time to time of a large indebtedness to said bank, which was finally reduced, in the usual course of business, so that on the 5th day of August, 1896, said indebtedness amounted to the sum of \$40,000.

"\*That the Metropolitan National Bank, [442] during the summer of 1896, applied to C. H. Fargo & Company to reduce its indebtedness to it and to finally discharge it by the month of November following.

"I further find that at the same time said bank gave the C. H. Fargo Company said notice, and down to about the 3d or 4th day of August, A. D. 1896, it had no knowledge of any transactions which occurred between it and the rubber companies in the previous month of January, and that it did not know of the change in the board of directors of said C. H. Fargo & Company, or that it had given the rubber companies judgment notes for an indebtedness owing by it to said rubber companies, or of the agreement which had been entered into in respect to the same between it and the rubber companies, or of the action which had been taken by the newly constituted board in pursuance of this agreement.

"I further find that on or about Monday, the 3d day of August, A. D. 1896, Charles E. Fargo, president of the said C. H. Fargo & Company, called at the Metropolitan National Bank, and while there applied to the bank for an additional loan of \$10,000.



"I find that during this interview, or shortly thereafter, the said Charles E. Fargo informed the president of said bank that the said C. H. Fargo & Company had given the rubber companies judgment notes for the amount of its indebtedness to them, and while said C. E. Fargo insisted that the assets of his company were at that time largely in excess of its indebtedness and ample to meet the entire amount thereof, that, owing to the difficulty in making its collections as rapidly as its outstanding paper matured, his company would be obliged to fail unless it received some assistance.

"I find that at the time of said interviews the said C. E. Fargo represented to the president of said bank that the said C. H. Fargo & Company was indebted to him and his brothers for money exceeding \$10,000 which they had borrowed upon their notes for the benefit of the company, and which they had paid over to the company for use in its business, and that said Fargo brothers had put up some bank stock that they owned [443] as collateral \*to said notes, and C. E. Fargo thereupon proposed to said bank that if it would loan said C. H. Fargo & Company \$10,000 in addition to its then existing loan, so that said company could reimburse him and his brothers and enable them to take up said notes, he would procure from the said C. H. Fargo & Company judgment notes for said bank, both for said sum so advanced as aforesaid, and also for notes then remaining due said bank to the amount of \$40,000.

"I further find that said bank acceded to said proposition, and loaned said C. H. Fargo & Company said additional sum of \$10,000, receiving two judgment notes of the Fargo Company for the sum of \$25,000 each, crediting to the account of said C. H. Fargo & Company in said bank said sum of \$10,000.

"I further find that, at the time of the completion of this arrangement with said bank, neither the bank nor its officers nor attorneys had any knowledge of the change of the board of directors of the said C. H. Fargo & Company, or of its by-laws, but the bank did know that the rubber companies, as a part of the final arrangements made, were entitled equally with themselves to enter judgment upon the judgment notes which had been given.

"I further find that neither the complainants herein nor any of the other creditors of the said C. H. Fargo & Company were led to give credit to said company by reason of the transactions had between it and the bank; nor did any of the said parties sell any goods to said C. H. Fargo & Company subsequent to the time when said bank made said \$10,000 loan aforesaid to C. H. Fargo & Company, nor did the said bank in any way participate in or have any knowledge of the change in the by laws of said C. H. Fargo & Company as aforesaid.

"I further find that from about the time when the said judgment notes were given to said bank, as aforesaid, the said bank entered into a stipulation with the rubber companies by which it was agreed that they should unite their efforts to collect their

respective claims against the said C. H. Fargo & Company and should share *pro rata* in whatever proceeds should be derived therefrom.

"\*I further find upon the testimony submitted to and taken before me in connection with this branch of the case, that the defendant, the Metropolitan National Bank, is not shown to have been guilty of any actual fraud as against the complainants or the other creditors of C. H. Fargo & Company by reason of any of its transactions with the said defendants, C. H. Fargo & Company or the said rubber companies.

"I further find that August 6, 1896, before entry of the judgment in favor of the rubber companies as set forth in the pleadings, C. H. Fargo & Company, by its president, C. E. Fargo, duly assigned to the United States Rubber Company all the accounts and bills receivable of the Fargo Company as further security for the indebtedness to the rubber companies, pursuant to and in accordance with the agreement made in January, 1896.

"I find nothing in the testimony which has been taken before me upon this reference, which so changes the record which was before the court upon the hearing of the application for the appointment of a receiver as to lead me to a conclusion different from that announced by the court at that time; indeed, the effect of the testimony, in my judgment, is to explain and strengthen the conclusion then expressed by the court, that there was no fraud in fact or want of good faith shown in the conduct of any of the defendants in respect to the transactions complained of; and upon a careful examination of the whole record and testimony I so find and report."

Exceptions filed by the respondents were overruled, and the report was in all respects confirmed.

On May 4, 1899, the circuit court, per Circuit Judge Grosscup, entered a decree setting aside the preferences complained of in the bill, as "fraudulent in law (although not at the time believed by the parties to be such, but, on the contrary, believed to have been within their rights) as against the other creditors of C. H. Fargo & Company;" and directing the assets in the hands of the receiver, amounting to about \$111,000, to be distributed *pro rata* among the creditors, including the defendants. An appeal and a cross appeal were taken to the circuit court of appeals, and that court, on October 3, 1899, reversed the decree of the circuit court in so far as it permitted \*the rubber com-[445] panies and bank, defendants, to share equally with other creditors in the fund to be distributed.

Thereupon this court upon the petition of the rubber companies and the Metropolitan National Bank, and the cross petition of the complaining creditors, allowed a writ of certiorari to the circuit court of appeals of the seventh circuit.



**Mr. Henry S. Robbins** argued the cause, and, with *Messrs. George A. Follansbee* and *Edward S. Isham*, filed a brief for petitioners:

The master's finding that there was no actual fraud in the preferences should be accepted as presumptively correct, and not be set aside unless clearly wrong.

*Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237.

The conditional promise to assign by way of preference, should the company find it necessary to suspend business, was valid.

*Smith v. Craft*, 17 Fed. 705; *Fechheimer v. Baum*, 43 Fed. 719. See also *National Park Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524.

The rights of the parties and the validity of preference acquired under the contract to prefer should be fixed as of January. Performance in August should relate back to the prior legal promise.

*National Park Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524; *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; *Douglass v. Vogelcr*, 6 Fed. 53.

The position of the circuit court of appeals, that secrecy kept for the purpose of enabling Fargo & Co. to outlive embarrassments was fraudulent because it gave rise to a fictitious credit, is opposed to the Illinois law.

*Hegeler v. First Nat. Bank*, 129 Ill. 157, 21 N. E. 812; *Field v. Ridgely*, 116 Ill. 424, 6 N. E. 156.

As respects even preferential securities, for the recording of which the Illinois law makes provision, mere intentional withholding from record is not *per se* fraudulent.

*Field v. Ridgely*, 116 Ill. 424, 6 N. E. 156; *Haas v. Sternbach*, 156 Ill. 44, 41 N. E. 51.

Intentional secrecy respecting a preference, without "fraudulent intent as to other creditors," does not make it constructively fraudulent.

*Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235.

An embarrassed corporation has the right to try to outlive its financial difficulties, and, for that purpose, to give securities which may ripen into preferences in case of failure.

*Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621; *Sutton Mfg. Co. v. Hutchinson*, 11 C. A. 320, 24 U. S. App. 145, 63 Fed. 496.

A change of directors solely for the purpose of assuring the performance of an agreement by a going corporation that a preferential security shall not be impaired by preferential judgments to other creditors is not constructively fraudulent.

*Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Leavenworth County Comrs. v. Chicago, R. I. & P. R. Co.* 134 U. S. 704, 33 L. ed. 1072, 10 Sup. Ct. Rep. 708.

The stockholders of a corporation can, in 181 U. S.

their discretion, select as its directors some of its creditors. There is no inconsistency in one's being at once a creditor and a director. The law permits a director to deal with his company and thereby become its creditor.

*Harts v. Brown*, 77 Ill. 226; *Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621.

The fact that the newly elected directors were clerks in the office of the attorney for the rubber companies is not illegal, nor does it justify the charge that the directors are "controlled" in any improper sense.

*Leavenworth County Comrs. v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Higgins v. Lansingh*, 154 Ill. 357, 40 N. E. 362; *National Bank v. Allen*, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545.

Nor will the law assume, in the absence of proof, that these directors (although elected upon the nomination of Mr. Beale) were to, or would, act illegally or fraudulently.

*Allen v. Wilson*, 28 Fed. 677; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 91 Fed. 299.

The tendency of the courts is not to hold transfers to creditors constructively fraudulent, but to make each transfer depend upon the actual intention therein.

*Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563; *Huntley v. Kingman & Co.* 152 U. S. 527, 38 L. ed. 540, 14 Sup. Ct. Rep. 688; *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196; *Jewell v. Knight*, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. Rep. 193.

The money for which the notes held by the Michigan bank were given having been borrowed from and used in the business of the company, the latter is to be regarded, especially on the question of fraud, as the real debtor to the Michigan bank.

*Poole v. West Point Butter & Cheese Asso.* 30 Fed. 513; *West v. Hanson Produce Co.* 6 Colo. App. 467, 41 Pac. 829.

A creditor who attempts to take a preference at the time when and in a state where preferences are lawful, with no conscious purpose to harm either present or future creditors, will not be denied a right to share *pro rata* in the insolvent estate because the particular preference he takes is adjudged contrary to law.

*White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 677, 9 Sup. Ct. Rep. 309; *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 36, 37 L. ed. 68, 13 Sup. Ct. Rep. 236; *Brown v. Morristown Co-operative Stove Co.* (Tenn.) 42 S. W. 161; *Comer v. Tabler*, 44 Fed. 467; *Re Reed*, 3 Fed. 798; *Re Cadwell*, 17 Fed. 693; *Phelps v. Curtis*, 80 Ill. 109; *Lobstein v. Lehn*, 120 Ill. 549, 12 N. E. 68; *Riggs v. Murray*, 2 Johns. Ch. 565.

All the facts now before this court were disclosed upon the application for the receiver by petitioners' answers. They contested his appointment to their utmost.



Under these circumstances their property ought not to be diminished by charging against it the costs of an improper receivership for which respondents are responsible.

*Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168.

Mr. **Jacob Newman** argued the cause, and, with Messrs. *George W. Northrup*, *S. O. Levinson*, and *Benjamin V. Becker*, filed a brief for respondents:

When an agreement exists by which a chattel mortgage or kindred lien is to be kept off the record, or otherwise kept secret, such agreement vitiates the security.

*Lehman v. Van Winkle*, 92 Ala. 443, 8 So. 870; *Blennerhassett v. Sherman*, 105 U. S. 107, 26 L. ed. 1082; *Walton v. First Nat. Bank*, 13 Colo. 265, 5 L. R. A. 765, 22 Pac. 440; *Goll & F. Co. v. Miller*, 87 Iowa, 426, 54 N. W. 443; *Liddle v. Allen*, 90 Iowa, 738, 57 N. W. 603; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; *Sanger v. Guenther*, 73 Wis. 354, 41 N. W. 436; *Standard Paper Co. v. Guenther*, 67 Wis. 101, 30 N. W. 298; *Blakeslee v. Rossman*, 43 Wis. 116; *Central Nat. Bank v. Doran*, 109 Mo. 40, 18 S. W. 836; *Thompson v. Van Vechten*, 27 N. Y. 568; *Parshall v. Eggert*, 54 N. Y. 23; *Karst v. Gane*, 136 N. Y. 320, 32 N. E. 1073; *Stephens v. Perrine*, 143 N. Y. 477, 39 N. E. 11; *Crippen v. Jacobson*, 56 Mich. 386, 23 N. W. 56; *Fearey v. Cummings*, 41 Mich. 383, 1 N. W. 946; *Cummings v. Feary*, 44 Mich. 39, 6 N. W. 98; *Wallen v. Rossman*, 45 Mich. 333, 7 N. W. 901; *Shipman v. Seymour*, 40 Mich. 274; *Roe v. Meding*, 53 N. J. Eq. 350, 30 Atl. 587, 33 Atl. 394; *Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444; *Hungerford v. Earle*, 2 Vern. 261; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Scrivenor v. Scrivenor*, 7 B. Mon. 374; *Bank of U. S. v. Housman*, 6 Paige, 526; *Coates v. Gerlach*, 44 Pa. 43; *Hafner v. Irwin*, 23 N. C. (1 Ired. L.) 490; *Hildeburn v. Brown*, 17 B. Mon. 779; *Neslin v. Wells, F. & Co.* 104 U. S. 428, 26 L. ed. 802; *Hoagland Bros. v. Wilson*, 15 Neb. 320, 18 N. W. 78; *Steele v. Coon*, 27 Neb. 586, 43 N. W. 411; *Barker v. Barker*, 2 Wood, 87, Fed. Cas. No. 986.

Personal conscious intent to defraud is not always necessary to constitute actual fraud.

*Hilliard v. Cagle*, 46 Miss. 309; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080; 2 Bigelow, Fraud, pp. 378, 379; Wait, Fraud, Conv. § 8; Pierce, Fraudulent Mortg. of Mdse. p. 5, § 3.

By the January scheme the rubber companies in fact and in equity usurped secret control of the Fargo Company, and thereby assumed the fiduciary relation of directors.

*Stockton v. Central R. Co.* 50 N. J. Eq. 75, 17 L. R. A. 107, 24 Atl. 964; *Sidell v. Missouri P. R. Co.* 24 C. C. A. 216, 51 U. S. App. 1, 78 Fed. 726; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218. See also *Ervin v. Oregon R. & Nav. Co.* 23 Blatchf. 517, 27 Fed. 625; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 30 N. E. 667; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac.

111; *Meyer v. Staten Island R. Co.* 7 N. Y. S. R. 245; 1 Beach, Corp. 276; *Smith v. Los Angeles Immigration & Land Co-op. Asso.* 78 Cal. 289, 20 Pac. 677; *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 106; *Bill v. Western U. Teleg. Co.* 16 Fed. 14; *Copeland v. Johnson Mfg. Co.* 47 Hun, 235; *Davis v. Memphis City R. Co.* 22 Fed. 883; *Sellers v. Phœnix Iron Co.* 13 Fed. 20; *Currier v. New York, W. S. & B. R. Co.* 35 Hun, 355; *Jackson v. McLean*, 36 Fed. 213.

Having assumed the fiduciary relation of directors, the burden is on the rubber companies to show that they acted in good faith.

*Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 496; *Wilkinson v. Bauerle*, 41 N. J. Eq. 645, 7 Atl. 514.

The rubber companies are legally responsible for and chargeable with the fraudulent representations and other deceits practised by the Fargos after January 6, 1896.

*Walton v. First Nat. Bank*, 13 Colo. 265, 5 L. R. A. 765, 22 Pac. 440; *Bank of Commerce v. Allen*, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545; 1 Bigelow, Fraud, 247; *Wolfe v. Pugh*, 101 Ind. 305; *Bennett v. Judson*, 21 N. Y. 239; Mechem, Agency, § 739.

Upon the insolvency of a corporation, the officers and directors cannot so use its assets as to prefer themselves over other creditors.

*Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 496.

The advancement of \$10,000 by the Metropolitan National Bank to the Fargos, and the inclusion of the same in judgment notes, was an active, actual fraud which infects the bank's entire claim and renders it fraudulent as to the other creditors.

*Atwater v. American Exchange Nat. Bank*, 152 Ill. 605, 38 N. E. 1017.

The decree of the circuit court of appeals holding that the rubber companies and the bank should be postponed until the claims of all other creditors have been paid in full is correct, and should be affirmed.

*Bacon v. Harris*, 62 Fed. 105; *Simon v. Openheimer*, 20 Fed. 556. See also *Rumsey v. Town*, 20 Fed. 558; *Argall v. Seymour*, 4 McCrary, 58; *Gill v. Griffith*, 2 Md. Ch. 281; *Goll & F. Co. v. Miller*, 87 Iowa, 426, 54 N. W. 443; *Root v. Harl*, 62 Mich. 423, 29 N. W. 29; *Falker v. Linehan*, 88 Iowa, 641, 55 N. W. 503; *Liddle v. Allen*, 90 Iowa, 741, 57 N. W. 603.

Mr. **Frederick A. Smith** also argued the cause, and, with Messrs. *William J. Manning* and *Horace Kent Tenney*, filed a brief for respondents:

The natural and logical effect of the January arrangement and the conduct of the parties thereunder and in execution thereof was to mislead and deceive the public and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known, and therefore the whole scheme was fraudulent as to subsequent creditors,—as much so as if it had been contrived from that motive and for that object.

*Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080; *Hilliard v. Cagle*, 46 Miss. 309.



If a creditor obtains a preference for the purpose of aiding his debtor to hinder and delay other creditors, and for the purpose of getting security for himself, the act of preference will be regarded as fraudulent and void.

*Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434; *Strohm v. Hayes*, 70 Ill. 41.

Although an assignment of a property right be made upon a valuable and ample consideration, without intention to defraud anyone, yet if there be a secret trust reserved, not disclosed by the writing, the law will treat the transaction as lacking the element of good faith, and conclusively infer fraud.

*Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655.

A debtor in failing circumstances is only allowed to place his property beyond the reach of his creditors by making a general assignment of it, when he does so for the benefit of the creditors, by devoting it unreservedly to the payment of his debts, and not with a view to his advantage in delaying until a favorable time the appropriation of the property for such purpose.

*Phelps v. Curtis*, 80 Ill. 113.

Fraud may consist as well in a *suppressio veri* as in a *suggestio falsi*.

*Lockridge v. Foster*, 4 Seam. 573.

[445] \*Mr. Justice Shiras delivered the opinion of the court:

This was a case in which the circuit court of the United States for the northern district of Illinois, sitting in chancery, was called upon to administer and distribute the assets of an insolvent corporation. The jurisdiction of the court was invoked by a bill of complaint filed on behalf of unsecured creditors seeking to set aside as fraudulent certain preferences held by the defendants. Pending that controversy, a receiver was appointed, and ultimately a fund was realized for distribution amounting to about \$111,000.

The contested questions raised by the bill, intervening petitions, and answers were referred to a master to take proofs and report the same "together with his conclusions thereon as to the facts only."

After stating his findings of facts, the master thus stated his conclusions thereon:

"I find nothing in the testimony which has been taken before me upon this reference, which so changes the record which was before the court upon the hearing of the application for the appointment of a receiver as

[446] to lead me to a conclusion different \*from that announced by the court at that time; indeed, the effect of the testimony, in my judgment, is to explain and strengthen the conclusion then expressed by the court, that there was no fraud in fact or want of good faith shown in the conduct of any of the defendants in respect to the transactions complained of; and upon a careful examination of the whole record and testimony I so find and report."

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The circuit court overruled exceptions taken to the findings and conclusion of the master, and confirmed his report.

The conclusions of the circuit court were thus expressed in the opinion of Circuit Judge Grosscup:

"After as careful an examination of the evidence as I have been able to give to it, I have come to the following conclusions:

"First. That the intervening creditors have not clearly proven that the rubber company and the Candee Company had any intention to commit a fraud upon the other creditors at the time of the arrangement of January, 1896; on the contrary, I think the weight of proof shows that both these companies believed that, with the help they were about to give Fargo & Company, that company would be able to weather the storm. I am, therefore, of the conclusion that there was no intentional fraud committed.

"Second. The proof on the part of the interveners has not clearly shown that the \$10,000 borrowed from the Metropolitan National Bank upon which the Fargos were personally liable as indorsers did not go into the business of and to the benefit of the Fargo Company; on the contrary, the proof clearly shows that, so far as the Metropolitan National Bank knew, the money had gone to the company. Under these circumstances I see no reason why the Metropolitan National Bank had not a right to advance the \$10,000 additional money. . . .

"Fourth . . . Candee & Company, the rubber company, and the bank would, undoubtedly, in January or in August, have had the rightful power to have obtained the judgment notes actually taken. Had they taken judgment thereon, there can be no doubt but that their preference would have been sustained. The vice in the conduct of the rubber company \*and the Candee Com-[447] pany consisted in their attempting to tie up the corporation against the power to give like preferences in favor of others. It was, in a certain sense, a new attempt; it was in the line of efforts of creditors to secure themselves; it was, on the whole, not ungenerous to Fargo & Company; and did not, considering their rights to have taken judgment notes, and the fact that none of the other creditors attempted to obtain such notes, or any other preference, before the general crash, do any actual injury to the other creditors.

"On the whole, I think the interests of justice will be best subserved by placing them in the class with the other creditors, and compelling them to pay the general costs of this litigation."

In the opinion of the circuit court of appeals there does not appear to have been made any serious attempt to overrule or substantially modify the master's findings of facts; but the conclusion of the circuit court permitting the defendants to participate in a *pro rata* distribution of the fund was not approved, and the decree in that particular was reversed by a majority of the court.

In his dissenting opinion Mr. Justice

Brown thus expressed his views on the questions of fact:

"I find no testimony to satisfy me that an actual fraud upon the general creditors was intended. . . . The evidence satisfies me that there was a bona fide attempt to assist the Fargo Company in continuing its business, with the hope of ultimately pulling it through, and that, if this attempt had been successful, it would have redounded greatly to the interest of the general creditors. It was natural, at least, that in making this attempt the rubber companies should have endeavored to secure themselves, not only for their immediate outlay of \$50,000, but for their prior debts. In palliation of the secrecy which was held to make this constructively fraudulent, it may be said that publicity doubtless would have destroyed the entire scheme of raising money to carry on the business." [37 C. C. A. 614, 96 Fed. Rep. 906.]

Nor has our own examination of the evidence led us to disapprove of the findings of facts by the master, confirmed and adopted by the circuit court.

[448] \*What judgment, then, ought a court of equity to render upon such an ascertained state of facts?

The view of the majority of the court of appeals was that the defendants in the court below should not be allowed to participate in the fund until all the other creditors had been paid in full. The result in the present case and in most similar cases would be that the defendants would get nothing, as the fund would not reach them. This would be a striking exercise of power by a court of equity. Thereby the advantages obtained by remedies on the law side of the court would be transferred to the complainants on its equity side; the preferred would become the unpreferred creditors, and the unpreferred become the preferred creditors.

The common law recognizes in every man the right to dispose of his property as he pleases. If he becomes insolvent, he may pay one creditor, and leave another unpaid. He may secure one, and not another, by a transfer of assets. Such a condition of things, when left uncontrolled, naturally resulted in great abuses. Under cover or pretense of paying or securing one set of creditors, property actually procured from another would be withdrawn from the reach of the latter. Yet the only remedy afforded by the common law was in the principles of the statute of 13 Elizabeth, chap. 5, which have been substantially re-enacted in the various states of the Union. Under those principles a collusive transfer placing the property of a debtor out of the reach of his creditors while securing to him its beneficial enjoyment would be invalid. But an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency and the effect of the preference be to delay or disappoint his other creditors. *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237.

The right of an insolvent debtor to prefer one creditor to another exists in the state of

Illinois to its fullest extent, and the giving of judgment notes is recognized as a legitimate method of preference. *Tomlinson v. Matthews*, 98 Ill. 178; *Field v. Ridgely*, 116 Ill. 424, 6 N. E. 156.

The abuses which are possible in such a state of affairs were among the causes that led to the enactment of bankrupt laws \*for-[449] bidding preferences by insolvent debtors. But, in the absence of such laws, as in the present case, if a remedy is sought in a court of equity against fraudulent preferences, it must be on allegation and proof of a design to defraud and delay the complaining creditor. It does not suffice to show a mere case of a preference intended by an insolvent debtor in paying or securing a bona fide creditor, even though the latter was well aware that the natural effect of the preference could work a detriment to other creditors. This was well known to the learned counsel who drew the bill of complaint in the present case, and accordingly we find therein charges that C. H. Fargo & Company, the United States Rubber Company, and L. Candee & Company entered into a fraudulent agreement in and by which it was provided that said foreign corporations should be immediately placed in control of said C. H. Fargo & Company, and have sole and exclusive power and authority to manage, control, and direct the business and affairs of C. H. Fargo & Company; that said transfer of control should be effectuated secretly, and to be kept secret, so as to enable C. H. Fargo & Company to continue apparently doing business for a limited time, and that said C. H. Fargo & Company should continue during said period to purchase merchandise on credit, and should turn the same or the proceeds thereof over to the said foreign corporations, and should secure and prefer said foreign corporations out of the assets and property then owned by C. H. Fargo & Company, and out of the property and merchandise which should be thereafter purchased by C. H. Fargo & Company, to the exclusion of the other creditors, and to defraud, hinder, and delay the other creditors; and that it was not intended that C. H. Fargo & Company should bona fide continue business, but, on the contrary, it was intended that they should continue in business for a limited time only, and only for the purpose of consummating said fraudulent agreement. The bill further alleges that said agreement was carried out; that a large amount of merchandise was purchased on credit from other creditors, and that finally, by means of judgment notes and transfers of accounts, the entire assets of C. H. Fargo & Company were levied on for the benefit of the secured creditors; \*that the[450] claims of the said rubber companies and of the Metropolitan National Bank were considerably less than the amount for which judgments were severally confessed in their favor, and that therefore said judgments so confessed were absolutely null and void, etc.

Without pursuing in further detail the allegations of the bill, it may be conceded that, if satisfactorily sustained by evidence, they would have justified the conclusion that the



transactions between C. H. Fargo & Company and the defendants constituted, not an agreement for the purpose of securing bona fide creditors, but a conspiracy to hinder, delay, and defraud the unsecured creditors of C. H. Fargo & Company. But, as already stated, and as found by the master and the circuit court, these incriminating allegations were not sustained, and the conclusion of the master, of the circuit court, and of the dissenting justice of the circuit court of appeals was that no fraud upon the general creditors was intended or actually carried into effect.

The theory of the court of appeals, as forcibly expressed in the opinion of Circuit Judge Woods, would seem to be an application to the facts of the case of the principles of the bankrupt law, with its feature of forbidding preferences. It overlooks, as we think, the legal right of creditors to secure themselves by legal remedies, even though they may result in hardship and loss to others. In stating that the rubber companies were guilty of fraud in fact, we think the circuit court of appeals was not borne out by the findings of the master and of the circuit court, nor by the facts as they appear to us; and in holding that, as against other creditors, they and the Metropolitan National Bank should not be allowed to share in the fund for distribution, there was error.

If, in the agreement between C. H. Fargo & Company and the preferred creditors, and the giving and taking of the preferences, there was no actual fraud upon the other creditors intended, it may not be easy to clearly state the grounds on which a court of equity may deprive the defendants in the bill of the legal advantages thus obtained.

[451] Still, it has often been held that permitting personal property, "like a stock of goods, to remain in the possession of an insolvent merchant as a basis for credit, however rightfully intended, is forbidden by the policy of the law. And we adopt the view of the circuit court, that "while the policy of the law permits preferences, and such preferences as are necessarily unknown to others than those concerned, it does not permit any device which prevents the debtor from giving a like advantage to his other creditors, if he so wishes, unless such device is put in the form of a mortgage or other instrument perpetually open to inspection upon the public records. . . . The device [resorted to] accomplished for the Fargos and the favored creditors all that a secret chattel mortgage, with possession and power of sale remaining in the mortgagor, could have accomplished, and must therefore be treated in equity [upon all considerations of justice and reason] as such a mortgage would be treated. . . . The judgment notes themselves would not have been a fraud in law; the assignment of the accounts or of the plant at Dixon would not themselves have been a fraud in law; but connected, as they were, with the other advantages obtained,—namely, deprivation of the Fargos of all further power, with permission to retain possession of the goods and reap the profits of their trade, a scheme on the whole under which a

dishonest trader could effectually shelter himself,—they are, in my judgment, within the plain prohibitions of the law,"—citing *Robinson v. Elliott*, 22 Wall. 513, 22 L. ed. 758.

The decree of the circuit court, while depriving the rubber companies and the Metropolitan National Bank of the prior liens created by the confessed judgments and assignments, placed them in the class with the other creditors, and entitled to share ratably in the distribution of the fund in court.

Mr. Justice Brown, in his dissenting opinion in the circuit court of appeals, thus expressed the same view:

"Upon the whole it does not seem to me that such a case of fraud is made out as authorizes the court to postpone the claims of the preferred creditors to those of the general creditors, and thereby practically to confiscate them; and that there is no sound reason for departing from the general rule laid down in the Supreme Court in *White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 677, 9 Sup. Ct. Rep. 309, and in *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 36, 37 L. ed. 68, 13 Sup. Ct. Rep. 236, wherein the preferred creditors were permitted, after their security had been set aside, to stand upon an equality with the general creditors."

The case of *White v. Cotzhausen* arose under the voluntary assignment act of the state of Illinois, and it was held that creditors who had attempted to secure an illegal preference of their debts by means of a conveyance to them of the property of their debtor when insolvent, to the exclusion of other creditors, were not thereby debarred, under the operation of the statute, from participating in a distribution, under that act, of all the debtor's property, including that illegally conveyed to them. The circuit court held that such illegally preferred creditors should be postponed in the distribution, but this court said, per Mr. Justice Harlan:

"We are not able to assent to this determination of the rights of the parties; for the mother, sisters, and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempts to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended by the statute to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors."

A similar view prevailed in *Streeter v. Jefferson County Nat. Bank*, and it was held that where a creditor of the bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt, and the levy was afterwards set aside as an illegal preference within the purview of the bankrupt act, in consequence of knowledge of the debtor's condition by the plain-

tiff's attorney, that the creditor was not thereby precluded from proving his debt against the bankrupt.

[453] There is a wide difference between the case of a fraud *ab initio*,—such for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged \*debtor from the reach of his bona fide creditors,—and the case of an attempt by bona fide creditors to secure preferences for themselves, but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case a court of equity will not declare a forfeiture of just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors.

We think the present case is one in which the fundamental rule, that equality is equity, may properly be applied, and that will result in avoiding the attempted preferences and in permitting all the creditors to share ratably in the distribution of the fund in the hands of the receiver.

*The decree of the Circuit Court of Appeals is reversed, with costs, and that of the Circuit Court is affirmed.*

Mr. Justice **Brown** did not take part in the decision of the case.

DISTRICT OF COLUMBIA, *Plff. in Err.*,  
v.

CAMDEN IRON WORKS.

(See S. C. Reporter's ed. 453-464.)

*Covenant—omission of corporate seal—signatures and seals of commissioners of District of Columbia—contract partly performed—waiver of further performance—interest.*

1. The omission of the seal of the District of Columbia from a contract which the commissioners executed as for the corporation, with their signatures and seals, will not prevent the instruments from binding the corporation as a specialty, although the commissioners had adopted a corporate seal which had not at that time been generally used, since they could adopt for the time being any seal they chose for the corporation, whether intended to be permanently used or not.
2. It is competent to show by parol that a

contract was finally executed and delivered at a date subsequent to that shown on its face.

3. An action of covenant on a contract to recover the price of articles delivered under it may be brought, although there has not been full performance, where that which has been delivered has been accepted in part performance, and further performance has been waived.
4. Fines or penalties for delay or failure to deliver articles under a contract cannot be recovered if strict performance by plaintiff has been prevented or waived by defendant.
5. Interest on the price of articles delivered in part performance of a contract, when no allowance is made for penalties or forfeitures and further performance is waived, is not to be limited to the period after suit was brought.

[No. 172.]

*Submitted March 7, 1901. Decided May 13, 1901.*

**I**N ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment in an action of covenant for the price of articles delivered under a contract. *Affirmed.*

See same case below, 15 App. D. C. 198.

Statement by Mr. Chief Justice **Fuller**:

\*This was an action of covenant brought in [454] the supreme court of the District of Columbia by the Camden Iron Works, a corporation created under the laws of the state of New Jersey, against the District of Columbia, to recover the price of certain iron pipe manufactured for and delivered to defendant by plaintiff in pursuance of a contract under seal. Several pleas were interposed, and among them the plea of *non est factum*, and the plea of the statute of limitations of three years. To the latter plea a demurrer was sustained, and issue was joined on the others. The case went to trial and resulted in a verdict in favor of the plaintiff below for \$11,044.16, with interest from February 27, 1888. A motion for new trial having been overruled, judgment was entered on the verdict, whereupon defendant carried the case to the court of appeals of the District, where the judgment below was affirmed. 15 App. D. C. 198. This writ of error was then sued out.

The contract bore date June 29, 1887, and, by its terms, purported to be made by the District of Columbia of the first part, and the Camden Iron Works, by Walter Wood, president, of the second part. It concluded as follows:

In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and

NOTE.—On oral evidence as applicable to written contracts—see notes to *Bradley v. Washington, A. & G. Steam Packet Co.* 10 L. ed. U. S. 772, and *Fire Ins. Asso. v. Wickham*, 35 L. ed. U. S. 860.

On waiver of provisions in contract—see note to *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551.

On prevention of performance of contract as

an excuse for nonperformance—see notes to *United States v. Peck*, 26 L. ed. U. S. 46, and *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 40 L. ed. U. S. 515.

As to effect of intervening impossibility to perform as a relief from contract obligations—see *Stewart v. Stone* (N. Y.) 14 L. R. A. 215, and note.



William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled "An Act Providing a Permanent Form of Government for the District of Columbia," approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) William B. Webb, [L. S.]

(Signed) S. E. Wheatley, [L. S.]

(Signed) William Ludlow, [L. S.]

Commissioners of the District of Columbia.

(Corporate seal Camden Iron Works.)

(Signed) Walter Wood,

Pres't Camden Iron Works.

[455] \*The contract was proved and offered in evidence, but its admission was objected to by defendant on the ground that it was not under the corporate seal of the District of Columbia. The objection was overruled, and defendant excepted. The evidence showed that no action was taken by the temporary board of commissioners appointed under the act of Congress approved June 20, 1874, looking to the adoption of a corporate seal for the District, and none by the permanent board appointed under the act of Congress of June 11, 1878, until September 23, 1887, when the board passed an order that the seal of the District of Columbia, as adopted by an act of the legislative assembly of August 3, 1871, be placed in the official charge and custody of the secretary of the board; and it further appeared that this seal was not generally used until after the contract had been entered into, but was affixed to deeds conveying real estate, to bonds and securities, and, in some cases, to tax deeds. Plaintiff further proved that the contract was not in fact executed and delivered by the commissioners before August 4, 1887. The evidence to this effect was objected to by defendant, the objection overruled, and exception taken.

The opinion of the court of appeals further states the facts as follows:

"The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, 'within 136 days after the date of the execution of the contract; one half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887.' For failure to deliver the pipes within the time thus fixed, the contract provided that there should be deducted from the contract price, as in said contract specified, 1 per cent of the contract price for all delinquent articles for each and every week day that they remained delinquent.' There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract 'the sum of \$10 *per diem* for the same period estimated as liquidated and fixed damages to the District.'

"In the contract there was a provision [456] made for inspecting 'the iron pipes and 'to determine whether there was any reason for 181 U. S.

rejection, prior to delivery.' Payments were to be made after August 1, 1887, for all pipe 'received and accepted in proper order and condition, less 20 per cent of the amount found due, to be reserved until the satisfactory completion of the contract.'

"There appears to have been a suspension in the execution of the contract, owing to misunderstandings as to the qualities of the work, and the inspection thereof; and consequently, but a small proportion of the pipe was delivered prior to November 30, 1887. But after that date, pipe worth \$11,404.09, at contract rates, according to estimate made, was delivered to and accepted by the District of Columbia, and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District of Columbia was \$16,335.87, on which there was paid in cash \$5,291.71, by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract; and the balance, \$11,044.16, was more than counterbalanced by the fines and penalties charged up by the defendant for nondelivery of the pipe within the time specified in the contract. It was for this balance of \$11,044.16 with interest thereon from the 27th of February, 1888, that this action was brought. There is no pretense that there was any demand made by the defendant for any more or other quantity of pipe than that delivered under the contract and which was refused to be delivered by the plaintiff. On the contrary, on November 30, 1887, when Captain Symons, the assistant engineer commissioner of the District, requested that no more pipe should be cast for delivery under the contract, there remained to be cast about 340,000 pounds, on which the profits to the plaintiff, at contract prices, would have been about \$1,300. After the plaintiff's letter of November 30, 1887, assenting to the cancellation of the contract, *as to all pipe not then manufactured*, provided all pipe then manufactured should be taken and paid for at contract rates, without deductions, and Captain Symons's reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe, at contract rates, actually shipped to the defendant, was \$11,404.16. \*It was for this amount that the verdict was rendered, with interest, and without any allowance or deductions for forfeitures or penalties for nondelivery of pipe within the time prescribed by the terms of the contract."

Certain instructions to the jury were requested and given by the court on plaintiff's behalf. Instructions were also asked on behalf of defendant, and refused. To the rulings of the court in granting the instructions given for plaintiff, and in refusing the instructions asked for defendant, defendant duly excepted. The court also charged the jury generally, to which charge or any part thereof no exceptions were taken.

The errors assigned were to the effect that an action of covenant would not lie on the contract because it was not under the seal of the District of Columbia; that it was not



competent for plaintiff below to show by parol evidence that the contract was finally executed and delivered by defendant at a date subsequent to that mentioned in the contract itself, from which latter date the time allowed for the manufacture and delivery of the pipe should be computed; that the manufacture and delivery of the pipe within the time mentioned constituted a condition precedent, and that no recovery could be had on the contract for any pipe delivered to and accepted by defendant after the time specified for delivery; that if plaintiff was entitled to recover for pipe delivered after the times mentioned, defendant was entitled to offset the penalties against the contract price as liquidated damages; and that no interest ought to have been allowed in the recovery.

**Messrs. Andrew B. Duvall and Clarence A. Brandenburg** submitted the cause for plaintiff in error:

The commissioners of the District of Columbia are not the municipality, and had only such authority in the premises as was conferred upon them by Congress.

*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

A contract on behalf of the corporation by an agent who affixes his private seal has the effect of binding the corporation only by simple contract.

*Bank of the Metropolis v. Guttschlick*, 14 Pet. 29, 10 L. ed. 340; *Tiedeman, Mun. Corp.* 165; 1 Dill. Mun. Corp. § 452; 21 Am. & Eng. Enc. Law, p. 910, 2d ed. pp. 1040, 1041.

Where duly appointed officers or agents acting within the scope of their authority execute an instrument on behalf of a corporation, signing their own names and affixing their own seals, such seals are merely nugatory, and the instrument is to be regarded as a simple contract, and, if otherwise valid, binding on the corporation as such.

*Regents of University v. Detroit Young Men's Soc.* 12 Mich. 138; *Blanchard v. Blackstone*, 102 Mass. 343; *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198.

An instrument purporting to be the deed of a corporation, and executed in its name by its president, with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under the Code. Such deed is only the personal act of the president, and is not admissible in evidence to prove the conveyance by the corporation.

*Caldwell v. Morganton Mfg. Co.* 121 N. C. 339, 28 S. E. 475.

A deed purporting to be the deed of a corporation authorized by law to have and use a common seal, which is not sealed with the corporate seal, is void.

*Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54; *Female Orphan Asylum v. Johnson*, 43 Me. 184; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131.

A corporation can only execute a formal bond with its corporate seal, countersigned by an officer entitled to affix its seal.

*South Missouri Land Co. v. Jeffries*, 40 Mo. App. 300.

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An agent or attorney of a corporation in executing a deed in its name must, in order to make it the act and deed of the corporation, affix thereto the corporate seal.

*Savings Bank v. Davis*, 8 Conn. 191; *Thompson, Corp.* § 5080, and cases cited; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 29, 10 L. ed. 340; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. ed. 351; *Mitchell v. St. Andrew's Land Bay Co.* 4 Fla. 200; *State v. Allis*, 18 Ark. 269.

The demurrer to the defendant's plea of the statute of limitations reached back through the whole record, and raised the question whether the declaration was good.

*Clearwater v. Meredith*, 1 Wall. 25, sub nom. *Ferguson v. Meredith*, 17 L. ed. 604.

Covenant cannot be maintained on a contract under seal, the material part of which is subsequently varied by parol agreement. The remedy is on the substituted agreement.

*M'Voy v. Wheeler*, 6 Port. (Ala.) 201; *Raymond v. Fisher*, 6 Mo. 29; *Vicary v. Moore*, 2 Watts, 451, 27 Am. Dec. 323; *Ellmaker v. Franklin F. Ins. Co.* 6 Watts & S. 443; *Heard v. Wadham*, 1 East, 630; *Littler v. Holland*, 3 T. R. 590; *Lehigh Coal & Nav. Co. v. Harlan*, 27 Pa. 429; *Ford v. Campfield*, 11 N. J. L. 327; *Jewell v. Schroepfel*, 4 Cow. 564; *Carrier v. Dilworth*, 59 Pa. 406.

An action will not lie on a contract not performed in time, but recovery may be on quantum meruit.

*Slater v. Emerson*, 19 How. 228, 15 L. ed. 626; *Dermott v. Jones*, 2 Wall. 1, sub nom. *Ingle v. Jones*, 17 L. ed. 762; *Dermott v. Jones*, 23 How. 223, 16 L. ed. 442.

Where it is necessary on the part of the plaintiff to aver performance, it must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled. There was no sufficient averment here.

*Thomas v. Van Ness*, 4 Wend. 549; 1 Chitty, Pl. 325.

An allegation of an original contract does not let in evidence of its modification.

*Lanitz v. King*, 93 Mo. 513, 6 S. W. 263; *Fallon v. Lawler*, 102 N. Y. 228, 6 N. E. 392; *Henning v. United States Ins. Co.* 47 Mo. 425, 4 Am. Rep. 332; *Pharr v. Bachelor*, 3 Ala. 237; *Buchanan v. Beck*, 15 Or. 563, 16 Pac. 422; *Salter v. Ham*, 31 N. Y. 321.

A declaration on an express contract, alleging performance, does not let in evidence of an excuse for nonperformance.

*Colt v. Miller*, 64 Mass. 49; *Palmer v. Sawyer*, 114 Mass. 1; *Purdue v. Noffsinger*, 15 Ind. 386; *Bernhard v. Washington L. Ins. Co.* 40 Iowa, 442; *Fauble v. Davis*, 48 Iowa, 462.

Nor under such declaration can excuse be shown in rebuttal, where plaintiff's nonperformance is set up as a defense, as in this case.

*Eiseman v. Hawkeye Ins. Co.* 74 Iowa, 11, 36 N. W. 780; *Boon v. State Ins. Co.* 37 Minn. 426, 34 N. W. 902; *Potts v. Pleasant Point Land Co.* 47 N. J. L. 476, 2 Atl. 242.

As plaintiff must allege and prove per-

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formance, a general denial lets in evidence of breach.

*Caverly v. McOwen*, 123 Mass. 574.

Upon the failure of the plaintiff to deliver the iron pipe mentioned in the contract, at the times and in the quantities specified, the defendant had the right to charge against the price it had agreed to pay the plaintiff for said pipe, as liquidated damages, the penalties provided for in the contract.

*Emack v. Campbell*, 14 App. D. C. 186.

At common law, interest was not allowed; it is the creature of statute alone. A municipal corporation is created for public purposes and with limited powers; and it has been held that, where it is not named in the act regulating interest, it is not liable for interest.

*Pckin v. Reynolds*, 31 Ill. 529.

It is never allowed when the delay is the result of mere failure of the creditor to press the collection of his claim.

*Adams Exp. Co. v. Milton*, 11 Bush, 49.

And where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.

*Redfield v. Ystalyfera Iron Co.* 110 U. S. 176, 28 L. ed. 110, 3 Sup. Ct. Rep. 570; *United States v. Sanborn*, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812; *Redfield v. Bartels*, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683.

The date of a writing is that part which purports to specify the time when it was executed.

8 Am. & Eng. Enc. Law, 2d ed. p. 727.

When time or place or any other circumstance is material, the plaintiff cannot vary from his previous statement of it.

Chitty, Pl. 638, 644, 648.

When the parties to a written agreement have made the date of the instrument a material part of the contract,—as, when the time of performance is fixed with reference to it,—oral evidence is not admissible to vary or change it.

*Joseph v. Bigelow*, 4 Cush. 82; *Huston v. Young*, 33 Me. 85; Story, Prom. Notes, 6th ed. § 85.

**Mr. Samuel Maddox** submitted the cause for defendant in error:

A seal is not necessarily any particular form or figure; any mark or sign indicating an intention to seal is sufficient.

*Hacker's Appeal*, 121 Pa. 192, 1 L. R. A. 861, 15 Atl. 500; *Jacksonville, M. & P. R. & Nav. Co. v. Hooper*, 160 U. S. 519, 40 L. ed. 521, 16 Sup. Ct. Rep. 379; 1 Sugden, Powers, \*283; *Bowman v. Robb*, 6 Pa. 302; *Hastings v. Vaughn*, 5 Cal. 318; *Osborn v. Kistler*, 35 Ohio St. 102; *McKain v. Miller*, 1 McMull. L. 313; *Eames v. Preston*, 20 Ill. 389; *Davis v. Burton*, 3 Scam. 4, 36 Am. Dec. 511; *Green v. Lake*, 2 Mackey, 162; *Pillow v. Roberts*, 13 How. 474, 14 L. ed. 229.

A corporation may adopt and use any seal it chooses for the time, as an individual.

*Bank of Middlebury v. Rutland & W. R. Co.* 30 Vt. 171; *Proprietors of Mill Dam* 181 U. S.

*Foundery v. Hovey*, 21 Pick. 428; *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212; *South Baptist Soc. v. Clapp*, 18 Barb. 36.

Where a deed is executed or a contract made on behalf of a corporation by an officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the corporation, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name or seal.

*Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173; *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. ed. 130; *Sheets v. Selden*, 2 Wall. 187, 17 L. ed. 825. See also *Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co.* 11 Wall. 488, 20 L. ed. 209; *Jacksonville, M. & P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *State v. McCauley*, 15 Cal. 429; *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Tenney v. East Warren Lumber Co.* 43 N. H. 344; *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274; *Stebbins v. Merritt*, 10 Cush. 34; *Haven v. Adams*, 4 Allen, 80; *Fleckner v. Bank of United States*, 8 Wheat. 357, 5 L. ed. 635; *Heidelberg School Dist. v. Horst*, 62 Pa. 307.

It is always competent to show that a deed was executed on a day subsequent to the date on which it is stated to have been executed.

*Hall v. Cazenove*, 4 East, 477; *Baldwin v. Freyendall*, 10 Ill. App. 112; *Com. v. Welch*, 144 Mass. 356, 11 N. E. 423; *Bruce v. Stemp*, 82 Va. 352; *School Dist. No. 4 v. Stilley*, 36 Ill. App. 135; *Treadwell v. Reynolds*, 47 Cal. 171.

The time of the delivery of a deed may be proved by parol.

*Mayburry v. Brien*, 15 Pet. 21, 10 L. ed. 646; *United States v. Le Baron*, 19 How. 73, 15 L. ed. 525.

If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispenses with, or by any act of his own prevents, the performance, the opposite party is excused from proving a strict compliance with the condition.

*Williams v. Bank of United States*, 2 Pet. 102, 7 L. ed. 362; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 14, 37 L. ed. 629, 13 Sup. Ct. Rep. 779; *Re Van Vliet*, 10 L. R. A. 451, 43 Fed. 762; *Van Buren v. Digges*, 11 How. 479, 13 L. ed. 778; *United States v. Peck*, 102 U. S. 65, 26 L. ed. 47. See also *Parker Vein Coal Co. v. O'Hern*, 8 Md. 201; *Coke*, Litt. p. 207; *Powell*, Contr. 417; *Marshall v. Craig*, 1 Bibb, 390; *Stewart v. Keteltas*, 36 N. Y. 388; *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875; *Ashcraft v. Allen*, 26 N. C. (4 Ired. L.) 99; *Holme v. Guppy*, 3 Mees. & W. 386.

The District is estopped from claiming penalties for delay in delivering pipe.

*Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. ed. 868; *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554; *Moran v. Miami County* 951



*Comrs. 2 Black, 722, 17 L. ed. 342. See also Pendleton County v. Amy, 13 Wall. 298, 20 L. ed. 579; Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 16 L. ed. 488; Randolph County v. Post, 93 U. S. 502, 23 L. ed. 957.*

Where the party suing has not departed from the terms of the special contract at all, but has been ready and willing to do all that it was the intention of the parties he should do, his action is properly said to be brought upon the special contract itself.

*Cutter v. Powell, 2 Smith, Lead. Cas. 8th ed. pt. 1, p. 33; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Phillips & O. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341.*

No penalty should be allowed except to the extent of actual damage shown.

*Seofield v. Tompkins, 95 Ill. 193, 35 Am. Rep. 160; Bradstreet v. Baker, 14 R. I. 549; Hahn v. Horstman, 12 Bush, 254; Greer v. Tweed, 13 Abb. Fr. N. S. 430; Colwell v. Foulks, 36 How. Pr. 306; Welch v. McDonald, 85 Va. 500, 8 S. E. 711; Colwell v. Lawrence, 38 N. Y. 71.*

[457] \*Mr. Chief Justice Fuller delivered the opinion of the court:

The 1st section of the act "to Provide a Government for the District of Columbia," approved February 21, 1871 (16 Stat. at L. [458] 419, chap. 62), \*provided: "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

A governor and legislature were created; also a board of public works, to which was given the control and repair of the streets, avenues, alleys, and sewers of the city of Washington, and all other works which might be intrusted to their charge by either the legislative assembly or Congress. They were empowered to disburse the moneys received for the improvement of streets, avenues, alleys, sewers, roads, and bridges, and to assess upon adjoining property specially benefited thereby a reasonable proportion of the cost, not exceeding one third.

June 20, 1874, an act was passed entitled "An Act for the Government of the District of Columbia, and for Other Purposes." 18 Stat. at L. 116, chap. 337. By this act the government established by the act of 1871 was abolished and the President by and with the advice and consent of the Senate was authorized to appoint a commission, consisting of three persons, to exercise the power and authority vested in the governor and the board of public works, except as afterwards limited by the act.

By a subsequent act approved June 11, 1878 (20 Stat. at L. 102, chap. 180), it was en- 952

acted that the District of Columbia should "remain and continue a municipal corporation," as provided in § 2 of the Revised Statutes relating to said District (brought forward from the act of 1871), and the appointment of commissioners was provided for, to have and to exercise similar powers given to the commissioners appointed under the act of 1874.

This legislation is considered and set forth in *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 6, 33 L. ed. 233, 10 Sup. Ct. Rep. 19.

By § 37 of the act of February 21, 1871 (which is applicable to the present commissioners, *District of Columbia v. \*Bailey*, 171 [459] U. S. 175, 43 L. ed. 125, 18 Sup. Ct. Rep. 868), it was provided that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

Section 5 of the act of June 11, 1878, provided: "All contracts for the construction, improvement, alteration, or repairs of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature, shall be made and entered into only by and with the official unanimous consent of the commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

On March 3, 1887, an act of Congress was approved, by which the sum of \$100,000 was appropriated for "repairing and laying new mains," and "lowering mains," and for engineers and others under the water department of the District government. 24 Stat. at L. 580, chap. 389.

The contract in this case was signed by all of the commissioners and recorded in a book kept for that purpose as required by the act of Congress. Unquestionably the commissioners when they executed the contract were authorized to purchase iron pipe for the extension of the water service, and as the municipal corporation had the right to have a seal, which could be changed from time to time, it had the right to execute contracts under seal. The principal objection here is, however, that this was not the sealed obligation of the District. It is conceded that the commissioners, who signed the contract officially, were not personally liable thereon, and that the contract bound the District, but it is insisted that the contract was not a specialty. The opinion of the court of appeals by Chief Justice Alvey satisfactorily disposes of this objection, and we concur with the views therein expressed.

\*The board of commissioners was consti- [460] tuted by statute to carry the powers of the municipal corporation called the District of 181 U. S.



Columbia into effect. The commissioners could adopt for the corporation any seal they chose, whether intended to be permanently used, or adopted for the time being. When, acting officially, as in this instance, they signed and sealed the instrument as for the corporation, their signatures and seals bound the corporation as by a specialty. As Judge Putnam said in *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 428: "A corporation as well as an individual person may use and adopt any seal. They need not say that it is their common seal. This law is as old as the books. Twenty may seal at one time with the same seal."

The general rule is "that when a deed is executed, or a contract is made on behalf of a state by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the state, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name and seal. In such cases the state alone is bound by the deed or contract, and can alone claim its benefits." *Sheets v. Selden*, 2 Wall. 187, 17 L. ed. 825; *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. ed. 130.

As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation, is enough though some other seal than the ordinary common seal of the company should be used. *Jacksonville M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Stebbins v. Merritt*, 10 Cush. 34; *Bank of Middlebury v. Rutland & W. R. Co.* 30 Vt. 159; *Tenney v. East Warren Lumber Co.* 43 N. H. 343; *Porter v. Androscoggin & K. R. Co.* 37 Me. 349; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357. Many of these cases are cited by Judge Dillon in his work on *Municipal Corporations* (4th ed.), § 190, where he says: "Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been authoritatively affixed to an instrument requiring it, though it be not the seal regularly adopted."

[461] \*Under the former corporate organization of the District a seal had been adopted, but it was not until after this contract was entered into that the board took official action in respect of it. It is to be assumed on this record that the commissioners affixed their seals as the seal of the corporation. It was for them to determine whether the interest of the District required the contract to be sealed.

We agree with the court of appeals that this contract was not only the contract of the District, as is conceded, but that it was its deed, upon which an action of covenant could be maintained. It was therefore properly admitted in evidence, and recovery could be had thereon, if otherwise justified. As such an action is not barred in three years the demurrer to the plea of the three years' statute of limitations was necessarily sustained. 181 U. S. U. S., Book 45.

The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within 136 days from its date, but "after the date of the execution of the contract." It is well settled that, in such circumstances, it may be averred and shown that a deed, bond, or other instrument was in fact made, executed, and delivered at a date subsequent to that stated on its face.

In *United States v. Le Baron*, 19 How. 73, 15 L. ed. 525, it was ruled that a deed speaks from the time of its delivery, not from its date; and Mr. Justice Curtis, who gave the opinion, cited *Clayton's Case*, 5 Coke, 1; *Oshey v. Hicks*, Cro. Jac. 263, and *Steele v. Mart*, 4 Barn. & C. 272; to which the court of appeals added *Hall v. Cazenove*, 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed, from which time it takes effect.

In *Williams v. Bank of United States*, 2 Pet. 102, 7 L. ed. 362, it was laid down as a general principle of law that "if a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act \*of his own prevent, the per-[462] formance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the nonperformance of the condition as a bar to the responsibility which his part of the contract had imposed upon him."

In this case the further performance of the contract was determined by the consent of the parties, but the contract was not rescinded except as to the future manufacture of pipe for delivery.

The third objection of the District is that an action of covenant on the contract would not lie to recover the price of the pipe that was delivered, because there had not been full performance; yet the pipe, to recover the price for which this action was brought, was, as the court of appeals said, manufactured, delivered, and accepted under the contract, in part performance thereof, and with reference to the specifications and price agreed upon as set forth in the contract. The dispensation of complete performance did not make a new contract, nor alter the terms of the existing agreement. It was a mere waiver of further performance.

It is said that the demurrer to the plea of limitations, the ninth plea, ought to have been carried back to the declaration. The hearing of that demurrer was reserved by stipulation to the trial of the cause, no suggestion of this kind was then made, and the declaration was good as against a general demurrer. The company averred full perform-

ance, "except in so far as it was prevented or discharged from so doing by the defendant." That was not setting up a modified or substituted contract, but a waiver of a condition precedent to be performed by plaintiff.

In *M'Combs v. McKenna*, 2 Watts & S. 216, it was held that covenant may be sustained upon a contract under seal, notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was changed.

[463] In *Phillips & O. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341, it was held that defendant was liable on his covenant for the contract \*price of the work when completed, where absolute performance had been waived. And in many cases of prevention by the defendant or of tender and refusal, the plaintiff has been held to have the right of action on a special contract, prevention or refusal being equivalent for that purpose to performance.

Assuming that full performance was dispensed with, the court did not err in ruling that the right to sue upon the contract remained.

The court gave to the jury, on behalf of plaintiff, the following instructions:

"If the jury believe from the evidence that the plaintiff corporation was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered under the contract offered in evidence within the time or times therein limited by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission.

"If the jury believe from the evidence that the defendant, by its silence or conduct, caused the plaintiff corporation to believe, on or about the 1st day of December, A. D. 1887, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief and thereafter deliver pipe to the defendant, which the plaintiff would not have otherwise done, and the defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract."

Defendant asked the following instruction, which the court refused to give:

"If the jury believe from the evidence that the failure of plaintiff to deliver the iron pipes mentioned in the contract given in evidence at the times and in the quantities specified hindered and delayed the defendant in extending the water service in 1887, then the defendant had a right to charge against the price it agreed to pay the plaintiff for the pipe it undertook to deliver as liquidated damages the penalties provided in the contract."

[464] \*The fourth question is whether the court erred in these rulings. Defendant's instruction was clearly wrong, and it seems to us that plaintiff's instructions fairly submitted  
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the contention as to penalties and forfeitures to the jury. If strict performance by plaintiff was prevented or waived by defendant as contended on the facts, then the claim for fines or penalties for delay or failure to deliver the pipe could not be sustained.

The court left the matter of interest to the jury, and refused to give at defendant's request an instruction that no interest should be allowed except from the time of the institution of the suit. Exception was taken to this refusal, but, in view of the evidence, the trial court committed no error in that regard. *Rev. Stat. D. C. § 829; Washington & G. R. Co. v. Harmon*, 147 U. S. 585, *sub nom. Washington & G. R. Co. v. Tobriner*, 37 L. ed. 290, 13 Sup. Ct. Rep. 557. To the general charge of the court in respect of interest no exceptions were preserved.

*Judgment affirmed.*

Mr. Justice **Brown** and Mr. Justice **McKenna** dissented.

### THE BARNSTABLE.

(See S. C. Reporter's ed. 464-473.)

*Admiralty—calling in charterer—liability of charterer or owner for collision.*

1. A proceeding on petition of the owner and claimant of a libeled vessel to call in the charterer to show cause why it should not be condemned for damage resulting from the collision for which the libel is filed is within the power of the court under general admiralty rule 59, as it is clearly within the spirit, though not within the words, of the rule.
2. Liability for damage caused by negligence of the officers and crew of a vessel, who are appointed and paid by charterers, is not, as between the charterers and the owners, imposed upon the owners by a clause of the charter party requiring the owners to "pay for the insurance on the vessel."

[No. 178.]

*Argued March 8, 1901. Decided May 13, 1901.*

**ON WRIT OF CERTIORARI** to the Circuit Court of Appeals for the First Circuit to review a decision affirming a decree establishing the liability of the owner as against the charterers of a vessel for a collision. *Reversed.*

See same case below, 36 C. C. A. 199, 94 Fed. Rep. 213.

Statement by Mr. Justice **Brown**:

\*This case originated in a libel by the owners of the schooner *Fortuna* against the British steamship *Barnstable*, for a collision which took place off Cape Cod on January 13, 1896, and resulted in a total loss of the schooner, and the personal effects of her master and crew. Nine of the crew were drowned.

A claim was interposed by the master of the *Barnstable* on behalf of the Turret  
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Steamshipping Company, a British corporation, and the owner of the steamship; and an order was subsequently entered substituting that corporation as claimant.

Before the time to answer expired, the Turret Company presented a petition, setting forth that at the time of the collision the Barnstable was chartered to the Boston Fruit Company, a Massachusetts corporation; that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, and that, if there were any faults on the part of the Barnstable, they were the faults of the charterer, and not those of the owner. In compliance with the prayer, a summons was issued to the Boston Fruit Company to appear before the district court to answer the petition. The company appeared and answered, admitting the charter (copy of which was annexed to the petition), but denying liability for the negligence of the officers and crew of the steamship, or that it had assumed liability therefor under its charter.

Subsequently, however, but after certain testimony had been taken, counsel for the owners and also for the charterer became satisfied that the Barnstable was in fault, and assented to a decree against her, leaving the question of liability as between the owner and charterer to be passed upon by the court.

The material provisions of the charter party, which was for thirty-six months from March, 1894, were that the charterer should "provide and pay for all oils and stores for the vessel, gear, tackle, and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen, and crew, who, except the guarantee \*engineer, shall be appointed by them;" that the owners should "maintain the vessel in a thoroughly efficient state" for the service, but the charterer should "provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions and all other charges whatsoever, excepting for painting and repairs to hull and machinery and everything appertaining to keeping the ship in proper working order;" to pay for her use £550 per month, and that "in the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service." There was a final and most important provision, upon the construction of which the case turned, "that the owners shall pay for the insurance on the vessel."

The case, as thus presented between the owner and the charterer, was submitted to the district court, which dismissed the owner's petition, holding it to be liable under the charter for the consequences of the collision. 84 Fed. Rep. 895. This decree was affirmed 161 U. S.

by the circuit court of appeals, 36 C. C. A. 199, 94 Fed. Rep. 213.

Mr. J. Parker Kirlin argued the cause, and Messrs. Convers & Kirlin filed a brief for petitioner:

Under the authorities there is hardly room for a doubt that this charter party effected a demise of the ship to the charterer.

Carver, Carriage by Sea, 3d ed. §§ 113-117; *United States v. Shea*, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519; *Baumwoll Manufactur von Carl Scheibler v. Furness*, 7 Asp. Mar. Cas. 263, [1893] A. C. 8; *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *Bramble v. Culmer*, 24 C. C. A. 182, 42 U. S. App. 303, 78 Fed. 497; *The India*, 21 Blatchf. 268, 16 Fed. 262; *Meikleroid v. West*, 3 Asp. Mar. Cas. 129, 1 Q. B. Div. 428; *Reeve v. Davis*, 1 Ad. & El. 312; *Belcher v. Capper*, 4 Mann. & G. 502; *Newberry v. Colvin*, 7 Bing. 190, 1 Clark & F. 286; *Sandeman v. Scurr*, L. R. 2 Q. B. 86; *The Francis Wright*, 105 U. S. 381, *sub nom. Duncan v. The Francis Wright*, 26 L. ed. 1100; *Trinity House v. Clark*, 4 Maule & S. 288; *The Scout*, 1 Asp. Mar. Cas. N. S. 258; *The Alert*, 40 Fed. 836; *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981; *Somes v. White*, 65 Me. 542, 20 Am. Rep. 718; *Tucker v. Stimson*, 12 Gray, 487; *Webster v. Disharoon*, 64 Fed. 143.

The conduct of the parties in the execution of the contract shows conclusively that it was a demise in its operation.

*United States v. Shea*, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519.

Whether the charter party was a demise or not, it is manifest that the navigation of the steamer and the carrying of cargoes was the charterer's business.

*The Turgot*, L. R. 11 Prob. Div. 21.

In the doing of the charterer's work, those who were engaged in the navigation of the ship at the time of the collision must be regarded as the charterer's servants and agents.

*Young v. Lehmann*, 27 Fed. 383. See *Boyd v. Moses*, 7 Wall. 316, 19 L. ed. 192; *The Centurion*, 57 Fed. 412.

Where a vessel is let out by a charter of demise, the charterer, or owner *pro hac vice*, as he is sometimes called, is liable for collision damages caused by the negligence of his servants.

*Thorp v. Hammond*, 12 Wall. 408, 20 L. ed. 419; *Williams v. Hays*, 143 N. Y. 442, 26 L. R. A. 153, 38 N. E. 449.

The general owner is not liable at law in a personal action for the torts of the charterer's servants.

*Thorp v. Hammond*, 12 Wall. 416, 20 L. ed. 422; *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981; *Webster v. Disharoon*, 64 Fed. 143; *Scott v. Scott*, 2 Starkie, 438, 20 Rev. Rep. 438.

The general owner is not liable on the master's contracts.

*Tucker v. Stimson*, 12 Gray, 487; *Baumwoll Manufactur von Carl Scheibler v. Furness* [1893] A. C. 8; *Reeve v. Davis*, 1 Ad. & El. 312; *Somes v. White*, 65 Me. 542, 20 Am. Rep. 718; *Thorn v. Hicks*, 7 Cow. 697; 955

*Wendover v. Hogeboom*, 7 Johns. 308; *Leonard v. Huntington*, 15 Johns. 298; *Sargent v. Stark*, 12 N. H. 332; *Fiske v. Framingham Mfg. Co.* 14 Pick. 491; 7 Am. & Eng. Enc. Law, 2d ed. pp. 194-196.

If the steamship had been injured physically, instead of by the impairment of her title by the lien that arose from the collision, there would be no doubt that the charterer, unless absolved by some exception in the contract, would be liable for the damage.

*Coupe Co. v. Maddick* [1891] 2 Q. B. 413.

Damage to a hired vessel, caused by the bailee's negligence, must be made good to the bailor.

*Cocks v. Boryngton*, 2 Marsden's Select Pleas Ct. Adm. 14; *Schultz & Markley's Case*, 3 Mott & Hunt, 56.

The bailee also answers for the total loss of the vessel if caused by his fault.

*Bouker v. Smith*, 40 Fed. 839, 1 C. C. A. 481, 1 U. S. App. 80, 49 Fed. 954; *Davey v. Chamberlain*, 4 Esp. 229; *Williams v. Hays*, 143 N. Y. 442, 26 L. R. A. 153, 38 N. E. 449; *United States v. Yukers*, 9 C. C. A. 171, 23 U. S. App. 292, 60 Fed. 641.

The rule that requires the bailee to return the vessel free from damage caused by his fault must also compel him to discharge all liens on her and encumbrances on her title for which he is responsible.

*The Alert*, 40 Fed. 836; *The Centurion*, 57 Fed. 412; *O'Brien v. Miller*, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140.

Whatever may be the true office of the insurance clause, it does not make a person an insurer merely because he has agreed to pay or bear the cost of an insurance.

*Williams v. Knight* [1894] P. 342; *Carver, Car. by Sea*, 3d ed. § 566; *Dufouret v. Bishop*, L. R. 18 Q. B. Div. 373; *Hill v. Scott* [1895] 2 Q. B. 371; *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60.

A clause in carriage contracts assuming to exclude liability for all insurable damage does not release the carrier from damage due to negligence.

*Carver, Car. by Sea*, 3d ed. § 105; *The Hadji*, 22 Blatchf. 235, 20 Fed. 875.

It was not stipulated that the charterers should be named as the assured in the shipowner's policy, and hence, of course, they could claim nothing under it directly.

*Carroll v. Boston Marine Ins. Co.* 8 Mass. 515.

The underwriters have a right to have the owners prosecute the claim in these proceedings as against the charterer, by virtue of their right of subrogation.

*Dufouret v. Bishop*, L. R. 18 Q. B. Div. 373.

This right on the part of the underwriters cannot be cut off except by the most explicit provision in the contract between the owner and the charterer.

*Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532; *North of England Iron S. S. Ins. Asso. v. Armstrong*, L. R. 5 Q. B. 244; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249.

It would be against public policy to presume that such was the intention of the insurance clause.

*General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. ed. 452.

The "insurance on the vessel" for which the owner was to pay does not include insurance against "running down risks," but only insurance against damage to the vessel insured.

*Ibid.*; 1 Arnould, Mar. Ins. 3d ed. 20, 21; 2 Arnould, Mar. Ins. 672, 673; Tyser, Marine Ins. Losses, London, 1894.

*Mr. Arthur H. Russell* argued the cause, and, with *Mr. Charles T. Russell*, filed a brief for respondent, the **Boston Fruit Company**:

The presumption is that, as the vessel is the offending *res*, her owner is her representative to respond to the maritime lien existing upon his property.

*Joyce v. Capel*, 8 Car. & P. 370; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Frazer v. Cuthbertson*, L. R. 6 Q. B. Div. 93; *Chasteauneuf v. Delange*, 7 App. Cas. 127.

The charter party as a commercial contract is to be liberally construed in furtherance of the apparent intention of the parties to it.

*Raymond v. Tyson*, 17 How. 53, 15 L. ed. 47; *Rich v. Parrott*, 1 Cliff. 55, Fed. Cas. No. 11,760; *Donahoe v. Kettell*, 1 Cliff. 141, Fed. Cas. No. 3,980; *Richardson v. Winsor*, 3 Cliff. 402, Fed. Cas. No. 11,795.

The meaning is to be ascertained by the whole instrument, and every clause and word must be given effect, and that construction of the whole adopted which will best, or most nearly, recognize a meaning and force in each clause and word.

*Hogarth v. Miller* [1891] A. C. 48; *Glynn v. Margetson* [1893] A. C. 351; *Bishop, Contr.* § 384; *Metcalf, Contr.* pp. 287, 288; 2 *Parsons, Contr.* p. 500; *Carver, Car. by Sea*, § 173; *Lawrence v. Aberdeen*, 5 Barn. & Ald. 107; *Leggett, Charter Parties*, p. 4; *Morris v. Levison*, L. R. 1 C. P. Div. 157; 1 *Parsons, Shipping & Adm.* p. 319.

The construction of the charter party will, in doubt, be against the party claiming an exceptional right or release from liability.

*Leggett, Charter Parties*, p. 30; *Airey v. Merrill*, 2 Curt. 11, Fed. Cas. No. 115.

Where the parties to the contract have put a practical construction upon it, that construction will be adopted by the court.

*District of Columbia v. Gallaher*, 124 U. S. 505, 510, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; *Carver, Car. by Sea*, § 165; *Leavitt v. Windsor*, 4 C. C. A. 425, 12 U. S. App. 193, 54 Fed. 439; *Davis v. Shafer*, 50 Fed. 764.

The conversation between the shipowner who negotiated the charter party and drafted it, and the representatives of the shipowners, is a circumstance of the adoption of the contract, of assistance in determining the subject-matter and meaning of the insurance provision and the standpoint of the parties in relation to it.

*Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup.



Ct. Rep. 419; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566.

The courts refuse to recognize as a demise of a vessel any agreement which does not give to the charterer "complete and absolute control."

*Leary v. United States*, 14 Wall. 607, 20 L. ed. 756; *United States v. Shea*, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519.

*Messrs. Eugene P. Carver and Edward E. Blodgett* filed a brief for A. G. Hall *et al.*

[466] \*Mr. Justice Brown delivered the opinion of the court:

The question involved in this case is, whether the owners of a vessel, who have let it out upon charter party and agreed to pay "for the insurance on the vessel," are liable, as between themselves and the charterers, for damage done to another vessel by a collision resulting from the negligence of the officers and crew, who are appointed and paid by the charterers.

1. It was within the power of the court, [467] under general admiralty rule 59, to entertain the petition of the Turret Steamshipping Company, owner and claimant of the Barnstable, and to call in the charterer to show cause why it should not be condemned for the damage resulting from this collision. *The Alert*, 40 Fed. Rep. 836. Such proceeding, though not within the words, is clearly within the spirit, of the rule; and the case, as between the Turret Company and the Fruit Company, thereafter proceeded substantially as an independent cause, in which the original libellants had no substantial interest, their claim being adequately protected by the decree against the Barnstable. The position of the Turret Company was in no manner affected by the failure of the libellants to appeal from their own decree.

2. Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt (*The Ticonderoga*, Swabey, Adm. 215; *The Lemington*, 2 Asp. Mar. L. Cas. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, L. R. 13 Prob. Div. 110; *The Parlement Belge*, L. R. 5 Prob. Div. 197; *The Castlegate* [1893] A. C. 52; *The Utopia* [1893] A. C. 492), the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer. *United States v. The Little Charles*, 1 Brock. 347, 354, Fed. Cas. No. 15,612. It was said by this court in the case of *The Palmyra*, 12 Wheat. 1, 14, 6 L. ed. 531, 535, referring to a seizure in a revenue case: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty." So in *United States v. The Malek Adhel*, 2 How. 210, 11 L. ed. 239, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked 181 U. S.

(p. 233, L. ed. 249): "That the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . \*It is not an uncommon [468] course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof." This was the principle upon which this court held, in the case of *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot,—a marked distinction from the English rule, which by statute, exempts the vessel from such consequences.

Indeed, the liability of the vessel for the negligence of the charterers is now fixed by statute in this country. Rev. Stat. § 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provision of this title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

As the charterers hired the Barnstable for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes,—the owners only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in an efficient state during the existence of the charter party,—there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault. *Thorp v. Hammond*, 12 Wall. 408, 20 L. ed. 419; *Williams v. Hays*, 143 N. Y. 442, 26 L. R. A. 153, 38 N. E. 449; *Scott v. Scott*, 2 Starkie, 438; *Webster v. Dishroon*, 64 Fed. Rep. 143; *Gulzoni v. Tyler*, 64 Cal. 334, 336, 30 Pac. 981.

This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received, less the ordinary results of wear and tear, and such injuries \*as are caused by a peril of the sea, or inevi- [469] table accident. *Coupé Co. v. Maddick* [1891] 2 Q. B. 413; *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; *Story*, Bailm. §§ 25-32.

If, then, the owners be liable for the negligence of the charterers, such liability must



arise from the particular stipulation in the charter party that "the owners shall pay for the insurance on the vessel." The language of the clause is peculiar and significant. It is not an agreement to insure, or to procure or provide insurance, but to pay for such insurance as the owner should see fit to take out,—and perhaps inferentially to apply such insurance toward the extinguishment of any liability of the charterers for losses covered by the policy. It is entirely clear that, under this stipulation, the owners could not charge the charterers with the expense of insurance, that is, the premiums, whatever form of policy the owner might select, though insurance be in fact a part of the running expenses of the vessel, and perhaps, in the absence of a special clause, covered by the stipulation that "the charterers shall provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order."

It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance "on the vessel" the owners must look to the companies, at least for the insured proportion of such damage, and not to the charterers. It may also be conceded that the owner might have selected a form of policy containing a special running-down clause that would have covered damages done to another vessel, though the rule in this court is, following the English case of *De Vaux v. Salvador*, 4 Ad. & El. 420, that an ordinary policy against perils of the sea does not cover damage done to another vessel by collision. *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. ed. 452. Mr. Justice Curtis remarked in this case (p. 363, L. ed. p. 456): "We believe that, if skilful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel,

[470] not insured by the policy, by a collision \*occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered unhesitatingly in the negative." This case was decided in 1853, although shortly before that the supreme court of Massachusetts had held in *Nelson v. Suffolk Ins. Co.* 8 Cush. 477, 54 Am. Dec. 776, that a policy on the vessel covered damages which the vessel insured might do to another vessel. The same view had already been taken by Mr. Justice Story in *Hale v. Washington Ins. Co.* 2 Story, 176, Fed. Cas. No. 5, 916. In speaking of these cases Mr. Justice Curtis observed (p. 367, L. ed. 458): "But with great respect for that very eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants, and that it is the safer and more expedient rule. We cannot doubt that the knowledge by own-

ers, masters, and seamen that underwriters were responsible for all the damage done by collision with other vessels through their negligence would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case [cause]." As the construction of a policy of insurance is one of general, rather than one of local, law (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 443, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469; *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322, Fed. Cas. No. 5,487), we are constrained to adopt our own views as to such construction, though the courts of the state in which the cause of action arose have adopted a different view.

But, whatever be the obligations as between the insured and his underwriters, this clause in the charter party should be construed in consonance with its other provisions and with the obvious intention of the parties that the duty of the owner is discharged by keeping the vessel in good order and condition, and that the charterers assumed and agreed to pay all her running expenses. Conceding that damages done to another vessel are neither the one nor the other, they are incident rather to the navigation than to the preservation of the vessel, although the cost of the premiums may be referable to the preservation of the ship, inasmuch as the owner obtains the benefit of them in case of damage or loss, for which, as between him and the charterer, \*he is [471] chargeable. If the responsibility for an extraordinary class of damages, that is, done to another vessel, be thus shifted from the charterer, by whose agents the damage is done, and to whom its reimbursement properly belongs, to the owners, it should be evidenced by some definite undertaking to that effect, and not be inferred from an obscure provision of the charter party, which seems to have been designed for a different purpose. It is scarcely credible that the owners could have intended to assume a liability for the acts of men not chosen by themselves and entirely beyond their control, which in this case equalled the hire of the ship for eight months, and might, had the *Fortuna* been of greater value, have exceeded the whole amount of rent payable by the charterers.

There is undoubtedly weight to be given to the proposition that, unless we hold the owners liable for everything a policy of insurance could have covered, the clause is of little value, since the charterers would not in any event be liable for damages resulting from the perils of the sea or other risks ordinarily covered by insurance upon the vessel. But this argument loses much of its force in view of the ruling of this court that an ordinary policy of insurance on a vessel does not cover damages done to another vessel; and as there seems to be a difference in practice, some charters providing that the insurance shall be paid by the charterer (*Latson v. Sturm*, 2 Ben. 328, Fed. Cas. No. 8,115) and others providing that it shall be paid by the owner, we think the probable object of the clause was to fix beyond cavil the responsi-



bility for premiums. It was probably inserted in this charter to negative the inference derivable from that provision of the charter, imposing upon the charterers the obligation to pay the running expenses of the vessel, and *all other charges whatsoever*. But, however this may be, we find ourselves unable to give it the broad construction that it was intended to fix upon the owners a new and extraordinary liability, which we think could not have been within the contemplation of the parties.

The evidence of a parol understanding as to the meaning of the insurance clause in this connection, is entitled to no weight whatever. In answer to a question put to the broker who negotiated the charter, upon cross examination, he testified as follows:

[472] \*Q. You have had no experience, I understand you, of the actual working out of this clause in any particular cases?

A. I have had considerable experience in various insurance claims—so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape, or manner against stranding, collision, and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure.

Q. Tell us what experience you have actually had of these insurance clauses, or the working out of them?

A. I have never known an owner to insure a charter for damage by collision before. He has always taken that risk.

Several answers may be made as to any inference derivable from this testimony. In the first place, the answer to the first question was not responsive to the question at all. In the second place, it was not the testimony of an expert as to the meaning of this clause among underwriters, and their customers, in which case it might properly have been admissible, but an attempt, in respect to the particular charter, to introduce the antecedent understanding of the parties, and thereby to explain, control, and qualify the language of the charter. This was obviously impossible. *Scitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46. Finally, giving to the answer its full effect, his statement of the owner's liability does not include damage which might be done to other vessels.

The statement of the witness, too, differs from his testimony upon direct examination, which was as follows:

Q. Did you have any conversation with Mr. Craggs [the then owner of the vessel] with regard to that clause?

A. I did; several.

Q. Please state the substance of that conversation.

A. I told him that he would have to insure for his vessel the same as the charter party stated.

Q. Did he make any reply?

A. Of course, I told him if he did not want to insure, he could take that risk. But his intention was to insure.

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In addition to this, however, the testimony was quite inadmissible as against the Turret Steamshipping Company, the \*purchaser of [473] the vessel and the assignee of the charter party, since it was not shown to have had any notice of the conversation, and therefore, in taking over the charter, was only bound by the obligations imported by the words of the insurance clause in their ordinary commercial sense. *Page v. Cagwin*, 7 Hill, 361; *Bristol v. Dann*, 12 Wend. 142; *Clews v. Kehr*, 90 N. Y. 633; *Truax v. Slatner*, 86 N. Y. 630; *Tabor v. Van Tassel*, 86 N. Y. 642.

In conclusion, we are of opinion that, if anything more were intended by the insurance clause than to impose on the owners the duty of paying the premiums, it was fully satisfied by an ordinary policy of insurance against perils of the sea; that such policy would not cover damage done to another vessel by a collision with the vessel insured, and that the primary liability for such damage rested upon the charterers, and not upon the owners. We express no opinion as to the effect of any payment that may have been actually made by the underwriters upon this loss.

*The decrees of both courts must therefore be reversed, and the case remanded to the District Court for the District of Massachusetts, for further proceedings not inconsistent with this opinion.*

WILLIAM D. HALE, *Plff. in Err.*,  
v.

LEDYARD V. LEWIS *et al.*

(See S. C. Reporter's ed. 473-480.)

*Error to state court—Federal question—other grounds broad enough to support judgment.*

A decision by a state court that a corporation is estopped to set up the invalidity of a statute, even if it is unconstitutional, by the action of its board of directors, cannot be reviewed on writ of error from the Supreme Court of the United States to the state court, since the non-Federal ground is broad enough to support the judgment.

[No. 151.]

*Argued January 28, 29, 1901. Decided May 13, 1901.*

IN ERROR to the Supreme Court of the State of Wisconsin to review a decision affirming a judgment to compel the distribution of trust securities of a building and loan association. *Dismissed.*

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.



See same case below, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793.

**Statement by Mr. Justice Brown:**

[474] \*This was a petition filed by Lewis, as subscriber for five shares of stock in the American Building & Loan Association, in the circuit court for Dane county, against the American Savings & Loan Association, the treasurer of the state of Wisconsin, and William D. Hale, receiver of the association (subsequently admitted as defendant), to compel the securities of this association, held in trust by the state treasurer, to be sequestered and distributed among the members and stockholders who are residents of the state of Wisconsin, and for an injunction and receiver as adjuncts to such relief.

The facts of the case as disclosed by the complaint, answer, and counterclaim are substantially as follows:

The American Building & Loan Association was originally incorporated under the laws of Minnesota, April 15, 1887, with its principal office at Minneapolis, where it continued to transact its corporate business until June 26, 1892, when its name was changed to the American Savings & Loan Association, without in any way affecting or altering its corporate rights. The general nature of its business was declared to be "to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan, to such of them as might desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contributions of its stockholders, and also such other funds as may from time to time come into its hands." The management of its affairs was vested in a board of seven directors, elected by the stockholders. Membership was acquired by [475] taking stock \*in the company and paying an admission fee. On July 31, 1888, the association amended its articles by adding thereto that "the board of directors may sell and dispose of the mortgages held by the corporation whenever they may deem best and as provided by the by-laws." But no by-laws were ever passed upon this subject; and on July 11, 1889, the articles of incorporation were again amended by declaring that "the board of directors shall not sell or dispose of any of the mortgages held or owned by this corporation."

On April 19, 1889, the legislature of Wisconsin enacted a law which provided that—

"No foreign building and loan association . . . shall issue its shares, receive moneys, or transact any business in this state unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust for the benefit and security of all its members in this state, the securities of the actual cash value of \$100,000 of the kind mentioned in § 2 of this act [2014b] to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and

until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged." Sanborn & Berryman, Anno. Stat. § 2014a.

At the time the complaint was filed the association had 246 shareholders in Wisconsin, of whom 162 had become such prior to the enactment of this law; and thereafter, and prior to the appointment of plaintiff in error as receiver, 84 additional residents of the state became shareholders, all under a contract identical with that by which all the shareholders in thirty-four other states became shareholders in the association, and the rights, privileges, immunities, and liabilities of every shareholder, whether residing in Wisconsin or elsewhere, were the same.

A few days after the enactment of the above law, and on May 1, 1889, the board of directors adopted the following resolution: "*Resolved*, That the state treasurer of Wisconsin be made a depository of the association for temporary convenience in complying with the law of Wisconsin in regard to the deposit \*of securities, \$100,000. Also re-[476] solved, That the association comply with the Wisconsin law as soon as possible." Thereafter, from time to time, without other or additional authority, mortgages taken by the association from its members were delivered to the state treasurer in the aggregate face value of \$145,234. The shareholders had no knowledge whatever of the delivery of these mortgages to the state treasurer, nor did they consent or acquiesce in that disposition of them.

On January 14, 1896, the association having become insolvent, the plaintiff in error, William D. Hale, was duly appointed receiver by the district court of Hennepin county, Minnesota, under the laws of that state.

Subsequent to the appointment of Hale as receiver, and on February 5, 1896, one Melville C. Clarke was appointed receiver for such association for the state of Wisconsin, by the circuit court of Dane county, and the state treasurer, who was a party to the proceeding, was ordered by the court to turn over all the mortgages in his possession as treasurer, to Clarke as receiver. This was done, and Clarke was proceeding to collect the same for the purpose of distributing the proceeds to the shareholders residing in Wisconsin.

Prior to the appointment of either of these receivers, however, Lewis filed this petition, to which Hale, the Minnesota receiver, was subsequently made a party defendant. He also filed an answer, praying that the Wisconsin receiver, Clarke, turn over to him the mortgages held by him, to be by him, Hale, collected, and the proceeds equitably distributed to all the shareholders of the association, wheresoever they may reside.

Clarke, the Wisconsin receiver, demurred to the counterclaim set up in the answer of Hale, which was sustained, and an appeal was taken from the order sustaining such demurrer to the supreme court, which affirmed the order of the lower court, and remanded the case for further proceedings. Hale refusing to amend his answer and coun-



terclaim, and electing to stand upon the record, judgment was rendered against him for costs, and from this judgment an appeal was [477] taken to the supreme court, which again affirmed the judgment of the circuit court. Whereupon plaintiff in error sued out this writ.

**Mr. Eugene G. Hay** argued the cause, and, with **Mr. Charles H. Van Campen**, filed a brief for plaintiff in error:

This court will examine each case for itself, and ascertain whether or not the independent ground upon which it is claimed a case has been decided is broad enough to sustain such decision, is well founded, and is justified by the facts of the case, and whether or not the same is not so intermingled with Federal rights as to become a part and parcel of the Federal question.

*McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Jefferson Brunch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Wilmington & W. R. Co. v. Alsbrough*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

In the case at bar the judgment could not have been rendered except by giving force and effect to the Wisconsin statute of April 19, 1889; and the mere language used by the court in rendering this decision should not prevent this court from examining and determining what is the real substance and effect of the Wisconsin decision.

*Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Houston & T. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

Where some general principle of law decided by a state court is intermingled with that of Federal right, the former will not be considered an independent matter.

*Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

**Mr. John L. Erdall** argued the cause and filed a brief for defendants in error:

When the judgment of the state court sought to be reviewed is based upon an independent non-Federal ground sufficiently broad to sustain it, this court is without jurisdiction and will dismiss the writ.

*Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Rutland R. Co. v. Central Vermont R. Co.*, 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Pierce v. Somerset R. Co.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *White v. Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604.

If the independent ground upon which the judgment of the court is based is broad enough to sustain it, this court will not inquire into the soundness of the decision of 181 U. S.

the state court with respect to such independent ground.

*Murdock v. Memphis*, 20 Wall. 620, 22 L. ed. 439; *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *Adams County v. Burlington & M. River R. Co.*, 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Chapman v. Goodnow*, 123 U. S. 540, sub nom. *Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *McLaughlin v. Fowler*, 154 U. S. 663, and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192; *Rutland R. Co. v. Central Vermont R. Co.*, 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Pierce v. Somerset R. Co.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *White v. Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604.

\***Mr. Justice Brown** delivered the opinion of the court: [477]

While no motion was made to dismiss this case, the question of jurisdiction arising from the alleged want of a Federal question is elaborately discussed by counsel in their briefs, and has received our attentive consideration.

The original complaint by Lewis against the Building & Loan Association and the state treasurer makes no reference to such question, and merely prays for relief under the state statute, and for a distribution of the local assets among the local stockholders. The answer of the state treasurer admits the main allegations of the bill, and apparently accedes to the position of the plaintiff. The answer and counterclaim of Hale, the Minnesota receiver, who was subsequently admitted as defendant, sets up no conflict between the Wisconsin statute and the Federal Constitution, but denies the authority of the association to pledge, transfer, or dispose of any of its mortgages, which were delivered to the state treasurer without authority; asserts that the assets of the association, including the mortgages in the possession of Clarke, are not sufficient to pay all the shareholders in full, and that if Clarke, the Wisconsin receiver, shall collect the mortgages in his possession, and distribute the same to the Wisconsin shareholders, they will receive their pay in full, and thereby be constituted a preferred class against equity and good conscience, and contrary to the purposes of the association as defined by its articles; and finally, "that the law under



which it is alleged said mortgages were deposited was intended to protect said Wisconsin shareholders in all their rights growing out of their membership in said association, and not for the purpose of extending, altering, or changing said rights; that the purpose for which any deposit made by said association with said state treasurer under said law was made terminated and was at an end when said association became insolvent and incapable of carrying out its contracts and effectuating the purpose of its being."

To this answer and counterclaim Clarke, the Wisconsin receiver, as well as Lewis, the plaintiff, demurred for insufficiency. The demurrer was sustained, and the defendant Hale given leave to amend. Instead of amending, Hale took an appeal to the supreme court from the orders sustaining the demurrer.

Upon this appeal the supreme court held that the principal question presented was as to the construction, validity, and effect of the law of Wisconsin requiring such associations to make a deposit of securities as a condition to doing business, and decided, first, that the mortgages in dispute were deposited with the state treasurer by the corporation in a bona fide attempt to comply with the Wisconsin law; that it was its duty and within the power of its directors to make such deposits, as a condition precedent to the right to do business in Wisconsin; that the recognition of the existence of a corporation by any other than the state of its creation depends purely upon the comity of such other state or states; that the power to exclude such corporations embraces the power to regulate them, and that this doctrine was conclusive as to the validity of the pledge of the securities in question under the Wisconsin statute, and was also within the power of the corporation, and not in violation of the trust reposed in the board of directors. And, second, that whatever the view taken of the rights and relations of the entire body of stockholders as between themselves and the corporation, the contract clause of the Constitution could not be invoked to release these securities from the operation of the statute, as the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the board of directors in making the deposit with the state treasurer under the statute. Said the court: "Whatever the practical result of the enforcement of the trust in favor of Wisconsin shareholders, creditors, and others sustaining contractual relations with the corporation defendant may be, it rests, as we think [479] and as we \*hold, upon the consent of the corporation and of its shareholders lawfully given, as it well might be in the present case, by and through its board of directors, for a valid consideration received by the corporation to the benefit and advantage of those now denying its validity."

The orders appealed from were affirmed, and the case sent back to the circuit court. Hale refusing to amend and electing to stand on the record, judgment went against him for costs. He appears to have carried the

case again to the supreme court, and for the first time assigned as error the repugnancy of the statute to the Constitution of the United States. Judgment was again affirmed.

Passing the question whether a party who failed to set up a Federal question in his original pleadings, or upon his first appeal to the supreme court, and subsequently declines to amend, and only sets such question up in an assignment of errors on a second appeal, after the question had been practically disposed of by the supreme court, does not lay himself open to the objection so often sustained by us that a party cannot raise a Federal question for the first time on a motion for a rehearing. (*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 113, 42 L. ed. 677, 681, 18 Sup. Ct. Rep. 260; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, ante, 395, 21 Sup. Ct. Rep. 240), it is clear that the supreme court disposed of the case upon a non-Federal ground broad enough to support the judgment. It held, in substance, that, conceding the law to be unconstitutional, the corporation is estopped to set up its invalidity, by the action of the board of directors in depositing securities with the state treasurer under the Wisconsin statute; that such action was within the power of the board; was binding upon the stockholders, and that such deposit, having been made subject to the condition that the securities shall be held "in trust for the benefit and security of all its members in this state, . . . and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged," the stockholders as well as the corporation were estopped to claim that such condition was invalid.

\*The case is completely covered by that of [480] *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131. This was an action to recover the residue of a note, the holder having received one half of the amount under certain insolvency proceedings in Massachusetts. Defendants pleaded the proceedings in insolvency, an offer of composition, its acceptance by plaintiff and the receipt of the amount coming to him under the composition. Plaintiff demurred, and insisted that the statute, which has been enacted after the note has been executed, impaired the obligation of his contract. The Supreme Court held that the action of plaintiff in accepting his dividend under the insolvency proceedings was a waiver of his right to object to the validity of the statute. Upon writ of error from this court, we held that, in deciding that it was competent for plaintiff to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court did not decide a Federal question, and the writ of error was dismissed, citing *Beaupré v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296. See also *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. 181 U. S.



Rep. 645; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

The case differs from the one under consideration only in the fact that in this case there was a further question whether the waiver was binding, not only upon the corporation, but upon its stockholders. That question involved the construction of the Minnesota statute, but no Federal right. See also *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856, in which a defense under the laws of the United States was held by the supreme court of Montana to have been waived by the laches of the plaintiff. This was also held to be a non-Federal ground sufficient to support the judgment, and the writ of error was dismissed.

The same result must follow in this case, and the writ of error is therefore dismissed.

[481] \*ALLEJANDRO BARKER, Baleriana Barker, Angela Barker, et al., *Plffs. in Err.*,  
v.

J. DOWNEY HARVEY, Administrator of the Estate of John G. Downey, Deceased, and the Merchants' Exchange Bank of San Francisco. (209)

JESUS QUEVAS, Sometimes Called Jesus Cuevo, et al., *Plffs. in Err.*,  
v.

J. DOWNEY HARVEY, Administrator of the Estate of John G. Downey, Deceased. (210)

(See S. C. Reporter's ed. 481-499.)

*Private land claims—grant to mission Indians—abandonment—subsequent grant.*

1. Mission Indians claiming a right of permanent occupancy of land in California under a Mexican grant are within the provisions of the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41, § 8), requiring every person claiming lands in California by virtue of any right or title derived from a Spanish or Mexican government to present the same to commissioners, and their failure to do so within the two years limited for that purpose by § 13 constitutes an abandonment of their rights.
2. The rights of mission Indians under a grant from the Mexican government were not recognized by that government at the time of the cession of California to the United States by the treaty of Guadalupe Hidalgo, where, though one later grant was subject to the condition that the grantee should not molest the Indians thereon, a still later was made on a report of the justice of the peace to the effect that the land had been for two years vacant and abandoned, and that there were some property rights vested in the mission, the officials of which had consented to the grant, which it could no longer cultivate and did not need, though it provides that the grantee shall be "allowed to fence it in without interference with the roads and other usages (*servidumbres*)."

[Nos. 209 and 210.]

Argued March 20, 21, 1901. Decided May 13, 1901.

IN ERROR to the Supreme Court of the State of California to review a decision affirming a decree in a suit to quiet title to land. *Affirmed.*

See same case below, 126 Cal. 262, 58 Pac. 692.

Statement by Mr. Justice Brewer:

These cases were brought by defendants in error in the superior court of the county of San Diego, California, to quiet their title to certain premises in that county. Decrees rendered in their favor were carried to the supreme court of the state, and by that court affirmed. 126 Cal. 262, 58 Pac. 692. To such affirmance these writs of error have been sued out.

The facts in the cases are so nearly alike that it is sufficient to consider only the first. The land in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848. 9 Stat. at L. 922. Generally speaking, the plaintiffs claim title by virtue of a patent issued to John J. Warner on January 16, 1880, in confirmation of two grants made by the Mexican government. On the other hand, the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of the alleged fact that they are mission Indians, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was protected by the terms of the treaty and the rules of international law.

The treaty of Guadalupe Hidalgo provided in article 8 as follows:

"Article VIII.

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, the property of



every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Article 10, as originally prepared, was stricken out by the Senate, but in the protocol signed by the representatives of the two nations, at the time of the ratification, on May 26, 1848, it was stated:

"2d. The American government by suppressing the 10th article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territory, are those which were legitimate titles under the Mexican law in California and New Mexico, up to the 13th of May, 1846, and in Texas up to the 2d March, 1836." Ex. Doc. No. 50 H. R. 30th Cong. 2d Sess. p. 77.

After the acquisition of this territory Congress, on March 3, 1851 (9 Stat. at L. 631, chap. 41), passed an act entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," which created a commission to receive and act upon all petitions for confirmation of such claims. Its decision was subject to appeal to the district court of the United States, and thence to this court. As originally organized the commission was to continue for three years, but that time was extended by subsequent legislation. Sections 8, 13, 15, and 16 are as follows:

"Sec. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government shall present the same to the said commissioners when sitting as a board, together with such documentary\* evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

"Sec. 13. That all lands, the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have

been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said district or supreme court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same; and in the location of the said claims the said surveyor general shall have the same power and authority as are conferred on the registrar of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act 'to Create the Office of Surveyor of the Public Lands for the State of Louisiana,' approved third March, one thousand eight hundred and thirty-one: *Provided*, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed <sup>for</sup> [485] hearing the same: And *provided*, further, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved."

"Sec. 15. That the final decrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

"Sec. 16. That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblo or Rancheros Indians."

On the trial before the court, without a jury, the findings of fact were in substance that the plaintiffs had the ownership in fee simple of the premises described; that the defendants had no rights or interest therein,



and the decree was in accordance therewith. The statement on appeal prepared by the trial court disclosed that the plaintiffs introduced in evidence the patent to John J. Warner, which patent recited the filing of a petition by Warner with the land commission praying for confirmation of his title, a title based on two Mexican grants,—one June 8, 1840, to José Antonio Pico by Juan B. Alvarado, then constitutional governor of the Californias, and the second, November 28, 1844, to petitioner by Manuel Micheltorena, governor general commandant and inspector general of the Californias; recited also a decree of confirmation of such title, an appeal to the district court of the United States, and an affirmance of the decision of

[486] \*the commission, the return of the surveyor general of the state showing a survey; and conveyed the premises to Warner, "but with the stipulation that in virtue of the 15th section of the said act neither the conformation of this claim nor this patent shall affect the interests of third persons." It was admitted that Warner's title had passed to plaintiffs, and that the taxes had all been paid by them. On the other hand, the appeal statement showed that the defendants offered copies of the expedientes of both of the grants referred to in the patent, and also oral testimony of occupation by the defendants and their ancestors. Some witnesses were introduced by the plaintiffs to contradict this matter of occupancy, but on final consideration the court struck out all the testimony in reference to occupancy and of the Mexican grants upon which the patent was issued. Upon the evidence, therefore, that was received by the trial court, there could be no doubt of the rightfulness of the decree, and the question presented by the record to the supreme court of the state was whether there was error in striking out the testimony offered on behalf of the defense.

Messrs. Shirley C. Ward and Assistant Attorney General Hoyt argued the cause and filed a brief for plaintiffs in error:

The possessory landed rights of mission Indians were protected and preserved by the general laws of Mexico, and grants which included Indian settlements were subject to the continuing right of use and occupancy in the Indians, though silent on the subject.

*Byrne v. Alas*, 74 Cal. 628, 16 Pac. 523.

This decision is the law of California on the subject to-day, and is binding, not only upon the courts of that state, but also upon the Supreme Court of the United States.

*Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Apis v. United States*, 88 Fed. 931.

In corroboration of the conclusion reached in *Byrne v. Alas*, 74 Cal. 628, 16 Pac. 523, as to the possessory rights of Indians under the Spanish and Mexican laws, the following additional authorities are submitted:

*Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Chouteau v. Molony*, 16 How. 203, 14 L. ed. 905.

The purpose of the act of March 3, 1851, was merely to furnish a means for ascer-

taining the bounds of private property, and of segregating the same from the public domain, and to relinquish all claim of the United States thereto; and its purpose was not the adjustment, as between individuals, of their private or conflicting property rights.

*Wilson v. Castro*, 31 Cal. 420; *Hart v. Burnett*, 15 Cal. 530; *Fulton v. Hanlow*, 20 Cal. 450; *Hardy v. Harbin*, 4 Sawy. 536, Fed. Cas. No. 6,060; *Townsend v. Greeley*, 5 Wall. 326, 18 L. ed. 547; *Meador v. Norton*, 11 Wall. 442, 20 L. ed. 184; *Carpentier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698; *Byrne v. Alas*, 74 Cal. 628, 16 Pac. 523; *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525.

The defendants in this case are such "third persons" as are protected by § 15 of the act in question.

*Townsend v. Greeley*, 5 Wall. 335, 18 L. ed. 549; *Hart v. Burnett*, 15 Cal. 530; *Meador v. Norton*, 11 Wall. 442, 20 L. ed. 184; *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Wilson v. Castro*, 31 Cal. 421; *United States v. Morillo*, 1 Wall. 706, 17 L. ed. 626; *Teschmacher v. Thompson*, 18 Cal. 11; *Leese v. Clark*, 20 Cal. 387; *Adam v. Norris*, 103 U. S. 591, 26 L. ed. 583.

Recitals in patents based on Mexican grants bind all parties claiming thereunder.

*McGarrahan v. New Idria Min. Co.* 49 Cal. 335; 2 Best, Ev. § 542; Phillips, Ev. 1 Cowen, Hill, & E. notes, p. 473, note 130, vol. 2, p. 574, note 476; *Graff v. Castleman* (Va.) 16 Am. Dec. 754, note.

Defendants' rights were preserved by virtue of § 16 of the act of Congress of March 3, 1851, even though they were not such "third persons" as were protected by the terms of § 15 of such act.

*Byrne v. Alas*, 74 Cal. 628, 16 Pac. 523.

Mr. David L. Withington argued the cause, and, with Messrs. Stephen M. White, Charles Monroe, and Cassius Carter, filed a brief for defendants in error:

The Micheltorena grant to Warner, based on the finding of the prefect that the lands were vacant and abandoned, is an adjudication that the Indians had no rights in the premises granted.

*United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547.

It is not in the power of this tribunal to declare that any legislation had by Congress in the execution of treaty rights is violative of constitutional power.

*Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525.

The United States as a sovereign has the power to do whatever it chooses with the property acquired from Mexico, regardless of any treaty stipulations.

*Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Spalding v. Chandler*, 160 U. S. 394,



40 L. ed. 469, 16 Sup. Ct. Rep. 360; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; *United States v. Alaska Packers' Assn.* 79 Fed. 152; *United States v. Four Bottles Sour-Mash Whisky*, 90 Fed. 720.

The plaintiffs in error are not third parties whose rights are saved by the act of March 3, 1851, but the patent and the proceedings leading up to it are conclusive against them.

*United States v. Fossatt*, 21 How. 447, 16 L. ed. 186; *Knight v. United States Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 35 L. ed. 278, 11 Sup. Ct. Rep. 656; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; *De Guyer v. Banning*, 167 U. S. 723, 42 L. ed. 340, 17 Sup. Ct. Rep. 937; *Houston v. San Francisco*, 47 Fed. 339.

The judgment of the land commissioners and the district court is conclusive that there were no persons entitled to superior rights.

*United States v. Fossatt*, 21 How. 446, 16 L. ed. 186; *Quinby v. Conlan*, 104 U. S. 425, 26 L. ed. 802; *United States v. Castillero*, 2 Black, 17, 17 L. ed. 360; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769; *United States v. California & O. Land Co.* 148 U. S. 43, 37 L. ed. 360, 13 Sup. Ct. Rep. 458; *Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457; *United States v. Conway*, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13; *Real De Dolores Del Oro v. United States*, 175 U. S. 71, 44 L. ed. 76, 20 Sup. Ct. Rep. 71; *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28; *United States v. Chavez*, 175 U. S. 509, 44 L. ed. 255, 20 Sup. Ct. Rep. 159; *Peabody v. United States*, 175 U. S. 546, 44 L. ed. 267, 20 Sup. Ct. Rep. 219; *United States v. Elder*, 177 U. S. 119, 44 L. ed. 696, 20 Sup. Ct. Rep. 537.

The action of the government of the United States, resulting in the issuance of a patent, is conclusive that there were no persons entitled to superior rights.

*St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 640, 26 L. ed. 876; *Knight v. United States Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Harvey v. Barker*, 126 Cal. 274, 58 Pac. 692; *Mora v. Foster*, 3 Sawy. 46, Fed. Cas. No. 9,784, 98 U. S. 425, 25 L. ed. 191; *Montgomery v. Bevans*, 1 Sawy. 653, Fed. Cas. No. 9,735.

The Supreme Court of the United States has never recognized the right of a party claiming under the Mexican or Spanish laws, who has not presented his claim to the board of land commissioners, to attack a patent issued upon a decree based upon an independent and hostile grant.

*Adam v. Norris*, 103 U. S. 593, 26 L. ed. 584; *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Miller v. Dale*, 92 U. S. 473, 23 L. ed. 735; *Townsend v. Greeley*, 5 Wall.

335, 18 L. ed. 549; *Harrison v. Ulrichs*, 39 Fed. 655.

There cannot be any paramount title from the Mexican government, except such title as is evidenced by the decree of the board of land commissioners and subsequent proceedings under the act of March 3, 1851.

*Harrison v. Ulrichs*, 39 Fed. 654.

The position of the plaintiffs in error cannot be improved merely because Warner, acting for himself and in hostility to the Indians, procured a patent to be issued.

*Ohm v. San Francisco*, 92 Cal. 437, 28 Pa. 580; *De La Guerra v. Santa Barbara*, 117 Cal. 528, 49 Pac. 733; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *Los Angeles v. Pomeroy*, 125 Cal. 426, 58 Pac. 69.

In order that the plaintiffs in error can come in under our patent, they must be entitled to control the legal title, there must be artifice or concealment, and they must seek by appropriate allegations and proofs the conveyance of the title to themselves.

*Bagnell v. Broderick*, 13 Pet. 436, 10 L. ed. 235; *Doe ex dem. Patterson v. Winn*, 11 Wheat. 380, 6 L. ed. 500; *Stark v. Starr*, 6 Wall. 419, 18 L. ed. 930; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Bernier v. Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; *Plummer v. Brown*, 70 Cal. 546, 12 Pac. 464.

The status of the plaintiffs in error as Indians does not relieve them from the binding effect of these proceedings.

*United States v. Joseph*, 94 U. S. 614, 24 L. ed. 295; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862.

\*Mr. Justice **Brewer** delivered the opinion of the court: [486]

Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, \*and to decree [487] that all claims which are not thus presented shall be considered abandoned. "Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; and Congress might either itself discharge that duty or delegate it to the judicial department. *De la Croix v. Chamberlain*, 12 Wheat. 599, 601, 602, 6 L. ed. 741, 742; *Chouteau v. Eckhart*, 181 U. S.



2 How. 344, 374, 11 L. ed. 293, 305; *Tamel-ing v. United States Freehold & Emigration Co.* 93 U. S. 644, 661, 23 L. ed. 998, 1002; *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525." *Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 80, 81, 37 L. ed. 376, 13 Sup. Ct. Rep. 457.

*Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525, the last case cited in the foregoing quotation, deserves special notice. The supreme court of California had held in several cases that a perfect title need not be presented to the land commission; that it was recognized by the treaty of cession, and required no further confirmation; that the act to ascertain and settle private land claims applied only to those titles which were imperfect and needed the action of some tribunal to ascertain and establish their validity. But in this case, which came from the supreme court of California, we held the contrary. We quote at some length from the opinion. Thus, on page 246, L. ed. 928, Sup. Ct. Rep. 527, it was said:

"Two propositions under this statute are presented by counsel in support of the decision of the supreme court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the Constitution and laws of the United States, so far as it may affect titles perfected under Mexico. The second proposition is that the statute was not intended to apply to claims which were supported by a complete and perfect title from the Mexi-  
[488] can \*government, but, on the contrary, only to such as were imperfect, inchoate, and equitable in their character, without being a strict legal title.

"With regard to the first of these propositions it may be said that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616, *sub nom.* 207 *Half Pound Papers Smoking Tobacco v. United States*, 20 L. ed. 227; *Taylor v. Morton*, 2 Curt. C. C. 454, Fed. Cas. No. 13,799; *Head Money Cases*, 112 U. S. 580, 598, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247; *Whit-*  
181 U. S.

*ney v. Robertson*, 124 U. S. 190, 195, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456."

In reference to the second proposition, after noticing several provisions of the statute, it was declared (p. 248, L. ed. 929, Sup. Ct. Rep. 527):

"It is not possible, therefore, from the language of this statute, to infer that there was in the minds of its framers any distinction as to the jurisdiction they were conferring upon this board, between claims derived from the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were incipient, imperfect, or inchoate. . . . It was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected.

"The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government, had its just influence in the board of commissioners or in the courts to which their decisions could be carried by appeal. If the title was perfect it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid; if it was not, then it was the right and the duty of that court \*to determine whether it was such a claim as [489] the United States was bound to respect, even though it was not perfect as to all the forms and proceedings under which it was derived. So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested.

"Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guaranty of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

"We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

The views thus expressed have been several times reaffirmed by this court, the latest case being *Mitchell v. Furman*, 180 U. S. 402, ante, 596, 21 Sup. Ct. Rep. 430, in which, after quoting the passage last above quoted, we said, in reference to statutes of the



United States respecting claims in Florida (p. 438, *ante*, 612, Sup. Ct. Rep. 444):

"We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions; and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued."

See also *Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 72, 77, *ante*, 432, 434, 21 Sup. Ct. Rep. 289, in which it was said in reference to the statute before us:

[490] "Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfil our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. § 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district court."

These rulings go far toward sustaining the decision of the supreme court of California in the present cases. As between the United States and Warner, the patent is as conclusive of the title of the latter as any other patent from the United States is of the title of the grantee named therein. As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land, within the language of the statute, "part of the public domain of the United States." "Public domain" is equivalent to "public lands," and these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. ed. 769. "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws." *Bardon v. Northern P. R. Co.* 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856, 857. See also *Munn v. Tacoma Land Co.* 163 U. S. 273, 284, 38 L. ed. 714, 717, 14 Sup. Ct. Rep. 820. So far, therefore, as these Indians are concerned, the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the government, and the government has conveyed to Warner. It is true that the patent, "following the 15th section of the act, in terms pro-

vides that the patent shall not "affect the interests of third persons," but who may take advantage of this stipulation? This question was presented and determined in *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88, and the court, referring to the effect of a patent, said (pp. 492, 493, L. ed. p. 93):

"When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. . . . The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, "resist successfully any action of the government in disposing of the property." If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore they do not come within the provision of § 8 as persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government," it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has "given to an Indian tribe a tem-[492] porary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that therefore the United States are bound to protect



their interests, and that all administration, not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (§ 16) "to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians." It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress \*considered that they had no claims which called for special action.

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But we are not compelled to rest upon any presumptions from the inaction of Congress. Turning to the testimony offered in respect to the matter of occupation, it may be stated that there was sufficient to call for a finding thereon if the fact of occupation was controlling. But in the Mexican grants upon which Warner based his application to the commission for a confirmation of his title we notice these things: The first grant was in 1840, to José Antonio Pico. The application was for "the place 'Agua Caliente,' belonging to the mission of San Luis Rey, since it is not needed by the said mission, having a house on it, and an orchard of little utility." The report of the justice of the peace was "that the land 'Agua Caliente' is the property of the San Luis Rey mission, which has improvements, buildings, and an orchard, from which derive their subsistence the Indians who live thereon, which is bounded by the property of Joaquín Ortega, and I believe it can be awarded to the interested party for being worthy, but without prejudice to the Indians, who from it derive their support."

The last paper in the expediente was the following:

Juan B. Alvarado, Constitutional Governor of the Department of both Californias:

Whereas José Antonio Pico has petitioned for his own personal benefit and that of his family the land known by the name of "Agua Caliente," bounded by the ranch of 191 U. S. U. S. Book 45.

"San José Valley," with the boundary of the canyon of "Buena Vista," and by the mountains of "Palomar," having previously complied with the writs and investigations corresponding, as required by the laws and regulations, exercising the powers which are conferred on me in the name of the Mexican nation, I have resolved to grant to him the said place, subjecting himself to pay for the place of worship and other improvements that be there, belonging to the San Luis Rey mission, and not molest (*prejudicar*) the Indians that thereon may be established, and to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

\*First. He is allowed to fence it in, with [494] out interfering with the roads, cross roads, and other usages (*servidumbres*); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it.

Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

Third. The land of which donation is hereby made is of the extent mentioned in the plan, which goes with the "expediente." The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for other purposes.

Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounceable by another.

Therefore, I command that this present order be to him the title, and holding it for good and valid, a copy thereof be entered into the proper book, and given to the party interested for his protection and other purposes.

No approval of this grant by the departmental assembly appears of record, but the finding of the commission was that whatever of right passed to Pico was transferred by conveyances to Warner. The second grant, that in 1845, was made directly to Warner, upon his personal application, which application was thus indorsed:

Office of the First Justice of the Peace,  
San Diego.

In view of the petition which the party interested remits to this office, I beg to state that the said "Valle San José" is, and has for the past two years been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this in San Diego.

August 6, 1844. Juan MaMarron.

\*To the Most R. P. Vincent Olivas: [495]

With the object of soliciting in property the place known by the name "Valle de San 6" 969



José," formerly occupied by the mission under your charge, I beg of you to be so kind as to inform me if, at the present day, the mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

Juan J. Warner.

San Diego, August 5, 1844.

The "Valley of San José" can be granted to the party who petitions for it, inasmuch as the mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

Fr. Vincent P. Olivas.

Mission of San Diego, August 5, 1844.

The grant was in these words:

"The citizen, Manuel Micheltorena, general of brigade of the Mexican army, adjutant general of the same, governor general, commander, and inspector of both Californias:

"Whereas Juan José Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name 'Valle de San José,' bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canyon of Aguanga; and on the north bounded by the mountain, and the boundaries on the south being the 'Carrizo' and the mountain; having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department and to the conditions following, to wit:

"First. He will not be allowed to sell it, to alienate it, nor to mortgage it, to place it under bond, or to place it under any obligation, nor give it away.

"Second. He will be allowed to fence it in, without interference with the roads, and other usages (*servidumbres*). He will hold it freely and exclusively, turning it to agriculture, or any \*other use he may please, and he shall build a house on it within one year, and live in it.

"Third. He shall apply to the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries whereon he shall place the stakes, some fruit and wild trees of some use or other.

"Fourth. The land which is being granted consists of 6 leagues, more or less (*seis sitios de ganado mayor*) according to the respective map or plan. The judge who may give possession thereof shall have it surveyed according to law, leaving the residue (*sobrante*) to the nation for its use.

"Fifth. Should he fail to comply with these conditions, he shall forfeit his right to the land, and it will be denounceable by another. Therefore I order that this present decree be to him his title, and holding it for good and valid notice thereof be entered into the respective books and be given to the

interested party for his protection and ~~other~~ purposes."

The grant was subsequently approved by the departmental assembly on May 21, 1844. On the application to the private land commission the matter was investigated, and a report made by Commissioner Felch, in these words:

"*J. J. Warner v. The United States*, for the place called Agua Caliente y Valle de San José, in San Diego county, containing 6 square leagues of land.

"Two grants are presented and proved in this case: The first made by Governor Juan B. Alvarado to José Antonio Pico, on the 8th day of June, 1840; the other by Governor Manuel Micheltorena, on the 28th day of November, 1844, to the present claimant. The land embraced in the grant to Pico is designated by the name of Agua Caliente, and that described in the grant to Warner is called the Valle de San José. On comparing the descriptions of the two parcels of lands and maps which constitute portions of the two expedientes, it is manifest that the grant to Warner embraces the premises described in the previous grant to Pico. The place known by the name of Agua Caliente constitutes the northern portion of the valley known by the name of San José, while the grant to Warner describes the entire valley, and the witnesses testify that the rancho claimed by \*Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant, but in 1842 he left the place, probably on account of the danger from the Indians, and does not appear to have done anything more in connection with it.

"The proof is scarcely sufficient to establish the performance of the conditions of the grant by him, while his absence from the place, and the want of any evidence of an attempt to return to it after 1842, indicates an abandonment of it. It was so treated by Warner in petitioning for a grant of the same in 1844, and by the governor in making the concession to him. If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the 13th day of January, 1852. This conveyance is given in evidence.

"I think, however, that the right of the present claimant must be determined entirely by the merits of the case based on Micheltorena's grant to him.

"This grant was approved by the departmental assembly May 21, 1845.

"The testimony of Andres Pico shows that Warner was living with his family on the place in the fall of 1844 and cultivating portions of the land.

"His residence on the place appears to have been continued until 1851, when the Indians burnt his buildings and destroyed his stock. Since that time his occupation has been continued by his servants.



"In the grant, the description of the land petitioned for is such as to embrace the entire valley called San José, as laid down on the map constituting a part of the expediente, giving well-defined landmarks and boundaries, which the witnesses testify are well-known objects.

"The valley is very irregular in shape and is surrounded by high hills.

[498] "Juridical measurement was required and the quantity of 6 \*square leagues was granted, but as the measurement was never obtained, it is important to determine whether the grantee is entitled to hold the entire premises described in the grant; using the scale given on the desino referred to in the grant, the quantity included in the premises cannot exceed 6 square leagues of land.

"The testimony of the witnesses who were interrogated on the subject estimate it variously; some more and some less than the quantity conceded. On an examination of the whole case, however, we are inclined to the opinion that the petitioner should have a confirmation of the premises according to the description contained in the grant to him, and a decree will be entered accordingly."

Upon that report the title was confirmed, which, as heretofore stated, was approved by the district court, and thereupon a patent was issued.

From these papers the following appears: The grant to Pico was made subject to the condition that he should "not molest the Indians that thereon may be established." No such condition was attached to the subsequent grant to Warner. On the contrary the report of the justice of the peace was that the land had been for two years vacant and abandoned; that there were some property rights vested, not in the Indians, but in the mission of San Diego, and the official of that mission consented to the grant, inasmuch as the mission had no means to cultivate and occupy the land, and it was no longer necessary for its purposes.

Some discussion appears in the briefs as to the meaning of the word translated "usages" (*servidumbres*) which appears in both grants, and it is contended by the plaintiffs in error that it is equivalent to the English word "servitudes," and is broad enough to include every right which anyone may have in respect to the premises subordinate to the fee. We shall not attempt to define the meaning of the word standing by itself. It may be conceded that it was sometimes used to express all kinds of servitudes, including therein a paramount right of occupation, but the context seems to place a narrower meaning upon its use here. Thus, in the [499] first grant, not only is there the distinct provision that the Indians established on the land shall not be molested, but the grantee "is allowed to fence it in without interfering with the roads, cross roads, and other usages" (*servidumbres*). In the second the grantee is "allowed to fence it in without interference with the roads and other usages" (*servidumbres*). Obviously, it is in these

two clauses contemplated that the fencing is to be without interference with roads and other usages or burdens. It does not mean that the general occupation and control of the property is limited by any so-called *servidumbres*, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or other things of like nature.

It thus appears that prior to the cession the Mexican authorities, upon examination, found that the Indians had abandoned the land; that the only adverse claim was vested in the mission of San Diego and made an absolute grant, subject only to the condition of satisfying whatever claims the mission might have. How can it be said, therefore, that when the cession was made by Mexico to the United States there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, and carried with it an affirmation that they had abandoned their occupancy, and that whatever of title there was outside of the Mexican nation was in the mission, and an absolute grant was made subject only to the rights of such mission.

For these reasons we are of opinion that there was no error in the rulings of the Supreme Court of California, and its judgments in the two cases are affirmed.

Mr. Justice **White** did not hear the argument of these cases or take part in their decision.

\*UNITED STATES, Appt.,  
v.

[500]

WILLIAM EDMONSTON.

(See S. C. Reporter's ed. 500-515.)

*Claims—overpayment for public lands.*

A voluntary payment by mistake, of \$2.50 per acre for public lands which, under the acts of Congress, could be purchased for \$1.25 per acre, gives the purchaser no lawful claim against the United States for repayment of the overcharge, where the mistake on his part was not induced by any attempt to deceive or misrepresentation by the government officials.

[No. 353.]

*Submitted April 8, 1901. Decided May 13, 1901.*

**A** PPEAL from a decision of the Court of Claims in favor of a claimant for money

NOTE.—As to what claims constitute valid demands against a state—see note appended to *Northwestern & P. Hypotheek Bank v. State* (Wash.) 42 L. R. A. 33, and *Houston v. State* (Wis.) 42 L. R. A. 39.

That money wrongfully and illegally exacted may be recovered back, and as to voluntary payments, and payments under protest—see note to *Bank of U. S. v. Bank of Washington*, 8 L. ed. U. S. 299.

overpaid in purchase of public lands. *Reversed.*

Statement by Mr. Justice **Brewer**:

This is an appeal from a judgment of the court of claims in favor of the appellee and against the United States for \$200, being the amount he was overcharged in the purchase of a quarter section of land. The evidence disclosed the following facts: The claimant on March 11, 1891, filed in the local land office at Ashland, Wisconsin, a statement, under the pre-emption laws, of his intention to pre-empt a tract of 160 acres. On September 16, 1891, he gave public notice, as required by law, of his purpose to make final proof, and, in pursuance of such notice, on November 9, 1891, proved up before the register and receiver of the land office the necessary settlement and improvement.

Findings 2, 3, 4, and 5 are as follows:

"2. The claimant, having established his right to the said land, on November 11, 1891, was required to pay for the same to the United States the sum of \$400, being at the rate of \$2.50 per acre for 160 acres, and he did pay the United States that amount for the land.

"3. The land inhabited and improved by the claimant, and paid for by him on the 11th of November, 1891, had been raised in price to \$2.50 per acre, and put in the market prior to January, 1861, by reason of the grant of alternate sections to aid in the construction of railroads, and was of an alternate section reserved to the United States along the line of a railroad within the limits granted to the state of Wisconsin by the act approved June 3, 1856 (11 Stat. at L. 20, chap. 44), to aid in the construction of railroads in that state, now known as the grant [501] to the Chicago, \*St. Paul, Minneapolis, & Omaha Railway Company, and it was never alternate reserved land to the United States along the line of railroads within the limits granted by any other act of Congress to any other railway company.

"4. At the time said cash entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land.

"5. Said land had been raised to \$2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, said land having been thus offered on June 14, 1856."

It also appears that the claimant applied to the land office for the repayment of half of the purchase money, which was refused.

Assistant Attorney General **Pradt** and Mr. **George Hines Gorman** submitted the cause for appellant:

The facts disclosed in the findings do not entitle the appellee to the relief provided for in the act of June 16, 1880.

*Medbury v. United States*, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503.

And such has been the uniform construction placed upon this act by the Interior Department.

*Texas Pacific Grant*, 8 Land Dec. 530; *Jacob A. Gilford*, 8 Land Dec. 583; *George G. Foster*, 12 Land Dec. 316; *Luretta R. Medbury*, 25 Land Dec. 308.

And it is well settled by the decisions of this court that the contemporaneous and uniform construction placed upon a statute by the executive department which is charged with its execution is entitled to the greatest respect, and will not be overturned by the courts unless it is clearly erroneous.

*United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247.

The facts in the case at bar are not sufficient to create a contract, "expressed or implied, against the government of the United States."

*Story*, Contr. 5th ed. § 11; *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85.

It is settled that where the United States takes possession of and uses property which at the time it asserts to be its own, and denies the ownership of the plaintiff,—takes the same under a claim of right,—no implied contract to pay for the value of the property thus taken arises, which can be enforced against the United States in the court of claims, although it transpires in the proof that the claim of the United States is erroneous, and that the property taken did in fact belong to the plaintiff.

*Lanford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011; *Church v. Imperial Gas Co.* 6 Ad. & El. 859; *O'Conner v. Hurley*, 147 Mass. 145, 16 N. E. 764; *Day v. Caton*, 116 Mass. 513, 20 Am. Rep. 347; *Holmes v. Kansas City Bd. of Trade*, 81 Mo. 137; *Potter v. Carpenter*, 76 N. Y. 157; *Moyer's Appeal*, 112 Pa. 290, 3 Atl. 811; *Pew v. First Nat. Bank*, 130 Mass. 391; *Levisse v. Shreveport City R. Co.* 27 La. Ann. 641; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Hertzog v. Hertzog*, 29 Pa. 465.

The mere fact that something was furnished by one party and received by another will not justify an implied promise to pay for it.

*Holmes v. Kansas City Bd. of Trade*, 81 Mo. 137; 1 Keener, Selections on Contracts, pp. 17, 18; *Jones v. Woodbury*, 11 B. Mon. 168; *O'Conner v. Hurley*, 147 Mass. 145, 16 N. E. 764; *Pew v. First Nat. Bank*, 130 Mass. 391; *Levisse v. Shreveport City R. Co.* 27 La. Ann. 641.

The jurisdiction given to a superior court, by a statute, "of all claims against the commonwealth which are founded on contract for the payment of money," did not extend to an obligation imposed upon the commonwealth by statute to reimburse the expense incurred by a town in support of a state pauper.

*Milford v. Com.* 144 Mass. 64, 10 N. E. 516.

The payment made by the appellee, being made with a full knowledge of the facts and



without any mistake of facts, cannot be recovered back, albeit the party paying and the party receiving the money were both mistaken as to the law.

*Knibbs v. Hall*, 1 Esp. 84; *Brown v. M'Kinally*, 1 Esp. 279; *Marriott v. Hampton*, 2 Esp. 547; *Bilbie v. Lumley*, 2 East, 409; *Brisbane v. Dacres*, 5 Taunt. 144.

The doctrines of these leading cases have been fully adopted by this court in a great variety of cases.

*Elliott v. Swartwout*, 10 Pet. 137, 9 L. ed. 373; *Bend v. Hoyt*, 13 Pet. 263, 10 L. ed. 154; *Morris v. Tarin*, 1 Dall. 147, 1 L. ed. 76; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *Waples v. United States*, 110 U. S. 630, 28 L. ed. 272, 4 Sup. Ct. Rep. 225; *Barney v. Rickard*, 157 U. S. 352, 39 L. ed. 730, 15 Sup. Ct. Rep. 642; *United States v. Wilson*, 168 U. S. 273, 42 L. ed. 464, 18 Sup. Ct. Rep. 85.

In addition to the leading cases already cited, the following cases may be referred to, out of the great mass of cases on the subject of voluntary payments, because they are direct adjudications upon that issue, and illustrate the doctrines laid down in the text of the brief:

*Clarke v. Dutcher*, 9 Cow. 674; *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Edge v. Koontz*, 3 Pa. St. 109; *Bailey v. Paullina*, 69 Iowa, 463, 29 N. W. 418; *Thompson v. Doty*, 72 Ind. 336; *Regan v. Baldwin*, 126 Mass. 485; *Connecticut Mut. L. Ins. Co. v. Stewart*, 95 Ind. 588; *Hipp v. Crenshaw*, 64 Iowa, 404, 20 N. W. 492; *Hall v. United States*, 9 Ct. Cl. 270; *St. Louis, A. & T. H. R. Co. v. Thomas*, 85 Ill. 464; *Comstock v. Tupper*, 50 Vt. 596; *Milnes v. Duncan*, 6 Barn. & C. 671; *Union P. R. Co. v. Dodge County Comrs.* 98 U. S. 541, 25 L. ed. 196; *Philadelphia v. The Collector*, 5 Wall. 720, *sub nom. Philadelphia v. Deihl*, 18 L. ed. 614; *The Collector v. Hubbard*, 12 Wall. 1, *sub nom. Brainard v. Hubbard*, 20 L. ed. 272.

Messrs. **Harvey Spalding** and **E. W. Spalding** submitted the cause for appeal:

Where the parties are not on equal terms, where the position of the parties is such that one party can make a demand of another party for the performance of certain duties, when the demand is unauthorized, the money paid in response to such a demand is not a voluntary payment, and the absence of a protest is no proof that the money was voluntarily paid.

*Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299; *United States v. Lawson*, 101 U. S. 164, 25 L. ed. 860; *United States v. Ellsworth*, 101 U. S. 170, 25 L. ed. 862; *Steele v. Williams*, 8 Exch. 625; *Tutt v. Ide*, 3 Blatchf. 249, Fed. Cas. No. 14,275b; *Shaw v. Woodcock*, 7 Barn. & C. 73; *Ogden v. Maxwell*, 3 Blatchf. 319, Fed. Cas. No. 10,458; *Clinton v. Strong*, 9 Johns. 370.

It can hardly be meant, in this class of cases, that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is

caused on the one part by an illegal demand on the other part, and is made reluctantly and in consequence of the illegality, and without the payer's being able to regain possession of his property except by submitting to the payment.

*Maxwell v. Griswold*, 10 How. 243, 13 L. ed. 405.

The department has never considered such an entry a closed transaction where less than the legal price has been charged; and there are great numbers of cases where sums additional to the original payment have been demanded, and where, if the demand has not been complied with, the entries have been canceled.

*Moses Stern*, 2 Copp's Public Land Laws, 1393; *Harvey G. Judd*, 6 Land Dec. 507; *Charles P. Bedell*, 7 Land Dec. 495; *Henry McCrea*, 7 Land Dec. 578.

The defense of voluntary payment in this case is exceptional and opposed to the entire policy of the government.

*M. F. Soto*, 6 Land Dec. 384; *Thomas Kearney*, 7 Land Dec. 29; *Frank A. White*, 17 Land Dec. 339; *Albert Nelson*, 28 Land Dec. 248.

\*Mr. Justice **Brewer** delivered the opinion-[501] ion of the court:

On June 16, 1880, an act was passed (21 Stat. at L. 287, chap. 244), in § 2 of which is the following clause:

"And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns."

Another act passed the day before, June 15, 1880 (21 Stat. at L. 237, chap. 227), contained this provision:

"The price of lands now subject to entry which were raised to two dollars and fifty cents per acre and put in market prior \*to[502] January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre."

*Medbury v. United States*, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503, arose under the clause first quoted, and it was held that it did not apply to lands which were in fact within the limits of a land grant, but which had been forfeited on account of the failure of the railroad company to build its road, but only to cases in which there had been a mistake in the first instance as to the location of the land, the court saying (p. 500, L. ed. 783, Sup. Ct. Rep. 506):

"That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.



"Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress.

The act of June 16, 1880, may therefore be put out of consideration. By the act of June 15, however, the price of this tract was reduced from \$2.50 to \$1.25 per acre. The claimant paid the \$2.50 without protest or question. He paid more than the law required him to pay. Can he recover the excess in this action in the court of claims?

The question thus presented is one of difficulty. If the parties to the transaction were both private individuals, it would clearly be a case of voluntary payment, and the amount overpaid would not be recoverable. If, for instance, the owner of a large body of land placed certain prices on different tracts thereof, and his agent, dealing with a purchaser of one of those tracts, charged him more than the price fixed by the principal, the purchaser paying the extra price without protest, and the principal accepting such payment, the transaction would not thereafter be open to inquiry in the courts, [503] and the purchaser \*could not recover the extra sum which he had paid to the agent. But it is insisted that the relations between the government and its purchaser are not like those between two individuals,—that there is a constraining power in the government, a species of force or compulsion in its action, which makes the payment of money by one purchasing land from it through its officers a payment not voluntary, but an exaction, and therefore enables the purchaser to recover any excess in the price.

We may not enter into any discussion of the mere equities of this transaction, or the extent of the moral obligation resting on the government to repay a purchaser an excess in the price charged to and received from him. Our inquiry is limited to the question whether, in the statutes conferring jurisdiction on the court of claims, Congress has intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services, and given to that court the power to render judgment against it for such excess.

The consequences of such a conclusion are far reaching. The administrative affairs of the government are carried on by many thousands of officers. The fees for their services are generally prescribed. The sums which are to be paid for property obtained from the government are in like manner fixed by statute. Can it be that every individual who pays for services rendered by any of the administrative officers of the government, or for property which he obtains through the action of such officers, may come into the court of claims, and have an inquiry whether he has paid more than the statutory fee or price, and, if he has, obtain judgment for the excess? Suppose, for instance, the statutory fee for a certificate from a certain official is 25 cents, and a party applying for such certificate is charged and pays 50

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cents, has Congress by its legislation in respect to the court of claims provided that he can go into that court and recover from the government the extra 25 cents? It may be said that this is an extreme case, and that the fee is for the personal services of the officer; but under the present provisions of the statutes, generally speaking, all fees for the services of officers belong to the government, and are available \*only in payment, so [504] far as they go, of their salaries. It may also be said that no one would go to the trouble of suing for such a trifle as 25 cents, but if there are 10,000 cases of that kind the aggregate is no inconsiderable sum. But whether the aggregate of these claims be large or small, the inquiry is fairly presented whether Congress by its legislation intended to commit to the courts a supervision of all the charges for services and all the prices for property which administrative officers collect and receive, and empowered them to render judgment against the government in every case of excess therein. Of course, if such was its purpose the courts cannot decline jurisdiction, and must act in compliance therewith. But before so holding it seems to us that that purpose should be clearly manifested, and that a doubt in respect thereto should be resolved in favor of the government.

By 24 Stat. at L. 505, chap. 359, jurisdiction is given to the court of claims over actions against the United States for—

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort."

One contention is that there is an implied contract by the government to return to the payer any sum in excess of that which is legally due as the price of property, although the payment was made without any question, protest, or notice.

No one can read the findings without recognizing that the transaction between the officials of the land office and the claimant was at the time acceptable to both and without any complaint on the part of the petitioner. Some stress is placed by counsel on the word "required," in the 2d finding, but we think that it means simply that the government officials charged him \$400. To that charge he made no objection. Take any case in which application is made to an official for services or for the purchase of property; when he names the fee or the price the applicant ordinarily without question pays it. In a certain sense the applicant is required to pay; \*that is, the sum which he pays is the [505] sum demanded of him. It may be a rightful or a wrongful demand. When it is demanded it is required. If he pays without objection, notice, or protest it is simply in response to the call upon him for the particular sum, and, as we have heretofore said, between individuals it would be regarded as a voluntary payment.



Our attention has been called by counsel to certain opinions of this court, and some expressions therein, disconnected from the facts, doubtless lend countenance to their contention. Those cases may be placed in two classes: First, those in which something was purchased from the government which the purchaser wanted or must have; and second, those in which some official of the government was called upon to return moneys he had received by virtue of his office. *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, is an illustration of the first class. In that case the Swift Company sued to recover certain commissions alleged to be due on the purchase of proprietary stamps under the internal revenue law. It appeared that the company had settled with the internal revenue department from time to time, and it was held that such settlements did not bar it from its right to recover, although in making the settlements in controversy there was, at the times thereof, no distinct objection, notice, or protest. It was contended by the government that the matter was closed by the voluntary action of the parties, but this court decided otherwise, predicated its decision upon the fact that there had been long-continued rulings of the department in respect to the basis of settlement, and that among those who had theretofore made frequent protests was William H. Swift, who upon the organization of the claimant company became one of its large stockholders and treasurer. It was held that the company was not compelled—in view of these repeated rulings, and after protests made by others engaged in the same business, including among the number one who was largely identified in interest with itself—to continue those protests at each settlement. In other words, the thought was that there was no magic in the mere formality of an objection at the time of each settlement; that when it appeared that parties engaged in like business had presented the question to the department and frequently protested against its rulings, and that among them was one who was largely instrumental in the organization of the company, one of its large stockholders, and its treasurer, it was a work of supererogation to every time repeat the formal protest. But the very line of argument pursued by the court implied the fact that there must have been some action by the party paying, or those connected with it in business; that the attention of the department had been called to the matter again and again, its action protested against, and still it insisted upon the ruling which it had made. The claimant in the case was held to be so far identified with the parties who had made protests as to be entitled to avail itself of the benefit of such protests. The language found in the opinion as to the difference in the position occupied by the government and a party dealing with it must be understood in connection with those facts. If taken otherwise, and in the broad sense which counsel desire, and as carrying with

it the suggestion that there can be no voluntary payment in a dealing between the government and an individual in respect to the purchase of property from the government, we must decline to accede to it.

We quote from the opinion in that case, pages 27, L. ed. 343, Sup. Ct. Rep. 246, and following, that which shows the facts as understood by the court, and the language upon which the contention is here made:

"It appears that prior to June 30, 1866, the leading manufacturers of matches (among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its largest stockholders and treasurer) made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that anyone in behalf of the claimant corporation ever, after its organization, made any such protest or objection, or any claim on account thereof, until January 8, 1879. On that date the appellant caused a letter to be written to the commissioner, asserting its claim for the amount afterwards sued for, as due on account of the commissions on stamps purchased. To this, on January 16, 1879, the commissioner replied, saying that the appellant had received all \*commissions upon stamps to which it was entitled, 'provided the method of computing commissions, which was inaugurated with the first issue of private die proprietary stamps and has been continued by each of my predecessors, is correct. I have heretofore decided to adhere to the long-established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.' And the claim was therefore rejected. [507]

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866 and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant that unless it complied with the exaction it should not continue its business; for it could not continue its business without stamps, and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to



preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria*."

[508] \**United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, is not in point. The question there was as to the necessity of a tender on the day of sale in order to prevent the issue of a valid tax-deed. The property was the Arlington estate, title to which was at the time in Mrs. Lee, and in respect thereto it was said (p. 204, L. ed. 176, Sup. Ct. Rep. 247):

"It is proper to observe that there was evidence, uncontradicted, to show that Fendall appeared before the commissioners in due time, and on the part of Mrs. Lee, in whom the title then was, offered to pay the taxes, interest, and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person."

It also appeared that the commissioners had laid down a rule to the same effect, and the court held, under those circumstances, that no further tender was necessary, quoting the general rule laid down in *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052, as follows (p. 202, L. ed. 175, Sup. Ct. Rep. 245):

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the officer will be refused."

Of course, this decision bears only remotely on what is or what is not a voluntary payment, and not at all upon the question whether there be any right of recovery in case of a voluntary payment.

*Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299, is even less in point. There it appeared that a judgment had been rendered against the Bank of Washington; that it sued out a writ of error, and ultimately obtained a reversal of the judgment; but that before it sued out such writ of error, and while the judgment was in full force, it paid the amount thereof to one having in his possession an execution, notifying him at the same time that it intended to take proceedings to reverse the judgment. It was held that, notwithstanding such notice, no recovery could be had by the Bank of Washington from the party who had the execution, he holding, not as owner of the judgment, but simply as agent to collect; that while upon reversal a recovery might be had [509] from the judgment creditor, a \*payment to this third party created no cause of action against the party so receiving.

On the other hand, in *Lamborn v. Dickinson County Comrs.* 97 U. S. 181, 24 L. ed. 926, Lamborn, trustee for a land company whose lands had been sold for taxes to the county of Dickinson, paid the amount of taxes to the county, and took an assignment of the tax-sale certificates. It was subsequently decided that the taxes were illegal, and thereupon he brought this action to recover the amount he had paid. When he made the payment and took the assignment he made no protest, and it was held that he could not recover, the payment having been voluntary, and made simply under a mistake of law. Many cases are cited in the opinion sustaining that proposition. To the same effect is *Union P. R. Co. v. Dodge County Comrs.* 98 U. S. 541, 25 L. ed. 196.

The other class of cases is illustrated by *United States v. Lawson*, 101 U. S. 164, 25 L. ed. 860, and *United States v. Ellsworth*, 101 U. S. 170, 25 L. ed. 862. In each of those cases it appeared that a collector had received certain fees, some of which he was entitled to retain, but all of which he paid into the United States Treasury upon the peremptory order of the commissioner of customs. This was held not to be a voluntary payment or sufficient to prevent a recovery of the moneys actually due him, the court saying, in the second of these cases (p. 173, L. ed. 863):

"You will also bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited. Had he added, if you fail to comply the law will be enforced, his meaning could not be misunderstood, as the act of Congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable, without any abatement, etc. Rev. Stat. § 3617.

"Penalties are prescribed for a noncompliance with that requirement, as follows: Every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office and to forfeit any part or share of the moneys \*with- [510] held, to which he might otherwise be entitled. 14 Stat. at L. 187, chap. 201; Rev. Stat. § 3619.

"Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain."

On the other hand, in *United States v. Wilson*, 168 U. S. 273, 42 L. ed. 464, 18 Sup. Ct. Rep. 85, it appeared that a consul for the United States, in his regular accounts and settlements with the Secretary of the Treasury, charged himself with certain fees received by him as consul, which he was not obliged to account for, and paid the same into the Treasury, retiring from office upon a final settlement without making any claim



or protest concerning them, and it was held that he could not recover them, as they were voluntarily paid into the Treasury, the court saying (p. 276, L. ed. 465, Sup. Ct. Rep. 86):

"There is no pretense that he paid the fees into the Treasury to avoid a controversy with any department of the government, or that he ever made any objection or protest against the fees being charged to him as official fees. The court of claims so finds in substance. If a voluntary payment can be made to the government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it."

[511] It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, \*and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered.

We now proceed to notice some special objections of counsel for the appellee. One is that the defense of voluntary payment made in this case is exceptional and opposed to the entire policy of the government. Yet confessedly in all customs cases protest is necessary,—made so by express statute. Counsel refer to *Elliott v. Swartwout*, 10 Pet. 137, 153, 9 L. ed. 373, 379, in which a reason for the necessity of protest was given as follows:

"To make the collector answerable, after he had paid over the money without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit."

And upon that say:

"It is evident that customs cases are a class by themselves, and that the reasons which make a protest absolutely necessary in such cases have no application to other

cases. The questions arising in the administration of the customs laws are so delicate, with such subtle shades of difference, that it is absolutely necessary that the Treasury have notice when one of its rulings is to be disputed, in order that the evidence may be preserved. This necessity has crystallized into positive law, regulating the form and time for filing protests, and creating a separate jurisdiction for the trial of such causes apart from other claims against the government."

But *Elliott v. Swartwout* was decided before there was a court of claims, and the specific reason stated in the quotation would not apply to an action brought directly against the government \*in such court, and [512] yet the necessity of protest is still affirmed by statute. So it cannot be said that the defense of voluntary payment is opposed to the entire policy of the government.

Passing from customs cases, counsel refer to several instances in which the Interior Department has repaid money received under a mistake. Thus, in *M. F. Soto*, 6 Land Dec. 384, Secretary Lamar ordered, in respect to a series of cases, a return of the excess of moneys charged and received by the local land officers and paid into the Treasury of the United States. An examination of that decision shows that it was made under the act of June 16, 1880, heretofore referred to, which in § 2 directed the repayment, and in § 3 provided that—

"The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated."

So, Congress having directed a repayment under conditions named in the statute, and authorized the Secretary of the Interior to make that repayment, the Secretary simply enforced the mandate of Congress.

*Re Thomas Kearney*, 7 Land Dec. 29, is to the same effect. It may be that the Secretary of the Interior misconstrued the law of June 16, 1880, as seems probable from our decision in *Medbury v. United States*, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503, but whether he did or no, his action was based upon that law. The same may be said of the case of *Jacob A. Gilford*, 8 Land Dec. 583.

*Re Frank A. White*, 17 Land Dec. 339, a case of desert land entry, is a decision that no repayment can be ordered in the absence of an express direction by Congress.

The case of *Albert Nelson*, 28 Land Dec. 248, referred to by counsel, is significant. In that case it was held that the repayment provisions of the act of June 16, 1880, did not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by § 3 of the act of June 15, 1880, but that, where the consideration received for the lands was in the form of scrip still in the custody of the Land Department, \*the error might be corrected by [513] that department by a return of scrip equal in amount to the excess. That means simply that when a sale has not been closed by



the payment of the consideration into the Treasury of the United States, and while the transaction is in process of administration, and the consideration is still in the hands of the department charged with the duty of making the sale, it can correct a mistake in the amount of the consideration received, and that it is not necessary to turn the entire amount into the Treasury and leave the party to some other remedy directly against the government. But it does not follow therefrom that when the consideration has been paid into the Treasury, and the power of the Secretary of the Interior to make any correction has ceased, a claimant may ignore the question of a voluntary payment, and maintain an action to recover the excess.

The conclusion we draw from these cases (and no others in respect to the ruling of the Land Department are referred to) is different from that drawn by counsel. That Congress has power in all cases to waive the question of voluntary payment, and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the court of claims, is undoubted; that, as shown by these references, it has made provision in certain cases for a refunding by the department which has received the money is obvious, and provided for such refunding irrespective of the question of voluntary payment. Now counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the government through its administrative officers and private individuals, except in customs cases, and that, if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the court of claims and enforce his right to recover. Our conclusion is directly to the contrary, and that Congress, recognizing the rule of voluntary payment, believed that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statutory [514]\*requirement of protest, or to the ordinary and well-established rule as to the effect of voluntary payment.

While the consequences of a construction are not conclusive, yet sometimes they are worthy of notice. If the jurisdiction of the court of claims is limited to cases in which the several departments have failed to recognize the direct mandates of Congress in respect to refunding, comparatively few cases will be brought into that court. It is to be assumed that the departmental officers will recognize all legislation of Congress, and carry it into effect in accordance with its terms, and therefore the only matters for judicial cognizance will be questions arising as to alleged misconstruction by such officers of its command, and the only judgments rendered against the government will be those in affirmance thereof; whereas, if the other construction is accepted, then, irrespective of

any ruling by the department, without any mandate from Congress to refund, upon the mere fact of a supposed mistake in the fees charged or the price collected, although such fees or price were paid without question, the court will have jurisdiction of all actions to recover any alleged excess, and will be flooded with a multitude thereof. We know that even now that court is loaded with a volume of cases, prophetic of long delay, and if the door is to be opened so that all charges made by the government, through its officers, for fees or prices, irrespective of the question of voluntary payment, may be litigated therein, it is obvious that its docket will be so burdened that determination within ordinary limits of time cannot be expected.

Finally, we pass to a consideration of the question whether there is anything in the record to show that which is tantamount to objection and protest. We have not pursued the order of argument followed by counsel in their brief, but that which seems to us most natural to develop the questions involved herein. As indicated in the opinion in *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, there are cases in which the formality of a protest or objection is unnecessary: some things may be taken as equivalent thereto, or as sufficient in lieu thereof.

But we fail to see anything in the record which brings this case within the scope of that decision. It does not appear that \*there [515] was any continued, or even a single, ruling of the Land Department to the effect that land situated as was this was subject to the price of \$2.50 per acre, and, of course, if there had been no ruling to that effect there had been no objection or protest by anyone. Nor is there anything to show that the \$2.50 was paid on any supposition that it was an excessive charge, or paid simply for the purpose of protecting a property right which he had acquired. It is said that, as he had already gone upon the land and made improvements, that he paid \$400 to protect his right to his settlement and improvements, and that he paid it because such price was exacted from him; but there is nothing in the record to indicate that he did not go upon the land in the first instance supposing that the price was \$400, or that he did not file his declaratory statement, makes his settlement and improvements,—all with the expectation of paying the sum which he did thereafter pay. Under those circumstances it cannot be said that he paid a sum which was exacted from him, not because he believed it was the proper charge, but because he felt that it was necessary to protect his rights. In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual and one of law,—a mistake on his part not induced by any attempt to deceive or misrepresentation by the government officials. It is a case of a voluntary payment, and as such the claimant's remedy is by appeal to the discretion of Congress, and not by an action in the



court of claims. *The judgment is reversed, and the case remanded, with instructions to enter judgment for the government.*

[516] \*HENRY LOCKHART, *Plff. in Err.*,  
v.

J. A. JOHNSON, Julia A. Johnson, His  
Wife, Charles Pilkey, *et al.*

(See S. C. Reporter's ed. 516-530.)

*Public lands—Mexican grant—mining claim  
—ejectment—relocation in pursuance of  
conspiracy.*

1. Land claimed to be within the limits of a Mexican grant is not withdrawn and reserved from entry under the mineral laws of the United States by reason of the mere fact that the claim is before the court of private land claims for adjudication, since there is nothing in the treaty with Mexico to work that result, and the provision of the act of 1854 (10 Stat. at L. 308, chap. 103), reserving such land until the final action of Congress on such claims, was repealed by the act of Congress of March 3, 1891 (26 Stat. at L. 854, chap. 539, § 15), establishing the court of private land claims.
2. An action of ejectment to recover mining property cannot be maintained on the ground that defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against the defendants, give plaintiff no legal title to the mine or any part thereof.

[No. 147.]

*Argued March 22, 1901. Decided May 13, 1901.*

IN ERROR to the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment for defendants in an action of ejectment for mining property. *Modified and affirmed.*

See same case below, 9 N. M. 344, 54 Pac. 336.

Statement by Mr. Justice **Peckham**:

This is an action of ejectment brought by plaintiff in error to recover certain mining property in the territory of New Mexico. The declaration alleges that the plaintiff, on July 10, 1893, was entitled to the possession of a certain mine, or deposit of mineral-bearing rock in place, situated in the Cochiti mining district, in the county of Bernalillo and territory of New Mexico, and that while so in possession the defendants, on October 1, 1893, entered into and upon the premises and have ever since withheld the possession of the same from the plaintiff to his damage. All the defendants pleaded not guilty, while Pilkey added a further plea that he was not at the time of the com-

mencement of the action in the possession of the premises or any part thereof. The plaintiff demurred to this second plea, and after argument the demurrer was overruled. The parties went to trial upon these pleadings, and after the testimony had been taken the jury, under the instructions of the court, found a verdict for the defendants. The plaintiff appealed from the judgment entered upon the verdict to the supreme court of the territory, where it was affirmed, and he thereupon sued out a writ of error from this court.

For the purpose of the trial the parties entered into the following stipulation:

"It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general of the territory of New Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same were filed in the court of private land claims, one by Joel Parker Whitney, José Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, José de Jesus Lucero, Juan Teodora Lucero, José Telesforo Lucero, Bernard S. Rodey, and Hannah Harris, being numbered 205 of the docket of the court of private land claims at Santa Fé, and filed March 2, 1893; and the other petition being filed by Manuel Hurtado and José Antonio Gallego on the 3d day of March, 1893, and that said petitions were consolidated in said cases heard, and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

"It is further stipulated and agreed that the official printed copies of the reports of the surveyor general to Congress upon said private land claim and all documents attached thereto may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor general's office, subject, however, to such objection as the parties may make upon other grounds."

The plaintiff also showed upon the trial that he and one Benjamin Johnson and the defendant Charles Pilkey on or about May 7, 1893, entered into an agreement at Albu-

NOTE.—As to what title or interest will support an action of ejectment—see *Hancock v. McAvoy* (Pa.) 18 L. R. A. 781. and note.  
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querque, New Mexico, by which they agreed to form a partnership for the purpose of discovering, locating, and operating mining claims, Pilkey agreeing to prospect and locate such veins and lodes and placers as he might discover, containing valuable ores or minerals, in the name and for the joint benefit of all the parties to the agreement, in the proportion of one-third interest to himself and an undivided two-thirds interest to the others. They were to furnish him with tools, etc., and to pay him for some portion of his labor upon the mines which he might discover. In pursuance of this agreement Pilkey started out and, among others, discovered, took possession of, and assumed to locate the mine in question. It is claimed on the part of the plaintiff that Pilkey, after taking possession of and locating the mine, remained there from July 10, 1893, until some time in October of that year, when in connection with several other persons he entered into a conspiracy against his partners and pursuant thereto ceased to do any work on the mine and permitted other persons (defendants herein) to take possession of it and make a relocation thereof, and that they have retained possession ever since.

Evidence was offered at the trial for the purpose of showing these last stated facts, which, under the objection of the defendants, was ruled out and exceptions duly taken.

The defendants contended that the land in controversy was at all times subject to the mining laws of the United States, and that plaintiff did not comply with the provisions thereof or of the laws of New Mexico applicable thereto, and that whatever right or title he ever had in the lands had expired [519] and become \*forfeited before the defendants took possession of the land and long before the commencement of this action.

Mr. J. H. McGowan argued the cause and filed a brief for plaintiff in error:

The Land Department has continuously held these private Spanish and Mexican claims to be in a state of reservation until their proper boundaries are fixed by some competent tribunal.

*Joseph Farr*, 24 Land Dec. 1; *The Per-rine grant*, 24 Land Dec. 109; *Atlantic & P. R. Co. v. Fisher*, 1 Land Dec. 392; *Tumacacori and Calabazas Grant*, 16 Land Dec. 408.

Until the title to a floating grant vests in the grantees, all the lands comprised within the claimed limits of the exterior boundaries thereof are held in reservation for the benefit of the grant.

*Whitecher v. Southern P. R. Co.* 3 Land Dec. 459.

While the title to claims of this character is in litigation for the purpose of settling the rights of the grantee, the whole area claimed is reserved from appropriation of any kind, and no part is "public lands" or "lands subject to sale."

*Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769.

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Neither party could make a legal mining claim, the lands being in reserve.

*Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779.

The owner of the true title, or the claimant to the title in litigation, not objecting, the courts regard the better right, as between the parties, to be vested in the first possessor.

*Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 601; *Weimer v. Lowery*, 11 Cal. 104; *Bequette v. Canfield*, 4 Cal. 278, 60 Am. Dec. 615.

Continuous *possessio pedis* does not apply to mines as to agricultural lands.

*Attwood v. Fricot*, 17 Cal. 37; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Blanchard & Weeks, Mines*, 107-172; *Morton v. Solambo Cooper Min. Co.* 26 Cal. 527.

The prior discovery and possession of the mine by Pilkey were sufficient possession and title on the part of the plaintiff to sustain ejectment against the defendants as intruders thereon,—they having no better title.

N. M. Comp. Laws, §§ 1570, 2218, 2258, 2263; *Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717; *New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 293, 13 Pac. 201; *Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843; *Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Coryell v. Cain*, 16 Cal. 567; *Wilson v. Fine*, 38 Fed. 792.

The possession of one tenant in common is the possession of his companions, and the law assumes and requires that each shall be true to the other.

*Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541; *Campbell v. Campbell*, 13 N. H. 483; *Kinney v. Slattey*, 51 Iowa, 353, 1 N. W. 623; *Miller v. Myers*, 46 Cal. 535.

Therefore, putting Fagaly in possession, and denial by Pilkey of plaintiff's rights, would constitute an actual and fraudulent ouster of plaintiff.

*Sedgw. & W. Trial of Title*, p. 163, § 277; *Barnitz v. Casey*, 7 Cranch, 456, 3 L. ed. 403.

The questions of conspiracy to defraud plaintiff of his property, and of his alleged abandonment of his property, were each questions of fact for the jury exclusively, under proper instructions from the court.

*Russell v. Post*, 138 U. S. 425, 34 L. ed. 1009, 11 Sup. Ct. Rep. 353; *Preston v. Bowers*, 13 Ohio St. 13, 82 Am. Dec. 430; *Comrs. v. Brown*, 14 Gray, 419; *Richardson v. McNulty*, 24 Cal. 339; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594; *Myers v. Spooner*, 55 Cal. 257; *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323; *Mallett v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 194, 90 Am. Dec. 484; *Oreamuno v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 215. See also *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548.

The statements made by Pilkey, Fagaly, and Walker, respectively, while in possession or conspiring to get into possession of the premises, were admissible in evidence

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for various reasons,—as declarations against interest, as showing the character of defendants' title, as declarations of conspirators made during the pendency of a fraudulent combination.

2 Whart. Ev. § 1156; 1 Greenl. Ev. 109; *Rowland v. Philadelphia, W. & B. R. Co.* 63 Conn. 415, 28 Atl. 102; *Ward v. Cochran*, 18 C. C. A. 1, 36 U. S. App. 307, 71 Fed. 135; *Martin v. Bonsack*, 61 Mo. 559.

**Mr. William B. Childers** argued the cause and filed a brief for defendants in error:

A reservation from entry and location can only be the result of a statute, or executive action in pursuance of a statute.

*Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 915; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769; *Van Reynegan v. Bolton*, 95 U. S. 33, 24 L. ed. 351; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. ed. 1130; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Aur-recochea v. Bangs*, 114 U. S. 381, 29 L. ed. 170, 5 Sup. Ct. Rep. 892; *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Grant v. Jaramillo*, 6 N. M. 313, 28 Pac. 508; *Chavez v. Chavez de Sanchez*, 7 N. M. 58, 32 Pac. 157; *United States v. McLaughlin*, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177.

If the mining laws were applicable, the plaintiff's failure to complete a valid location by compliance with the statutes left the land open to location by the "Washington" locators on that day.

*Belk v. Meagher*, 104 U. S. 287, 26 L. ed. 738; *Faxon v. Barnard*, 4 Fed. 703; *Mallett v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 188, 90 Am. Dec. 484; *Kendall v. San Juan Silver Min. Co.* 144 U. S. 665, 36 L. ed. 585, 12 Sup. Ct. Rep. 779; *Wills v. Blain*, 5 N. M. 238, 20 Pac. 798; *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789; *Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741.

The holding of the Secretary of the Interior that the repeal of the 8th section of the act of 1854 creating the reservation had no effect on the reservation is directly at variance with the principle laid down by this court in *Stoddard v. Chambers*, 2 How. 285, 11 L. ed. 269.

The contention of the plaintiff in error that the reservation existed by reason of the treaty is not sound. The treaty itself creates no such reservation, and none could be created except by act of Congress.

*Botiller v. Dominguez*, 130 U. S. 247, 32 L. ed. 928, 9 Sup. Ct. Rep. 525.

"Forfeiture" and "abandonment" are not synonymous. The first depends on facts alone; the second upon fact and intent. In case of forfeiture, intention is immaterial.

*Mallett v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 188, 90 Am. Dec. 484; *St. John v. Kidd*, 26 Cal. 264; *King v. Edwards*, 1 Mont. 235.

All evidence of alleged conspiracy and collusion between Pilkey and the "Washington" locators, Fagaly and Walker, is wholly irrelevant because it is immaterial how or

why the failure occurs which works a forfeiture.

*Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911; *Hunt v. Patchin*, 35 Fed. 816.

There is no rule of law which makes a subsequent relocation of a mining claim by one owner enure to his co-owner's benefit. One owner can relocate and exclude his co-owners.

*Strang v. Ryan*, 46 Cal. 33.

Where an outstanding title is acquired by one partner in a mining claim, such purchase does not enure to the benefit of his copartners.

*Bissell v. Foss*, 114 U. S. 260, 29 L. ed. 129, 5 Sup. Ct. Rep. 851.

The possession of a cotenant in a mining claim can become hostile to his cotenants whenever he openly repudiates the relation, and gives notice to his cotenants of such repudiation, and notifies them that he is no longer holding for them.

*Freeman, Cotenancy & Partition*, § 1229.

The bringing of this suit admits that there was an ouster; otherwise ejectment could not be maintained.

*Barnitz v. Casey*, 7 Cranch, 471, 3 L. ed. 408.

The evidence clearly shows that neither Pilkey nor any other person had such prior possession as would sustain an action of ejectment.

*Sabariego v. Maverick*, 124 U. S. 297, 31 L. ed. 444, 8 Sup. Ct. Rep. 461.

There is no ground for the contention that Pilkey's possession was or could have been the plaintiff's after the repudiation of the contract, which all the evidence shows was before the entry of defendants. A prospecting contract can be rescinded or abandoned, and thereafter all privity under it ceases.

*Chadbourne v. Davis*, 9 Colo. 581, 13 Pac. 721.

In the action of ejectment under the New Mexico statute the plaintiff cannot recover on an equitable title, but only on the legal title, or actual prior possession of which he has been deprived by the defendant without title.

*Hunter v. Hemphill*, 6 Mo. 106; *Gurno v. Janis*, 6 Mo. 330; *Guyol v. Chouteau*, 19 Mo. 546; *Williams v. Carpenter*, 35 Mo. 70; *Beal v. Harmon*, 38 Mo. 439. See also *Pickett v. Jones*, 63 Mo. 200; *Sedgw. & W. Trial of Title*, § 184.

In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which show the right in another, these cases can only be considered on the equity side of the Federal courts.

*Foster v. Mora*, 98 U. S. 428, 25 L. ed. 192. To the same effect see *Johnson v. Christian*, 129 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; *Bagnall v. Broderick*, 13 Pet. 436, 10 L. ed. 235; *Hooper v. Scheiner*, 23 How. 235, 16 L. ed. 452; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344, 8 Sup. Ct. Rep. 429; *Morehouse v. Phelps*, 21 How. 294, 16 L. ed. 140; *Doe ex dem. Oaksmith v. Johnston*, 92 U. S. 346, 23 L. ed. 683. See also *Carpen-*



*tier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698.

Conceding that the mining laws did not apply, nevertheless the trial court was justified in instructing the jury to find for the defendants.

*Ferris v. Coover*, 10 Cal. 631; *St. John v. Kidd*, 26 Cal. 272; *Davis v. Butler*, 6 Cal. 510; *Derry v. Ross*, 5 Colo. 295; *Mallett v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 188, 90 Am. Dec. 484; *Depuy v. Williams*, 26 Cal. 310; *Strang v. Ryan*, 46 Cal. 33.

The allegation of fraud and collusion between Pilkey and the locators of the Washington mine adds nothing to the right of plaintiff in error to maintain his ejectment suit; and it was not a question which should have been submitted to the jury, or that could have been litigated in an ejectment suit.

*Morehouse v. Phelps*, 21 How. 294, 16 L. ed. 140; *Doe ex dem. Oaksmith v. Johnston*, 92 U. S. 343, 23 L. ed. 682; *Carpentier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698.

[519] \*Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

The first question to be determined in this case is one which arises out of the facts set forth in the stipulation between the parties, and that is, Did the lands which the plaintiff claims to recover belong at the time of the location in 1893 to the United States within the meaning of § 2319, Revised Statutes, which provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," etc.?

At the time of the location the record shows the parties believed the land was government land, and not within the limits of any Mexican grant. The stipulation shows, however, that the lands were in fact within the limits of the private land claim known as the Canada de Cochiti grant; that the grant was never confirmed by Congress upon the report of the surveyor general, and that two different sets of claimants under the grant had filed their petitions in the court of private land claims at Santa Fé, one on the 2d and the other on the 3d day of March, 1893; that there was a decree of confirmation rendered by the court on September 29, 1894, and in that decree of confirmation the lands were not included within the boundaries of the grant as confirmed by that decree. An appeal was taken therefrom by all the parties to the Supreme Court of the United States, where it was pending at the time the stipulation was entered into, the appeal being dated March 11, 1895.

It therefore appears that at the time of the discovery and location of the lode in July, 1893, the Cochiti grant was before the

[520] \*court of private land claims for adjudication, and the question is whether by reason of that fact these lands were reserved from

entry and were not subject to the mineral laws of the United States at that time. It will be noticed that before the trial of this case the validity and extent of the Cochiti grant had been decided by the court of private land claims, and this land was thereby excluded from the limits of that grant. We know by our own records that the decree of the court of private land claims was affirmed in this court, in substance, in *Whitney v. United States*, decided in May, 1897. 167 U. S. 529, 42 L. ed. 263, 17 Sup. Ct. Rep. 857. The contention on the part of the plaintiff in error is that while the Cochiti claim was before the court of private land claims, and thereafter until its final determination by this court, no land within its claimed limits could be entered upon under the mining laws of the United States, and if any such entry were in fact made it was illegal and void, and gave no rights under the mining laws to the parties so entering, and consequently plaintiff's possession was not subject to forfeiture under those laws. In other words, that while the claim was *sub judice* all lands within its limits as claimed were withdrawn and reserved from entry under any of the laws pertaining to the sale or other disposition of the public lands of the United States, and that the plaintiff, being in possession, had the right to retain it as against defendants who entered without right or title, and were therefore mere trespassers.

Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either expressed or implied. *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. ed. 915, 920; *Hewitt v. Schultz*, 180 U. S. 139, ante, 463, 21 Sup. Ct. Rep. 309. We must therefore refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual limits of a grant by the Spanish or Mexican authorities before the cession of the \*territory by Mexico [521] to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848. 9 Stat. at L. 922. The 8th and 9th articles of that treaty provide that the property of every kind belonging to Mexicans in the ceded territory should be respected by the government of the United States and their title recognized.

In 1854 (10 Stat. at L. 308, chap. 103) Congress established the office of surveyor general of the territory of New Mexico, and in the 8th section of that statute it was made the duty of that officer, under instructions from the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico.



He was to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty above mentioned, with his decision as to the validity or invalidity of each. This report was to be laid before Congress for such action thereon as it might deem just and proper, "and until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

The Cochiti grant came before the surveyor general pursuant to the provisions of the act of 1854, and therefore by the terms of that portion of § 8, just quoted, the lands were reserved from sale or other disposal by the government until final action by Congress thereon. Up to March 3, 1891, Congress had taken no action in regard to this grant and on that day it passed the act establishing the court of private land claims (26 Stat. at L. 854, chap. 539), and by its 15th section Congress in terms repealed the 8th section of the act of 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act." By this repeal, lands which were in fact public lands belonging to the United States, although within the claimed limits of a Mexican grant, became open to entry and sale under the laws of the United States, unless, as is the contention of plaintiff, such (422) lands were reserved from entry and sale or other disposition by the United States, by reason of the provisions of the treaty with Mexico. We see nothing in the terms of that treaty, either in the 8th or 9th article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale.

We are aware that the Land Department has in some cases taken a different view of this subject. In the *Tumacacori and Calabazas Grant*, 16 Land Dec. 408, 423, the Secretary held that the act of 1891, creating the court of private land claims, did not by its 15th section, "either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage."

And in the *Joseph Farr Claim*, 24 Land Dec. 1, the Secretary held that by the terms of the treaties between the United States and the Republic of Mexico all lands embraced within the Mexican and Spanish grants were placed in a state of reservation for the ascertainment of the rights claimed under said grants, and that the act of March 3, 1891, continued that reservation in force, and that it would remain so until final ac-

tion is taken on the respective claims or grants affected thereby.

We cannot agree with these decisions. In the last case the Secretary held, in opposition to the views expressed by his predecessor in the earlier case, that the lands were not reserved by virtue of the statutory reservation under the act of 1854, because that section was repealed by the 15th section of the act of 1891 without any qualification, and the repeal went to the entire section; but he held that "whatever may have been the purpose of Congress in making said reservation, it is clear that all lands embraced within the claimed limits of grants made by Mexico or Spain prior to said treaty were in a state of reservation under the terms of the treaty itself, independent of any reservation that might be made after such treaty was duly ratified. \*It follows that the re-[523]peal of the section of the statute containing the reservation would not have the effect of releasing lands reserved under treaty obligations from such reservation."

As we have already stated, there are no words in the treaty with Mexico expressly withdrawing from sale all lands within the claimed limits of a Mexican grant, and we do not think there is any language in the treaty which implies a reservation of that kind. Whatever reservation there is must be looked for in the statutes of the United States, and we are of opinion that there is no such reservation and has been none since the repeal of the 8th section of the act of 1854.

In *Stoddard v. Chambers*, 2 How. 284, 11 L. ed. 269, the action was ejectment for lands in Missouri. The defendant claimed title under a New Madrid certificate permitting location upon the public lands which had been authorized to be sold under an act of Congress, approved February 15, 1811, by which the President was authorized to sell public lands in the territory of Louisiana, with a proviso that "till after the decision of Congress thereon no tract shall be offered for sale the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

From the time of the passage of that act up to May 26, 1829, it was not questioned that all lands claimed under French or Spanish title were reserved from sale by acts of Congress. On May 26, 1829, this reservation ceased until it was revived by the act of July 9, 1832, and was continued from that time until the act of 1836. The defendant's patent was issued on July 16, 1832,—after the time when the reservation was revived by the act of July 9, 1832. In speaking of the location under his New Madrid certificate by the defendant, the court said (at p. 318, L. ed. 283): "His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued."



[524] Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title \*of the defendant could not be contested. But at no other interval of time from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate."

So in that case it appears that unless there were a reservation of the land by congressional action, it was not reserved in any other way, and that during the interval of three years, when the reservation by the act of Congress was not in operation, an entry made during that time would have been valid, and the title of the defendant thereunder could not have been contested.

Mineral lands are not supposed to have been granted under ordinary Mexican grants of lands, and the act of 1891 provides that minerals do not pass by such grants, unless the grant claimed to effect the donation or sale of such mines or minerals to the grantee, or unless such grantee became otherwise entitled thereto in law or in equity; the mines and minerals remaining the property of the United States, with the right of working the same, but no mine was to be worked or any property confirmed under the act of 1891 without the consent of the owner of such property, until specially authorized thereto by an act of Congress thereafter to be passed. Section 13, subd. 3, act of 1891. This provision makes it still plainer that, so far as regards mineral lands, there was no intention after the passage of the act of 1891 that they should be reserved by a mere claim in a Mexican grant of ordinary land.

Nor does the claim that the Cochiti grant was *sub judice* at the time of the location of these lands affect their status as public lands belonging to the United States. They were not, in fact, within the limits of the grant.

The case of *Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457, is not in point. In that case it was held that a private claim to land in Arizona, under a Mexican grant which had been reported to Congress by the surveyor general of the territory, could not, before Congress had acted on the report, be contested in the courts of justice. It was stated (p. 83, L. ed. 377, Sup. Ct. Rep. 458) that "the case is one of those, jurisdiction of which has been committed to a particular tribunal, and which cannot, therefore,—at least, while proceedings are pending before that tribunal,—be \*taken up and decided by any other." The court further said that Congress having constituted itself the tribunal to finally determine upon the report and recommendation of the surveyor general whether the claim was valid or invalid, the proceedings were pending until Congress acted, and while they were pending the question of the title of the petitioner could not be contested in the ordinary courts of justice. This is no such case. There was no contest in any other court by which the validity or extent of the grant pending for

decision in the court of private land claims could in any way be affected. No court of justice had been appealed to for any such purpose. The question was simply whether the land was public land open to entry under the laws of the United States, and this was a question which parties might decide at the peril of having their acts rendered of no avail if the decision of the court of private land claims included those lands in the grant then before it.

Nor does the case of *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad, were not embraced in the congressional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. The act of March 3, 1851 (9 Stat. at L. 631, 633, chap. 41, § 13), which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provisions the lands were not public lands under the laws of the United States until the claims thereto had been either barred by lapse of time or rejected. The 6th section of the act of 1853, March 3 (10 Stat. at L. 244, 246, chap. 145), was also referred to as expressly excepting all lands claimed under any foreign grant or title. There was no such legislation existing in regard to New Mexico at the time of the location of this mining claim, July, 1893. The lands were in fact, and have been since their cession to this country, public lands of the \*United States, although during the period between [526] the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined.

Being public land and since 1891 open to location under the mining laws of the United States, it is further contended on the part of defendants that the location of the claim made by Pilkey on July 10, 1893, in behalf of himself and his two partners, Lockhart the plaintiff herein and Johnson, became forfeited by reason of noncompliance with the mining statutes of the United States and also the territory of New Mexico, and that while such failure to comply with the statutes continued, peaceable possession of the land was taken and a relocation made by the defendants, and whatever rights the plaintiff ever had under the first location were thereby cut off.

The laws of New Mexico in force at the time when this location was made provide that a person desiring to locate a mining claim must distinctly mark the location on the ground so that its boundaries may be readily traced, and must post in some conspicuous place on the ground a notice in



writing stating the names of the locators, their intention to locate the claim, giving a description thereof by reference to some natural object or permanent monument so as to identify it, and must also within three months after such posting cause a copy of the notice to be recorded in the office of the recorder of the county in which the notice is posted. The locator must, also, within ninety days from the date of taking possession of the claim, sink a discovery shaft upon the claim to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or he shall drive a tunnel, adit, or open cut upon such claim at least 10 feet below the surface exposing mineral in place. By the provisions of the act of 1889 the surface boundaries of all mining claims located must also be marked by four substantial posts, or four substantial monuments of stone set at each corner of the claim and which posts or monuments must be plainly marked so as to indicate the direction of the claim from each monument or post. N. M. Comp. Laws 1897, §§ 2286, 2298; N. M. Laws 1889, §§ 1, 2, chap. 25.

[527] \*There is no pretense in the evidence that these things were done other than the posting of a notice upon a pile of rocks at some point within the claim. No work was done, no monuments or posts set, no discovery shaft sunk, nor any tunnel, adit, or open cut driven, as provided by law. It also appears that some time about the last of September or the early part of October, 1893, Pilkey who was the only one of the partners who went to the land and stayed near it at any time, left the neighborhood with his wife and came to Albuquerque and remained there until November, 1893, and that while he was absent and no one in possession of the land, and on or about October 23, 1893, four of the original defendants, Fagaly, Walker, Leeds, and Johnson, located this claim and peaceably entered upon and took possession of it.

If the statutes are not complied with by doing the work as therein provided, and another locates before such work is done, it is a valid location. *Faxon v. Barnard*, 4 Fed. Rep. 702, 2 McCrary, 44; *Belk v. Meagher*, 104 U. S. 279, 282, 26 L. ed. 735, 736.

It is undisputed that the requisite amount of work was not done by the first locator, nor is there any dispute that he left the mine, certainly early in October, 1893, and that there was no one in possession of the land on the 23d of October, 1893, when the above-named defendants entered upon the land, peaceably took possession thereof and made their location, and that in such location Pilkey did not join, and his name was absent from the notice, and he was not present when possession was taken by the other defendants.

These undisputed facts are shown by the record, and upon such evidence the court directed a verdict for the defendants. The supreme court of the territory has affirmed the judgment entered upon this verdict, on the ground that the land was public land of the

United States and open to location under the mineral laws thereof; that the failure of the original locator to comply with the terms of the statutes of the United States and of New Mexico by doing the work therein prescribed forfeited all his rights under such location, and the peaceable location and possession by others while such failure continued were valid, and the plaintiff therefore showed no legal title to the mine, and consequently \*could not recover in this action. Upon the facts thus stated we think the supreme court was right.

In the course of the trial, however, while the cause was with the plaintiff, he offered to show certain other and further facts which he claimed entitled him to recover the lands as against all the defendants. The defendants objected to the evidence so offered on the ground that it was inadmissible and immaterial in this action, and the objection was sustained and the plaintiff duly excepted.

The facts which the plaintiff sought to prove are briefly these: After Pilkey and the plaintiff and Johnson had entered into their agreement, and while Pilkey was, pursuant to its provisions, engaged in prospecting, he discovered the mine in question and located it in the name of himself and his partners, and thereafter and before the expiration of the ninety days in which to do the necessary work on the claim he and the other defendants conspired together, and agreed that he should do no work on the mine within the statutory time, and after the expiration of that time and a forfeiture had been incurred by a failure to comply with the statutes the other parties defendant should relocate the mine, comply with the laws in regard to doing the work upon it and thereby obtain the ownership thereof, and that pursuant to such conspiracy he did neglect to do the necessary work within the statutory time, the defendants relocated the mine, entered into the possession thereof and did the necessary work thereon and have remained in possession ever since. The plaintiff therefore claims that Pilkey, being one of the conspirators with the other defendants and also a copartner of plaintiff, could not be a party to a hostile relocation of the mine, and that any such relocation by others, under an agreement with him, was illegal and gave no right or title to defendants, and that the prior possession of plaintiff, through his copartner, continued in law, and, as against the defendants, such possession gave plaintiff a good title, they being on account of their fraud mere trespassers upon the land.

Much of the testimony thus given is denied on the part of Pilkey, but as all of it was rejected by the court we must assume its truth for the purpose of determining the case.

\*It is clear that the statutes providing for a location of mining lands were not complied with by Lockhart or his partners. There is no dispute on that subject. When peaceable possession of the mine which Pilkey had abandoned was taken and the relocation was

made by the defendants Fagaly, Walker, Leeds, and Johnson, and in their own names, whatever legal title to the mine the plaintiff Lockhart had by virtue of the prior location by defendant Pilkey was cut off. The plaintiff has now brought this purely legal action of ejectment, and must recover upon the strength of his legal title, or not at all. It is undisputed that whatever possession Pilkey had ever taken of the land in question had been in fact abandoned by him as early as the first of October, 1893. Lockhart had never had any other than constructive possession of the land based upon the alleged actual possession of his copartner, and when the latter abandoned such actual possession, left the mine and came to Albuquerque, the constructive possession of plaintiff ceased at the same moment. When the four defendants who took possession of and relocated the mine went on the land on October 23, 1893, they found it vacant, and when they took peaceable possession of the vacant land before any resumption of work upon the claim by plaintiff or in his behalf, the latter's legal title, whatever it had been, ceased. It is not a case, therefore, of a prior possession under color of law or title being sufficient as against an ouster by a mere trespasser. There has been no ouster, but, on the contrary, a complete abandonment of possession. Whatever may be the equities of the plaintiff in regard to this land as against the defendants, he has certainly no legal title to the mine or any part thereof, and in this purely legal action he must fail.

In the courts of the United States in an action of ejectment the strict legal title must prevail, and if the plaintiff have only equities they must be presented and considered on the equity side of the court. *Foster v. Mora*, 98 U. S. 425, 428, 25 L. ed. 191, 192; *Johnson v. Christian*, 128 U. S. 374, 382, 32 L. ed. 412, 414, 9 Sup. Ct. Rep. 87. The law of New Mexico is to the same effect. N. M. Comp. Laws, § 3160, and following sections.

[530] Whatever the rights of the plaintiff may be (and as to what \*they are we express no opinion), it is clear that on this record he cannot maintain an action of ejectment. If he have rights as a copartner or cotenant with Pilkey, and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. *Turner v. Sawyer*, 150 U. S. 578, 586, 37 L. ed. 1189, 1191, 14 Sup. Ct. Rep. 192.

In relation to mining, it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up is against the copartner or cotenant, by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911.

In this case it will be seen that the relocation on behalf of some of the defendants did not contain Pilkey's name, and hence he never had any legal title under that location. He denies that he had any interest in the mine

under the relocation, and asserts that it was not made in his interest or for his benefit. Although the plaintiff has no right to maintain this action, yet he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants or either of them that he may be advised; and in order to avoid any complication of that nature which possibly might result from an absolute affirmance of the judgment of the supreme court of the territory, we modify the terms of that judgment by providing that it is entered without prejudice to the enforcement by other remedies, of the rights, if any, which the plaintiff may have against the parties defendant or either of them, and as so modified, such judgment is affirmed.

\*DAVID WELLS *et al.*, Plffs. in Err., [531]  
v.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH and Robert J. Wade, City Marshal.

(See S. C. Reporter's ed. 531-548.)

*Sale of city lots on ground-rent plan—right to exemption from taxation for city purposes.*

A contract for the exemption from taxation for city purposes of lots sold by a city on the ground-rent plan under the Savannah (Georgia) ordinance of 1790, providing that the lots may be held forever on payment of the ground rent, but making no reference to taxes, is not created where the deeds provide that the holders shall be "subject to all such assessments and burthens as might be in common with other lot holders in the city," although for many years annual ordinances exempted such lots from taxation for the respective years, and on the sale of such lots from time to time statements were made by officials to the effect that they would not be taxable, and similar statements were contained in reports of committees.

[No. 222.]

*Argued April 9, 1901. Decided May 13, 1901.*

IN ERROR to the Supreme Court of the State of Georgia to review a decision affirming a judgment refusing an injunction against the collection of city taxes. *Affirmed.*

See same case below, 107 Ga. 1, 32 S. E. 669.

Statement by Mr. Justice Peckham:

The plaintiffs in error commenced this proceeding in the superior court of the state of Georgia, Chatham county, against the mayor, etc., of the city of Savannah and its city marshal, to enjoin the collection of taxes upon certain real estate in that city, of which they claim to be lessees from the city.

NOTE.—That exemption from taxation, whether a contract or not, is not implied—see note to *Tucker v. Ferguson*, 22 L. ed. U. S. 805.



and they allege that the taxes assessed upon such real estate are illegal. They also seek to recover from the city the amount of taxes theretofore paid by them on such real estate, under protest. The trial of the case resulted in a judgment for the city, which was, on appeal to the supreme court of the state, affirmed, and the plaintiffs have brought the case here on writ of error.

They claim that the levying and collection of the taxes referred to, under an ordinance of the city providing therefor, passed in 1878, constitute an impairment of the obligations of a contract between the city and the predecessors in title of the plaintiffs in error, made at the time the real estate was purchased, by which contract it was agreed that on the payment of a certain annual sum, called "ground rent," to the city by the holders of the real estate, it was to be forever exempt from all city taxation.

[532] Upon the trial of the action these facts appeared: Prior to 1790 \*the city of Savannah owned certain lots which were called "common lots," and on September 28 of that year the common council passed an ordinance for disposing of a portion of them. Each lot, by the provisions of the ordinance, was to be valued by the city, and then put up for sale at public outcry, and the highest bidder, over and including the original valuation, was to have the lot, and if he chose to pay the whole amount of his bid in cash he was to have a deed conveying it to him in fee simple, or he might, instead of making the whole cash payment, agree with the city to pay in cash the balance of his bid over the valuation, called the increase money, and also to pay a ground rent of 5 per cent upon the amount of valuation, payable quarterly, and in that event the lot might be retained in his hands or in the hands of his heirs and assigns forever on payment of such ground rent. The ordinance further provided that at any time thereafter the purchaser or his heirs or assigns should have the power to pay the original valuation money, with what rent might be due up to that time, in full discharge and extinguishment of the ground rent, and he or they should thereupon be entitled to the land in fee simple. The city was also to give a deed by way of bargain and sale to each purchaser of lots which should vest an absolute or conditional estate in the purchaser, according to the circumstances; that is to say, an absolute one if the valuation and increase money should be paid down, or a conditional one if the valuation money should not be paid down, but which should become absolute if and when the valuation money should at any future time be paid into the treasury, which payment should be acknowledged by the mayor and a majority of the aldermen, under the seal of the city, and attested by the city treasurer, to be indorsed on the deed. The ordinance continued:

"And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on

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failure therein for the space of fifteen days after the same shall become due the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of \*their proper officers exercised such power [533] and given a notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes, as fully as if the same had not been bargained for or purchased, any sale or encumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her, or them, to the contrary thereof in anywise notwithstanding."

Pursuant to such ordinance the lands were sold and the purchasers of many of the lots elected to hold their purchases on ground rent payable quarterly, as stated in the ordinance. Deeds were thereupon executed on the part of the city and also were signed by the respective purchasers. Lands have been sold from time to time under ordinances of substantially the same character and containing language in substance the same up to 1872, since which time conditional sales have been abandoned.

The deeds contained a provision that "in consideration of the rent to be paid, and of the several covenants and agreements to be performed (mayor and aldermen), have bargained and sold, and by these presents do bargain and sell, unto the said ——— all that lot of land (describing it) . . . unto the said ——— executors, administrators, and assigns, forever, on this express condition. Nevertheless, that ——— the said ——— executors and administrators and assigns" shall pay rent as covenanted; and "in case of failure herein for the space of twenty days after any of the said quarterly payments shall become due, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of re-entry; and having, by means of their proper officers, exercised such power, and given a notice thereof in writing, posted on the premises, the said lot, with all improvements thereon, shall be considered, at the expiration of ten days thereafter, as absolutely revested in the corporation, and the estate by these presents created determined to all intents and purposes as fully \*as if the same had not been [534] bargained for or purchased; any sale or encumbrance, or other act made or suffered by the said ——— executors, administrators, or assigns, or others under him or them, to the contrary thereof in anywise notwithstanding."

The purchaser also covenanted to pay the annual rent, and that in case of failure the city should have the lawful right of re-entry as already provided for.

The deed also contained the following provision:

"And it is hereby declared to be the true



intent and meaning of these presents, and all parties to the same, that, on payment of the said ground rent, at the times and after the manner hereinbefore directed, the said ——— heirs, executors, administrators, and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said lot and premises, and receive and take the rents, issues, and profits thereof, and of every part thereof, to ——— and ——— own use, absolutely, without the let, suit, trouble, eviction or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burthens as shall be in common with other lot holders in the said city."

It was also provided in the deed that the purchaser, his heirs, executors, or administrators, or assigns, might at any time pay into the city treasury the valuation money and the rent then due, in full discharge and extinguishment of such rent, and in that case there should be an acknowledgment of such payment under the seal of the city, signed by the mayor and a majority of the aldermen and attested by the city clerk, and indorsed on the deed, "which shall then and from thenceforth vest an absolute estate, in fee simple, of and in the said lot and premises, in the said ——— heirs and assigns to ——— and their only proper use and behoof forever." It is admitted that the same character of deed has been executed for lots sold under other sales since 1790.

[535] Extracts from the minutes of the proceedings of the common council of the city, in regard to meetings of that body in 1790 \*and thereafter, were put in evidence, from which it appeared that the ordinance for the sale of these lots was induced by the fact that the expenses of the city government were more than its revenues, and these sales were provided for in the hope that the condition of the city's finances might thereby be improved. There was also put in evidence a notice of sale of lots, advertised in the Georgia Gazette of June 13, 1799, in which were specified the terms contained in the ordinance for the sale of the lots, and the advertisement contained the statement that the "purchasers are at liberty to take a lease to him or her or his or her heirs and assigns forever of the lots so purchased, at a ground rent of 5 per cent on the valuation," etc.

An ordinance for laying off into city lots what was called the "Springfield Plantation," and providing for the sale of the same, passed in the year 1851, was also put in evidence, which contained substantially the same plan as that provided for in the ordinance of September 28, 1790, except that the conditional sale was to be for twenty-four years only. Although the lots mentioned in the petition of the plaintiffs in error in this case are not situated within the Springfield Plantation, the ordinance and the deed thereunder regarding those lots were put in evidence for the purpose of comparison with the ordinance of 1790, and the deeds executed thereunder, in order to show that the

same language, except as to the term, was used in the instrument which granted a lease for but twenty-four years as was used in the other granting a perpetual term. There were also ordinances of February 27 and July 31, 1851, put in evidence, the former of which permitted one of two or more tenants in common or joint tenants to pay his proportion of the purchase money, and, upon such payment, he should receive a deed in fee, and any lessee of a city lot might, on application, have it divided into two or more parts and receive a lease for the same; and the other ordinance provided for increasing the depth of certain lots, at an increased rent therefor, payable at the same time that the regular ground rents on these lots fell due.

A report of the mayor in 1854, to the common council, was put in evidence, in which was a statement of the resources of \*the city [536] of Savannah, among which were designated 643 lots in 22 wards "under lease;" also two reports of the mayor, the one on October 31, 1855, and the other a year later, both containing similar statements as to the number of lots belonging to the city, which were "under lease," and similar reports from and including 1857, up to and including 1877, with the exception of the years 1864 and 1865, when no report was made by the mayors of the city. This class of evidence was offered for the purpose of showing that the title conveyed to the purchasers was under a lease, and that it was not a conditional estate subject to be terminated by a breach of a condition subsequent, and that the city recognized the conveyance as a lease, and not in truth as a conditional estate.

On April 7, 1806, an ordinance was passed by the city council for raising a fund for the support of a "watch" in the city, which provided that a tax should be levied on property therein, "including all lots held by lease from the corporation," but on November 24, 1806, an ordinance was passed providing "that so much of the 1st section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation . . . be and the same is hereby repealed."

It was admitted that every annual tax ordinance to raise revenue for the city passed by the mayor and aldermen from the above date, November 24, 1806, up to and including the ordinance of January 22, 1857, used the words "excepting lots held by lease from the corporation." On December 11, 1857, the tax ordinance provided as follows:

"Sec. 4. The following real property shall be exempt from taxation, to wit: each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen, of the class commonly called city lots."

The annual report of the mayor for the year 1871 was also put in evidence, in which the following language occurs: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and are, therefore, not the sub-



fect of taxation, and are not included in the assessments."

[537] It was also admitted that lots known as "ground-rent lots" were never in fact assessed for taxation from 1790 until some time after the passage of the ordinance of May 29, 1878, and that those lots were omitted from the assessment books made in 1807 and every year thereafter down to the assessment book made out in the year 1878, and that in fact no city taxes were ever levied on them until after the resolution of the common council of November 17, 1889, under which they have been for the first time assessed for city taxation for the year 1890.

It was also admitted that no taxes were in fact assessed or levied under the ordinance of April 7, 1806, above mentioned. The holders of these city lots have always paid state and county taxes, and street improvements, and assessments for sidewalks, and all other assessments and burdens common to lot owners in the said city, except city taxes. A report of the finance committee made in 1872 and signed by the chairman was also put in evidence, in which it was stated as follows:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them.

"The ordinance of 1790, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such a lot, and all claiming under him, shall have the use, etc., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds; the ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from them or conflict with them. And as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

The ordinance of May 29, 1878, provided that—

"Every person and corporation owning real property in said city, including improvements, shall pay a tax upon said property of 2½ per cent of the value thereof, including ground-rent lots, except on such property as may be exempt from taxation under the laws of this state."

[538] \*The city is given full power of taxation by state legislation. Code of 1863, § 4756; Code of 1882, § 4847.

Oral evidence was also given from which it appeared that on sales of the property under various ordinances of the same nature as that of 1790 the city marshal by whom the sales were made "would announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under authority of the committee. And often when the bidding would lag the marshal would remind the bystanders that there was only a  
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20 per cent cash payment required, and that there was no city taxes, but only an annual ground rent."

One of the witnesses, who was himself at the time of some of the sales an alderman between 1858 and 1869, stated:

"I, as a city official, in good faith, have made the statement and directed the marshal so to announce when making sales of city lots under my supervision as chairman of the committee on public sales and city lots, and under the common and universal construction of the city deeds, the absence of any reservation of a right to tax the lots sold under ground rent has always been construed as an agreement not to tax."

Another witness said that he would not say that the city of Savannah ever at any time formally agreed not to tax ground-rent lots; he did not know of any official action taken thereon by the city.

The above are substantially the facts upon which the contention of the plaintiffs in error that their lots are exempt from city taxation is founded. There is no evidence that any of them bought their lots at a sale where an announcement of exemption was made, or that they purchased them under the belief that they were forever legally exempt from all city taxation.

They also claim that the deed itself, irrespective of the above testimony, necessarily and by its terms implies a perpetual exemption from all city taxation upon the lots so long as the ground rent is paid.

*Messrs. Pope Barrow and Joachim R. Saussy* argued the cause and filed a brief for plaintiffs in error:

Long and continued usage furnishes contemporaneous construction which must prevail over the mere technical import of the words.

*Rogers v. Goodwin*, 2 Mass. 475; *Rumsey v. People*, 19 N. Y. 41; *Cronise v. Cronise*, 54 Pa. 255; *People v. Maynard*, 15 Mich. 463; *Scanlan v. Childs*, 33 Wis. 663; *Johnson v. Joliet & C. R. Co.* 23 Ill. 202; *Weems v. Coker*, 70 Ga. 749; *Hardy v. Waltham*, 7 Pick. 110; *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *United States v. Moore*, 95 U. S. 763, 24 L. ed. 589; *United States v. Johnston*, 124 U. S. 253, 31 L. ed. 396, 8 Sup. Ct. Rep. 446; *Solomon v. Cartersville Comrs.* 41 Ga. 157; *Harvard College v. Boston*, 104 Mass. 477.

General and long-continued usage is not without its importance, and may be resorted to in aid of a proper construction of a statute or charter.

1 Dill. Mun. Corp. § 93, and note.

A lease does not require any set form of expression. No particular form of words is necessary to constitute a lease.

*Taylor, Land. & T.* § 159; *Boone, Real Prop.* § 90 (8).

Any expression which shows an intention on the part of the lessor to divest himself of the possession in favor of the lessee, and a corresponding intention of the lessee to come into possession of the premises for a determinate period, is sufficient.



*Taylor, Land. & T.* § 159; *Martindale, Conveyancing*, § 326, p. 273.

A contract by which one is to pay an annual rent of 6 per cent on the cost of a building, with the right of becoming owner on paying the price, is a lease. Its accidental provisions do not change its character.

*Municipality No. 1 v. New Orleans*, 5 La. Ann. 761; *Gilbert v. Port*, 28 Ohio St. 276.

A lease may be made to continue so long as the lessee shall pay rent and perform its covenants.

*Gould v. Bugbee*, 6 Gray, 371; *Worster v. Great Falls Mfg. Co.* 41 N. H. 18; *Taylor, Land. & T.* § 72; *Boone, Real Prop.* § 97; *Sadler v. Biggs*, 27 Eng. L. & Eq. 74.

The estate conveyed and the covenants and conditions contained in the conveyance comport only with a perpetual lease, and not with an estate in fee.

*Folts v. Huntley*, 7 Wend. 210; *Atkinson v. Orr*, 83 Ga. 34, 9 S. E. 787; *Laurence v. Savannah*, 71 Ga. 399.

The law imposes the obligation on the landlord, when the lease is silent on the subject, to pay all state, city, and county taxes and assessments.

*Taylor, Land. & T.* 4th ed. § 341; *Wood, Land. & T.* p. 683, § 417.

The proviso, "subject only," etc., is not in the ordinance of September 28, 1790, which controls; and the insertion of these words in the deed binds only to the extent that they have been acted on and construed by the parties.

*Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994; *McGarrahan v. New Idria Min. Co.* 96 U. S. 316, 24 L. ed. 630; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195.

The right does not exist by the leasing act in one party to revoke a highly important stipulation in the contract, and at the same time to demand that the other shall abide by and perform all the others.

*Western & A. R. Co. v. State*, 54 Ga. 429; *State v. Western & A. R. Co.* 66 Ga. 563.

A tax levied by the city of Charleston upon its bonds subsequent to the sale has been held to impair the obligation of the contract to pay the stipulated interest, notwithstanding that the city had not expressly stipulated that it would never tax its bonds.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

The city could be bound by the announcement, made at the sales of these lots, that the same while held on ground rent would be free from city taxes.

*Macon v. Franklin*, 12 Ga. 253; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; 1 Dill. Mun. Corp. p. 322, note, § 452, note 2; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Augusta v. Pearce*, 79 Ga. 100, 4 S. E. 104; *Davies v. New York*, 93 N. Y. 250.

Ratification by the city of unauthorized acts of its officers within the scope of the corporate powers is valid and binding, and the ratification may frequently be inferred from acquiescence after knowledge of all the

material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.

1 Dill. Mun. Corp. p. 322, note, § 463; *St. Louis v. Armstrong*, 56 Mo. 298; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.

The citizens have been induced to purchase from the city and from its assigns these lots at prices controlled by the advantages of fixed charges as rent, instead of fluctuating charges as annual taxation; and all the principles of estoppel apply to prohibit the city from levying a tax in addition to the ground rent.

1 Dill. Mun. Corp. § 452, note 2; *Davies v. New York*, 93 N. Y. 250; *Moran v. Miami County Comrs.* 2 Black, 722, 17 L. ed. 342; *Pendleton County v. Amy*, 13 Wall. 298, 20 L. ed. 579; *Randolph County v. Post*, 93 U. S. 502, 23 L. ed. 957.

The city is estopped by the terms announced at its sales. When it enters into a contract with its citizens, it is not exempt from the rules of law applicable to contracts between individuals; and all acts, declarations, and admissions of its agents, which relate to the contract, and which in the case of a citizen would affect the contract, must be held as affecting the contract made by it.

*Macon v. Franklin*, 12 Ga. 253; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; 1 Dill. Mun. Corp. p. 322, note; *Patton v. Gilmer*, 43 Ala. 548, 94 Am. Dec. 665; *Barelay v. Howell*, 6 Pet. 498, 8 L. ed. 477.

The covenant of quiet enjoyment on the payment of the rent barred the city from adding any terms whereby the use and enjoyment of the tenant could be restricted or forfeited.

*Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 382; *St. Louis v. Armstrong*, 56 Mo. 298; *Western & A. R. Co. v. State*, 54 Ga. 429.

The imposition of a tax by the city on the holders of these lots was a payment in addition to this rent, and was a violation of the contract because it increased the annual payment to be made to the city beyond the amount specified in the contract.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

**Mr. Samuel B. Adams** argued the cause and filed a brief for defendants in error:

The word "assessment" has always been construed in Georgia to cover ordinary taxation.

*Frederick v. Augusta*, 5 Ga. 561; *Home Ins. Co. v. Augusta*, 50 Ga. 539; *Savannah, T. & I. of H. R. Co. v. Savannah*, 112 Ga. 164, 37 S. E. 394.

An exemption from taxation must be looked for in the language of the instrument, and, if not found there, should not be inserted by construction.

*Providence Bank v. Billings*, 4 Pet. 562, 7 L. ed. 956.

The courts are reluctant to recognize a contract of exemption from taxation, even when expressed. They will certainly not make one for the parties; particularly against the terms of an express covenant.



*Tucker v. Ferguson*, 22 Wall. 575, 22 L. ed. 816; *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *Vicksburg S. & P. R. Co. v. Dennis*, 116 U. S. 667, 29 L. ed. 771, 6 Sup. Ct. Rep. 625.

A delay or failure to tax, no matter how long continued, cannot destroy or impair the right of taxation. This right is never lost by nonuser or barred by prescription.

*Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Wells v. Savannah*, 87 Ga. 401, 13 S. E. 442.

No evidence as to usage, custom, or anything else can add to, vary, or contradict a writing.

*First Nat. Bank v. Burkhardt*, 100 U. S. 692, 25 L. ed. 769.

The usual incidents of landlord and tenant do not apply where the lessee is to all intents and purposes really the owner. "The rule fails with its reason."

*Davidson v. Westchester Gaslight Co.* 99 N. Y. 559, 2 N. E. 892; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; *Brainard v. Colchester*, 31 Conn. 407; *Wells v. Savannah*, 87 Ga. 399, 13 S. E. 442.

The deed conveyed a freehold of inheritance, to be defeated upon the nonperformance of a condition subsequent.

2 Bl. Com. 105, 106, 109, 110, 139 *et seq.*; 4 Kent, Com. 5, 6, 9; *Irwin v. Bank of United States*, 1 Pa. St. 349; *Krider v. Laferty*, 1 Whart. 303; *Sahl v. Wright*, 6 Pa. 433; *Sanderson v. Scranton*, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; *Saunders v. Hanes*, 44 N. Y. 353; *Carter v. Burr*, 39 Barb. 59; *St. Paul's Church v. Ford*, 34 Barb. 16; *Davidson v. Westchester Gaslight Co.* 99 N. Y. 559, 2 N. E. 892; *Bridge v. Wellington*, 1 Mass. 219; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159; *Ipswich Grammar School v. Andrews*, 8 Met. 584; *Alexander v. Warrance*, 17 Mo. 228; *M'Murphy v. Minot*, 4 N. H. 254; *Cole v. Lake Co.* 54 N. H. 242; *Farley v. Craig*, 11 N. J. L. 262; *School Dist. No. 5 v. Everett*, 52 Mich. 314, 17 N. E. 926; *Arms v. Burt*, 1 Vt. 303, 18 Am. Dec. 680; *Stevens v. Dewing*, 2 Vt. 411; *Atlantic & St. L. R. Co. v. State*, 60 N. H. 139; *Brainard v. Colchester*, 31 Conn. 407; *Cincinnati College v. Yeatman*, 30 Ohio St. 286; *Hudson Tunnel Co. v. Atty. Gen. ex rel. Riparian Owners*, 27 N. J. Eq. 573; *Taylor, Land. & T. §§ 14, 50, 74, 470*; *Wood, Land. & T. p. 106, § 75*; *McAdam, Land. & T. 48*.

[539] \*Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

The contention on the part of the plaintiffs in error is that, in the exercise of the taxing power granted it by the legislature, the common council of the city adopted the ordinance of May, 1878, and in providing therein for the taxation of the leased lots

it thereby impaired the obligation of the contract existing between the city and the holders of that class of property, among whom are the plaintiffs in error, and the ordinance is therefore to that extent void. This contract they say is evidenced, first, by the ordinance of 1790 and the deeds executed in pursuance of its provisions; also by the minutes of the common council of the city and by subsequent proceedings of the common council; by the statements of the city officials at the time when some of the sales of the property were made; by the reports of the officials, mayors of the city and committees of the common council; by the actual omission for a hundred years—from 1790 to 1890—to tax these lots; also by ordinances similar to that of 1790 for the sale of lots, passed subsequently to that year, and by the deeds executed pursuant to such ordinances, which, it is admitted, were in substance similar to those executed under the ordinance of 1790.

Taking all the foregoing evidence into consideration, including the ordinance of 1790 and the deeds executed under it, we are unable to see that any contract of exemption has been proved. The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt \*that such was the intention[540] of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court. *Tucker v. Ferguson*, 22 Wall. 527, 573, 22 L. ed. 805, 815; *Bank of Commerce v. Tennessee use of Memphis*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456, and cases cited.

The different annual ordinances for taxation passed by the common council, exempting from taxation thereunder the leased lots, were but exemptions for the year in which the ordinance was passed, and there can be no plausible claim urged that they, one or all, constituted any contract for exemption beyond the time of each specific ordinance. The statements of officials when lots were sold, that they were not taxable, did not constitute a contract. The lots had not in fact been taxed at the time of these statements and had been annually exempted from taxation, and the statements amounted to no more than opinions of officials as to what would be done in the future. There is no evidence that they had the least power to speak for or to bind the corporation in this behalf. The reports of committees that the lots were not taxable are of the same charac-



ter,—merely the opinions of officials upon a question of law, and not in the nature of a contract.

Upon this question of proof of a contract we quote what was said by the supreme court of Georgia in this case upon the last review, through Mr. Justice Lewis:

“Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which the sales were to be made and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record we fail to find any reference whatever to the matter of exempting this property from taxation, and instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers, there appears a clause directly negating the idea that the city ever intended to grant a perpetual exemption of [541] this property \*from the burden of taxation. In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred ‘subject only to such assessments and burthens as shall be in common with other lot holders in the said city.’ The term ‘assessment’ is often used as a synonym of ‘taxes.’ Indeed, one of the definitions of this term given by Webster is ‘a tax.’ But even if this word, as used in the deed, does not necessarily refer to taxation, the word ‘burthen,’ which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city. The deed was signed by both parties. Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

“Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the municipal officers at the time the sales by the city took place. It was shown that when lots were put up for sale the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large, and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere nonuser by a government of

its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: ‘Whatever the expectation of purchasers or the unbroken practice of \*the city hitherto [542] may have been, the mandate of the Constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now.’

“There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution, or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city’s property. . . . Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs or any of their predecessors in title bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city’s conveyance of the lots purchased by them.”

We think the opinion correctly states the facts and the law relating to them.

Looking specially at the contents of the deeds executed under the ordinance of 1790, which were signed by both parties, the city and the purchasers, we find that the provision under which the purchasers took the title and by which they were thereafter peaceably and quietly to have possession of the lots was, by positive agreement, “subject to all such assessments and burthens as might be in common with other lot holders in the city.”

Plaintiffs in error endeavor to give to the word “assessments,” contained in the deeds from the city, its more modern meaning of a peculiar kind of tax levied upon lands specially benefited by improvements which are to be paid for by such assessments. \*The [543] fact is notorious that a century ago special assessments of that kind upon the lands benefited were not usual in this country, and at that time the word was used as synonymous with “rates or taxes,” generally. Thus, in a statute passed by the legislature of Georgia in the year 1787, to be found in Watkins’s Digest of the Laws of Georgia, 1755-1790, at page 354, it was provided in the 4th section, in speaking of the city of Savannah and the hamlets thereof, “that it shall and may be lawful for the said war-



dens, or a majority of them, yearly and every year, or oftener, if occasion may require, to make, lay, and assess one or more rate or rates, assessment or assessments, upon all or every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house, or place, . . . within the limits of the town of Savannah or hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall in their discretion judge necessary for and towards carrying this act into execution; and in case of refusal or neglect to pay such rate and assessment, the same shall be levied and recovered in manner as hereinafter directed."

Here is an instance of the use of the word "assessment" at that time in relation to this very city as descriptive of a general tax upon the owners of property within the limits of the city, and to be expended for the general purposes of the corporation. We agree with Mr. Justice Lewis in his construction of this language contained in the deed.

It is further objected in behalf of the plaintiffs in error that the condition that the land was to be subject to assessments, etc., was inserted in the deeds without the authority of the common council, and that the ordinance of 1790 providing for the sale of lots contained no such provision. We think the deeds are substantially in accord with that ordinance, and there is nothing therein inconsistent or at war with the insertion of such provision in the deed; it was but providing for one of the details connected with the sale, and there was an implied power under the ordinance to do so. In addition to that the purchasers took their deeds with such language contained in them, and, having themselves signed the deeds, [544] they personally agreed to \*the condition, and took their titles subject thereto. We do not by this mean to intimate that the title would not have been equally subject to the condition contained in the deed by accepting the deed while not signing it; but in addition to the acceptance there is the affirmative act of signing the instrument, and we think the language subjecting the lots to the same assessments and burthens as were laid in common with other lot holders created a valid agreement, and made the lands subject to the same kind of taxation as is levied upon other lots in the city.

The covenant on the part of the city that the purchasers should have peaceable and quiet possession, use, occupation, and enjoyment of the lots upon payment of the rent as it became due, is in nowise violated by the taxation of the lots in the hands of the purchasers or their assigns. A covenant for quiet enjoyment would not under these circumstances include an exemption from taxation. The purchasers of these lots became to all intents and purposes their owners, as they had the right to their possession, use, and occupation forever upon payment of the rent, and they could assign or devise the same, and their assignees or devisees would take good title, and their heirs would also take in case there was no assignment or de-

vised. They could also, at their discretion and on the payment of the money agreed upon, become owners in fee.

Although the city retained the right of re-entry for nonpayment of rent, the character of the title conveyed to the purchasers and their heirs and assigns was not thereby so changed from an absolute fee that the property actually conveyed could not be assessed for the payment of city taxes. The interest of the purchasers was capable of assessment for taxation, and their right was in substance that of ownership. It bears no resemblance to the case of an ordinary lease for years between landlord and tenant.

In reference to this subject, Mr. Chief Justice Bleckley, in his opinion in this case on its first appearance in the supreme court of Georgia (87 Ga. 397, 13 S. E. 442), at page 399, S. E. pp. 442 *et seq.*, said:

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true \*own-[545] er of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold, or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contract of purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate per annum on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these



purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held. *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546.

[546] \*Not an iota of beneficial ownership in the city lots now in question abides in the municipality. The city but retained a qualified and wholly unproductive title as security for the purchase money and, until that shall be paid, as security also for the annually accruing compensation under the name of ground rents in lieu of interest on that money. If the municipal government held all the values in the city as trustee for the owners, or as security for purchase money, these values would be none the less taxable for that reason. The Constitution of the state requires that taxes on property shall be ad valorem, and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception. It prevails in Savannah. *Savannah v. Weed*, 84 Ga. 683, 8 L. R. A. 270, 11 S. E. 235. The property in question is situate in that city, and, as already said, its beneficial ownership is not in the municipality, but in those who long ago purchased it from the city or who hold under such purchasers by succession to their title. Relatively to the question of taxation, it makes no substantial difference whether the estate or property of beneficial owners be classed as realty or personalty, whatever property of either kind belongs to them is taxable ad valorem. That the so-called ground-rent lots, as long as the conditions of sale are unbroken, are the property of the purchasers, follows from what was decided by this court in *Laurence v. Savannah*, 71 Ga. 392, and that case shows that, even after condition broken, the limit of the city's rights would generally be to have all arrearages cleared and discharged, the surplus proceeds realized by a sale of the property being payable to the real owner. Our reasons for the conclusion at which we have arrived need not be further elaborated. The Constitution is imperative that property is to be taxed ad valorem. The foundation principle of such a system is that those who own and enjoy values are to pay the taxes. The real owners of the money which these lots would now sell for on the market are the persons whom we have designated as owners, and it is upon the cash market value that taxes are assessable. If that value is any less, on account of the subjection of the

[547] property to ground \*rents or unpaid purchase money, than it otherwise would be, that fact would no doubt be taken into consideration in making the assessment. The market value, whatever that may be, is the proper basis.

"2. There was no error, either of practice or decision, in denying the injunction. Whatever the expectation of the purchasers, or the unbroken practice of the city hitherto may have been, the mandate of the Constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed.

That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

We think these views are a correct exposition of the law applicable herein.

We find no element of estoppel in the case. As has been said, the statements of officials made at the time some of the sales may have been effected were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt perpetually or at all these lots from taxation for city purposes. The ordinances and the deeds show the transaction and there is no estoppel arising from the language there used. On the contrary, there is evidence of an agreement to pay such taxes.

Such an estate as was created by these deeds does not in our opinion come under the general rule which imposes on a landlord, when the lease is silent upon the subject, the payment of taxes chargeable upon the premises during the term of the lease. Where the purchaser holds real property for a term which may be in perpetuity, upon the condition of paying a certain ground rent, and where he is entitled to a deed conveying the fee at any time on the payment of certain money, he is more nearly described as an owner than he is as a lessee of such property, and he would be liable to pay the taxes imposed upon the property upon the principle which is set forth in *Sanderson v. Scranton*, 105 Pa. 469, and *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394. It is not necessary to decide this question, however, as the specific language of the deed places the burden of [548] paying the taxes on the purchaser and his grantees.

*The judgment of the Supreme Court of Georgia was right, and must therefore be affirmed.*

RED RIVER VALLEY NATIONAL BANK  
OF FARGO, Plff. in Err.,  
v.

ARCHIBALD J. CRAIG, Menomonie Hydraulic Press Brick Company, et al.

(See S. C. Reporter's ed. 548-558.)

*Mechanics' liens—impairment of obligation of contract—change of statute affecting remedy—right to question validity of statute.*

1. An alteration and enlargement of the remedy for enforcing a mechanic's lien after a

NOTE.—On impairment of obligation of contract—see notes to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 12, and *Fletcher v. Peck*, 3 L. ed. U. S. 162.

That impairing the remedy impairs the obligation of contracts—see notes to *Best v. Baumgardner* (Pa.) 1 L. R. A. 356; *Louisiana ex rel. Ranger v. New Orleans*, 26 L. ed. U. S. 132, and *Phinney v. Phinney* (Me.) 4 L. R. A. 348.



sale under foreclosure of a mortgage on the premises, subject to the lien, by providing, in addition to the right under the former statute to sell the building on the lien claim and remove it from the land, that the court, for the best interests of all the parties, might require the land and improvements to be sold together and the proceeds distributed so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building.—does not impair the obligation of the contract with the mortgagee or the purchaser on foreclosure.

2. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity.

[No. 231.]

*Argued and Submitted April 11, 1901. Decided May 13, 1901.*

**IN ERROR** to the Supreme Court of the State of North Dakota to review a decision affirming a judgment enforcing mechanics' liens. *Affirmed.*

Statement by Mr. Justice **Peckham**:

This action was brought to enforce certain mechanics' liens provided for by § 4796, Revised Code of North Dakota, upon real estate described in the complaint. The trial resulted in a judgment in favor of the lienors, which on appeal was affirmed by the supreme court of the state, and the Red River Valley National Bank of Fargo, one of the defendants below, has brought the case here by writ of error.

The trial court found the following facts: On July 8, 1884, Elvira Cooper was the owner of the property, being lot 6, block 5, of the original town site of Fargo, Cass county, North Dakota, and on that day she, with her husband, mortgaged it to secure the payment of the sum of \$3,000 to the Travelers' Insurance Company of Hartford, Connecticut. Prior to January 1, 1893, the mortgagor sold and conveyed the property, \*subject to the mortgage, to one Rosa Herzman, who remained the owner until the foreclosure of the mortgage under the statute and the sale of the property to the insurance company, which took place on May 7, 1894, and on that day a sheriff's certificate of sale was issued to it. On January 12, 1895, the insurance company assigned this certificate of sale to the plaintiff in error, and on May 17, 1895, it received from the sheriff a deed of the premises. During the time of the ownership of the property by Rosa Herzman she erected upon the lot a two-story and basement brick building, which was completed by February 3, 1894, and which still remains on the lot in good condition. During the summer and fall of 1893 various work was done and materials furnished upon and for the building for which the owner of the premises failed to pay in full, and thereafter and between November 17, 1893, and February 2, 1894, various persons who had furnished materials or performed work and labor for and in the erection of the house filed their liens, and subsequently, on November 15, 1898, commenced this action to foreclose

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the same against (among others) the plaintiff in error as the owner of the property.

It was also found by the court that the east and west walls of this new two-story brick building were party walls, the east wall standing equally upon its own and the adjoining lot, while the west wall stood wholly upon its adjoining lot, and the walls were built in pursuance of an agreement to that effect between the owners of the different lots, so that the building in question and those on each side constituted a solid row of three brick buildings belonging to different owners, and the building was incapable of being removed from the lot unless it were first torn down. It was also found that it would be for the best interest of all parties that the land and the improvements thereon should be sold together, and that the land and the improvements were of equal value, each one being at least of the value of \$2,500. The judgment, after adjudging the amounts of the liens of the various parties, gave the plaintiff in error the privilege of paying the same within thirty days from the service of a copy of the judgment, and in default, after proper notice, the property was directed to be sold by the sheriff of Cass county, and of the moneys received therefor [550] one half was directed to be paid and delivered to the plaintiff in error, and from the other half the lienors were to be paid, and if there were any excess after such payment it was to be paid over to the bank.

At the time of the execution of the mortgage the mechanics' lien law then in existence was known as chap. 31 of the Code of Civil Procedure, as found in the Revised Codes of 1877. Sections 655, 666, and 667 are set out in the margin.†

At the time when the work was done upon, and the materials furnished for, the erec-

†Chapter 31, Code of Civil Procedure of the Revised Codes of 1877. Territory of Dakota.

Sec. 655. Lien, to whom and for what.—Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for any building, erection, or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

Sec. 666. Lien superior to mortgage, when.—The lien for the things aforesaid, or work, shall attach to the buildings, erections, or improvements, for which they were furnished or done, in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

Sec. 667. Action to enforce.—Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of the county or judicial subdivision wherein the property is situated.



tion of the house, the mechanics' lien law in force is to be found from §§ 5468-5485, Comp. Laws N. D. 1887. Section 5469 is the same as § 655, of chap. 31, above mentioned, with the exception of an immaterial addition at the end of the section, while § 5480 is identical with § 666 of that chapter. Section 5481 is a substitute for § 667 of the same chapter, and is set forth in the margin.†

[551] \*It is evident that the law was in substance the same on this subject when the mortgage was executed and when the work was done and the materials furnished.

The mechanics' lien law in existence at the time that this action was brought is to be found from §§ 4788-4801, Revised Code of 1895. Section 4788 would seem to be a substitute for § 655 of chapter 31, above mentioned, and § 4795 is a substitute for § 666 of the same chapter. These sections are placed in the margin.‡

Mr. Ira B. Mills argued the cause, and, with Messrs. William C. Rosser and Ernest B. Mills, filed a brief for plaintiff in error:

The remedy given by the statute to foreclose a mortgage by advertisement under the power of sale, which includes the sale, the certificate, and the deed, on the expiration of the period allowed for redemption, is a part of the mortgage contract; and any law which interferes with, renders less valuable, or de-

vests the title acquired under a foreclosure by virtue of a statutory remedy impairs the obligation of the contract, and is therefore void.

*Gantly v. Ewing*, 3 How. 713, 11 L. ed. 796; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458.

The mortgagee, his successors and assigns, are entitled to a remedy substantially equal to that in existence when the mortgage was given.

*Gantly v. Ewing*, 3 How. 713, 11 L. ed. 796.

Wherever the effect of the subsequent law is to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other. Hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

*Taylor v. Stearns*, 18 Gratt. 288; *Gantly v. Ewing*, 3 How. 707, 11 L. ed. 794; *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447; *Curran v. Arkansas*, 15 How. 319, 14 L. ed. 705; *Howard v. Bugbee*, 24 How. 461, 16 L. ed. 753; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776.

Any law impairs the obligation which renders the contract in itself less valuable or

†Compiled Laws, Territory of Dakota, 1887.

See § 667, *supra*.

Sec. 5481. Any person having a lien by virtue of this article may bring an action to enforce the same in the district court of the county or judicial subdivision where the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court may also allow as part of the costs the money paid for filing each lien and the sum of \$5 for drawing the same.

‡Chapter 77, Revised Codes, North Dakota, 1895.

Sec. 4798. Who may have and for what.—Any person who shall perform any labor upon or furnish any materials, machinery, or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration, or repair of any building or other structures upon land, or in making any other improvement thereon, including fences, sidewalks, paving, wells, trees, drains, grades, or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall, upon complying with the provisions of this chapter, have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which the work was done or the things furnished, to secure the payment for such labor, materials, machinery, or fixtures. The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien. The provisions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments.

Sec. 4795. When prior to prior lien on land. Power of court.—The liens for the things aforesaid or the work, including liens for additions, repairs, and betterments, shall attach to the building, erection, or improvement for which they were furnished or done in preference to any prior lien or encumbrance or mortgage upon the land upon which such erection, building, or improvement belongs or is erected or put.

If such material was furnished or labor performed in the erection or construction of an original and independent building, erection, or other improvement commenced since the attaching of such prior lien, encumbrance, or mortgage, the court may in its discretion order and direct such building, erection, or improvement to be separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, building, or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, erection, or other improvement.

If the material furnished or labor performed was for an addition to, repairs of, or betterments upon, buildings, erections, or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs, or betterments, and upon the sale of the premises distribute the proceeds of sale so as to secure to the prior mortgage or lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs, or betterments.



less enforceable, whether by changing its terms and stipulations, its legal qualities and conditions, or by regulating the remedy for its enforcement. The degree to which the contract is impaired, the manner or cause, is not the matter to be considered, but merely whether in any respect the obligation has been encroached upon or its binding power to any extent diminished.

*Rutland v. Copes*, 15 Rich. L. 105.

Remedial statutes come within the prohibition of the Constitution if they so change the nature and extent of existing remedies as to impair the rights and interests of the owner, and are just as much a violation of the contract as if they directly overturned its rights.

*Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547.

Mr. Samuel B. Pinney submitted the cause for defendants in error. *Messrs. George W. Newton, Emerson H. Smith, John D. Benton, V. R. Lovell, and C. L. Bradley* were with him on the brief:

Enforcement of the law which enters into and forms a part of the contracts under which the plaintiff in error claims in no way impairs the obligations of such contracts.

*Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612.

A statute is not void because it is retrospective.

*Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513; *Sampcyreac v. United States*, 17 Pet. 222, 8 L. ed. 665.

The statute in question and the judgment rendered in pursuance of such statute "neither took away any pre-existing right nor rendered less efficient any pre-existing remedies."

*Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Cooley, Const. Lim.* 6th ed. p. 347; *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Van Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Van Hoffman v. Quincy*, 18 L. ed. 403; *Sutherland, Stat. Constr.* p. 619, §§ 476-478, p. 630, § 482; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *Mason v. Haile*, 12 Wheat. 370, 6 L. ed. 660; *White v. Hart*, 13 Wall. 646, 20 L. ed. 685; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Pomeroy's note to Sedgw. Constr. Stat. & Const. Law*, 2d ed. p. 617.

The fact that the building wholly erected may be sold and removed pertains to the

remedy only. So, the amendment complained of; and it in no way enlarges or diminishes the force and extent of the rights of the plaintiff in error, or the liens of the defendants in error, as declared by the statutes in force when they originated.

*Hepburn v. Curtis*, 7 Watts, 300, 32 Am. Dec. 760; *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Wilbur v. Gilmore*, 21 Pick. 250; 6 Am. & Eng. Enc. Law, 2d ed. p. 946; *Cooley, Const. Lim.* p. 454; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 131. See also *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 1 N. E. 680; *Paine v. Woodworth*, 15 Wis. 298; *Rich v. Flanders*, 30 N. H. 304; *Wade, Retroactive Laws*, §§ 23, 24; *Oullahan v. Sweeney*, 79 Cal. 537, 21 Pac. 960.

The question here presented is not unlike that in an action for partition, where part of the co-owners object to a sale of the premises for the purpose of effecting a division. The exercise of such power violates no constitutional principles.

17 Am. & Eng. Enc. Law, p. 785.

And the entire property may be sold when there are several liens, and the money distributed according to the priorities of the several creditors.

13 Enc. Pl. & Pr. 1042; *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Kenney v. Appar*, 93 N. Y. 539; *Philipps, Mechanics' Liens*, §§ 238, 239; *Wimberley v. Mayberry*, 94 Ala. 240, 14 L. R. A. 305, 10 So. 157; *Croskey v. Northwestern Mfg. Co.* 48 Ill. 481; *Grundeis v. Hartwell*, 90 Ill. 324; *Bradley v. Simpson*, 93 Ill. 93.

A statute authorizing an order of sale to effect a partition of real property acquired before the passage of such act is constitutional.

*Richardson v. Monson*, 23 Conn. 94.

And a statute giving to mechanics liens upon the building as against a prior mortgage upon the land has also been enforced.

*Newark Lime & Cement Co. v. Morrison*, 13 N. J. Eq. 133.

The rights of parties are not devested by changing the form of the property from real property to money.

*Wade, Retroactive Laws*, § 241; *Norris v. Glymer*, 2 Pa. St. 277; *Sergeant v. Kuhn*, 2 Pa. St. 393.

The principle which allows a change of security necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint if the legislature in varying the nature and extent of the security takes care that the property is preserved.

*Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170; *Ogden v. Saunders*, 12 Wheat. 266, 6 L. ed. 606; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395, 13 L. ed. 469; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Locke v. New Orleans*, 4 Wall. 172, 18 L. ed. 334; *Drehman v. Stifle*, 8 Wall. 595, 19 L. ed. 508; *Lobrano v. Nelligan*, 9 Wall. 295, 19 L. ed. 694.



[552] \*Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

The Federal question in this case arises because of the legislation of North Dakota subsequent to 1884, the time of the execution of the mortgage to the Travelers' Insurance Company, the plaintiff in error contending that by reason of such legislation its rights, with reference to the property herein, have to some extent been taken away or unfavorably affected, without due process of law, and it also contends that the subsequent legislation operated to impair the obligation of a contract arising out of the execution of the mortgage already mentioned, its foreclosure, and the sale of the property to the insurance company, and its assignment to the plaintiff in error.

[553] \*We think it was the legislative intent that the last statute should apply to past transactions, and that no substantial rights of the plaintiff in error are thereby unfavorably affected, because, in our opinion, there is no such material difference in the several statutes, so far as regards the rights of the parties, as to forbid the application of the latest statute to a case where the mortgage was given and the materials furnished prior to its passage. The difference between that statute and its predecessors, so far as relates to the point in question here, has special reference to the remedy only and to the manner of executing the provisions of the statute in force at the time of the execution of the mortgage and also when the work was done and the materials furnished. It in reality solely affects the remedy, and does not thereby substantially alter those rights of the mortgagee or his representatives which existed when the mortgage was made. A mechanic's lien law was then in existence, and the mortgage was taken subject to the right of the legislature, in its discretion, to alter that law, so long as the alterations only affected the means of enforcing an existing lien, while not in substance enlarging its extent or unduly extending the remedy to the injury of vested rights. So long as those rights remain thus unaffected the subsequent statute must be held valid, although the remedy be thereby to some extent altered and enlarged. Looked at in this light, the legislation under review cannot be held to violate any rights of the plaintiff in error protected by the Constitution of the United States.

Section 655 of the old act provided for the lien, and gave it to those persons who performed labor upon or furnished materials for a building, upon complying with the provisions of the chapter (31). Section 666 provided for the enforcement of the lien in certain cases, and granted the right to any person having a lien to enforce the sale of the building, and to the purchaser the right to remove the same within a reasonable time. These two sections are reproduced in substantially the same language in the act of 1887 (in force when the work was done), as §§ 5409 and 5480 of the Compiled Laws

of 1887, there being an immaterial addition in § 5469 to § 655, whose place it takes.

\*By the law of 1895, which was in force [554] when this action was commenced, the old § 655 is somewhat elaborated by § 4788 of the Revised Code of that year, but the substance of the old section, so far as the facts of this case touch it, remains the same in the new section.

Old § 666 is amended by § 4795, Revised Code, which provides more in detail for the carrying out of the provisions of the old section. The old section itself provided for the enforcement of the lien which was given by that statute, and the last statute, it must be remembered, neither created nor extended that lien, but somewhat amplified the means to enforce or discharge it. By this alteration the prior statute was not altered to the disadvantage of the owner or his mortgagee in regard to those rights which the person furnishing the materials or performing the labor had under such prior statute. In that prior statute it was provided that the lien for the work done or materials furnished should attach to the buildings, erections, or improvements for which they were furnished or done in preference to any prior lien or encumbrance or mortgage upon the land upon which the same was erected or put, and any person enforcing such lien was granted the right to have the building, erection, or other improvement sold under execution, and the purchaser had the right to remove the same within a reasonable time.

By the last act (§ 4795) the same right still exists; the building may be sold separately and the purchaser may remove the same. There is added, however, the further provision which permits the court for the best interests of all the parties to sell the land and the improvements together; and, after ascertaining the separate values of the land and of the building, provision is made for the distribution of the proceeds of the sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building into which his labor or materials have entered.

True it is that the property was sold under the foreclosure when there was no right to sell the land in connection with the building for the purpose of paying the liens on the latter. The liens on the building, however, were there, and the building \*could be sold and removed to pay the amount [555] thereof, and under the foreclosure the purchaser bought subject to that existing right. He thus obtained a title under which his building could be sold from under him and removed from the land. Under the amended statute the court may sell all the property, land, and building together, and return to the owner the value of the land and the surplus arising from the building after payment of the liens. As the liens were in existence when the mortgage was foreclosed, we think the purchaser took title subject to the right of the legislature, in making a reasonable and proper amendment of the law, to provide, in foreclosing the liens,



for the sale of the whole property and the return to the owner of the lot of the full value thereof in money, instead of allowing him to keep the lot and have the building thereon sold and removed. The plaintiff in error's property was already in the grasp of the statute creating the liens when the mortgage was foreclosed, and that fact is the material one for consideration with reference to the statute and its amendment.

The plaintiff in error asserts that this change in the law rendered the mortgage security less valuable, and that, therefore, it impaired the obligation of the contract and was void. This is mere assertion, and we do not assent to its correctness. A mortgage which is already subject to the right of subsequent lienors, who furnish materials or labor in the erection of a building, to sell the same and have it removed for the payment of the liens, is not in our judgment reduced in value by the provision contained in the amendment under consideration.

Some reference has been made to a decision of the supreme court of North Dakota, decided before the foreclosure of the mortgage, and it has been said that it is therein decided that § 5480 of the Compiled Laws of 1887, which, as we have stated, is identical with § 666 of chap. 31, above mentioned (in force when the mortgage was executed), does not give any lien as against a mortgagee or one representing him in a case like this, because such lien could not be enforced without a demolition of the building, and in such case no lien is given, while by the latest statute it is asserted that the lien is given, and also an effective means of enforcing it. In

[556] brief, it \*is urged that a lien is given by the last statute as against a mortgagee or his representative, in a case where it did not exist when the mortgage was made, as the supreme court of the state decided, and that such decision had been given when the mortgage was foreclosed and the property bid in by the mortgagee and then assigned to the plaintiff in error, and it is claimed that the subsequent statute giving the lien was a clear violation of the contract as against the plaintiff in error. *James River Lumber Co. v. Danner*, 3 N. D. 470, 57 N. W. 343, is the authority referred to for this contention, but an examination of the facts and the opinion of the court therein shows that no such proposition was decided. In that case there was a mortgage upon the whole of the property, which consisted of a lot with a brewery erected thereon. A fire occurred which to some extent damaged, without destroying, the building. It was therefore repaired, and for the materials for such repairs and for the labor expended on the building liens were filed, and the claim was made that they were liens superior to the mortgage thereon at the time the materials were furnished and the labor performed. This the court held was not the true construction of § 5480; that while that section gives the lienor the right to sell the building and the purchaser the right to have it removed, yet no authority was given to sell the entire building to pay the lien of

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one who had only repaired it while a recorded mortgage existed against the land at the time he made the repairs. It was said that a lien for repairs upon a building covered by a mortgage at the time of the repairs would not justify a sale and removal of the building as against such mortgage; that priority of lien was given in cases where the whole erection might be sold and removed without unlawfully encroaching upon the right of the mortgagee of the land, and that a priority of lien existed only when a new structure had been put upon the land subsequently to the execution of the mortgage, and one who claimed a prior lien must have contributed to the erection of such building by the furnishing of materials or the doing of work. And the court further held that as the work on the partially destroyed building was not begun until some time after the recording of the mortgage on the \*whole property, the [557] lienor could not procure a sale of the whole building and give to the purchaser the right to remove it, and as this could not be done as against the mortgagee, the priority of lien did not exist. The court, however, recognizes in terms the existence of a lien under that statute, when a new structure has been put upon the land subsequently to the execution of the mortgage, if the person claiming the lien has contributed to the erection of the building by furnishing materials therefor or performing labor thereon.

In this case, the building did not exist at the time the mortgage was executed, and the liens were filed to secure payment for the materials used in its construction and the labor performed upon it, and no decision of the supreme court of North Dakota has been called to our attention holding that under such circumstances there would not have been a lien upon the building in favor of the mechanics and prior to that of the mortgage executed before its erection. In such case as this it is clear that under the act in force when the mortgage was executed and when the labor was performed, a lien on the building was created by virtue of that act, and that the building could have been sold under it and the purchaser would have had the right to remove it notwithstanding, in order to do so, he would have been compelled to demolish the entire building.

One of the amendments contained in the last statute, which provides a means for the enforcement of a lien by the sale of the whole premises in the case of repairs upon a building already covered by a mortgage, was probably passed because of the above decision of the Dakota court, and we need not concern ourselves as to its validity, because the plaintiff in error does not occupy such a position as to enable it to raise that question, the whole building in this case having been erected subsequently to the mortgage. The same may be said as to any question which might upon other facts be raised because of the cutting off of an existing mortgage not yet due and the (claimed) impairment of the obligation of a contract by the

sale of the premises under the provisions of the amended statute.

[558] The mortgage in this case was past due and had been foreclosed and the land sold in 1894, subject to the lien on the \*building provided by the statute then in existence. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity. *Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 274; *Lampasas v. Bell*, 180 U. S. 276, 283, ante, 527, 21 Sup. Ct. Rep. 368.

The amendments to the old § 667, relating to the bringing of such an action as this, are simply of the same nature as those above discussed, amplifying to some extent, but not materially, the powers of the court as to the remedy.

The decision of the main question in this case is fatal to the rights claimed by the plaintiff in error, and the judgment must therefore be affirmed.

BARBARA CHAVEZ DE ARMIJO, Appt.,  
v.  
JUSTO R. ARMIJO.

(See S. C. Reporter's ed. 558-561.)

*Appeal—from supreme court of territory—absence of findings and bill of exceptions.*

In the absence of any findings by the supreme court of a territory, and of anything in the nature of a bill of exceptions, there is nothing on which to base a reversal of the judgment in the case on appeal to the Supreme Court of the United States, and the judgment must therefore be affirmed.

[No. 243.]

*Argued April 16, 17, 1901. Decided May 13, 1901.*

**A** PPEAL from a judgment of the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment in an action for the recovery of money for services. *Affirmed.*

The facts are stated in the opinion.

Mr. J. H. McGowan argued the cause and filed a brief for appellant:

The case was properly in the supreme court of the territory on appeal.

*Reilly v. Lamar*, 2 Cranch, 349, 2 L. ed. 302; *Hewitt v. Filbert*, 116 U. S. 142, 29 L. ed. 581, 6 Sup. Ct. Rep. 319; *Brown v. McConnell*, 124 U. S. 489, 31 L. ed. 495, 8 Sup. Ct. Rep. 559; *Sage v. Central R. Co.* 96 U. S. 712, 24 L. ed. 643; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989; *Draper v. Davis*, 102 U. S. 370, 26 L. ed. 121; *United States v. Adams*, 6 Wall. 101, 18 L. ed. 792.

The appeal was perfected when the bond

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to *Miners' Bank v. State ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

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was approved, and if any irregularities existed in regard to it, they were entirely cured by the appearance of the appellee in the appellate court.

*United States v. Yates*, 6 How. 608, 12 L. ed. 576; *Carroll v. Dorsey*, 20 How. 204, 15 L. ed. 803; *Chicago & P. R. Co. v. Blair*, 100 U. S. 661, 25 L. ed. 587.

The motion made by the defendant in the trial court to set aside the report of the referee and again refer the cause, with instructions, was the legal equivalent of a motion for a new trial.

*Hartley v. Chidester*, 36 Kan. 363, 12 Pac. 578.

If the decision in *Spiegelberg v. Mink*, 1 N. M. 308, fixed a rule requiring that a motion for new trial be made in cases tried in the district courts before an appeal be taken, such rule was wholly abrogated by the act of the territorial legislature of March 16, 1899.

Mr. Neill B. Field argued the cause and filed a brief for appellee:

There has been such disregard of all statutory requirements on the part of appellant that her appeal should be dismissed.

*Benites v. Hampton*, 123 U. S. 519, 31 L. ed. 260, 8 Sup. Ct. Rep. 254; *Rowe v. Phelps*, 152 U. S. 87, 38 L. ed. 365, 14 Sup. Ct. Rep. 632; *Micas v. Williams*, 104 U. S. 557, 26 L. ed. 842; *The Alaska*, 130 U. S. 201, sub nom. *Metcalf v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; *The S. C. Tryon*, 105 U. S. 267, sub nom. *Nickerson v. Merchants' S. S. Co.* 26 L. ed. 1026; *Chanute City v. Trader*, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

Where a jury is waived and the cause is tried by the court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate court, must move for a new trial below, and, if refused, embody the evidence in a bill of exceptions.

*Sierra County Comrs. v. Dona Ana County Comrs.* 5 N. M. 191, 21 Pac. 83; *Spiegelberg v. Mink*, 1 N. M. 308.

The court having acted in this case as a jury, so far as its decisions on questions of fact were concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a case where there is any evidence whatever on which it could be based.

*Zanz v. Stover*, 2 N. M. 34; *De Cordova v. Korte*, 7 N. M. 683, 41 Pac. 526.

This court has held, in at least one case, that it would not review the action of the supreme court of a territory on a question of practice such as this.

*Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727. And see *Laird v. Upton*, 8 N. M. 413, 45 Pac. 1010; *Torlina v. Trorlicht*, 6 N. M. 54, 27 Pac. 794, 5 N. M. 148, 21 Pac. 68; *Territory v. Christman*, 9 N. M. 586, 58 Pac. 343; *Lynch v. Grayson*, 7 N. M. 26, 32 Pac. 149; *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Perez v. Barber*, 7 N. M. 223, 34 Pac. 190; *Rogers v. Richards*, 8 N. M. 658, 47 Pac. 719.

The jurisdiction of this court on an appeal from the supreme court of a territory, apart from exceptions duly taken to rulings on the

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admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment.

*Harrison v. Perca*, 168 U. S. 323, 42 L. ed. 482, 18 Sup. Ct. Rep. 135; *Young v. Amy*, 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 802.

The contention that the exceptions to the report of a referee are to be taken as and for a motion for a new trial is well met by the reasoning of the supreme court of Missouri.

*State ex rel. Walker v. Hurlstone*, 92 Mo. 331, 5 S. W. 38. And see *Hosford v. Stone*, 6 Neb. 378; *Perez v. Barber*, 7 N. M. 223, 34 Pac. 190; *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Dictz v. Lymer*, 11 C. C. A. 410, 27 U. S. App. 415, 63 Fed. 758; *Kleinschmidt v. Iler*, 6 Mont. 122, 9 Pac. 901.

There being no findings of fact and no rulings on evidence, properly certified, there is, in the language of this court, nothing to review.

*Young v. Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802; *Naeglin v. De Cordoba*, 171 U. S. 638, 43 L. ed. 315, 19 Sup. Ct. Rep. 35; *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 735; *Harrison v. Perca*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 135; *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.* 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384.

Mr. Justice **Peckham** delivered the opinion of the court:

[559] This action was commenced on February 13, 1897, by the \*appellee Justo R. Armijo against the appellant, in the district court of Bernalillo county, in the territory of New Mexico, for the purpose of recovering the sum of \$9,434.44 as a balance due for services rendered during the five years prior to January 1, 1897. The defendant filed a plea of the general issue and also one of set-off. Thereafter the defendant moved to refer the case to a referee on the ground that the trial of the action would involve the taking of a long account, and the motion was granted over the objection of the plaintiff. A trial was had before the referee, who on August 18, 1898, filed his report in the clerk's office recommending judgment in favor of the plaintiff for \$6,097.92 and costs. The defendant filed exceptions to the referee's report on September 2, 1898, and on the 15th day of that month the exceptions were overruled, the findings of the referee adopted as the findings of the court, and judgment rendered for \$6,097.92, with interest and costs.

The defendant then sued out a writ of error, and also appealed from the judgment to the supreme court of the territory. For the purpose of a review in that court the defendant annexed to the judgment roll a paper purporting to contain certain evidence taken on the trial before the referee, but the same was not authenticated in any manner, either by the certificate of the stenographer who took the testimony, or by the referee, or by the judge of the court in which the trial was had. No compliance with the territorial

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law or with the rules of the court relating to the authentication of testimony appears by the record. There was no bill of exceptions incorporating therein the testimony, and no bill was ever signed by any judge, but, on the contrary, the record shows that the judge declined and refused to sign, seal, or settle the bill of exceptions, and it was then stated in the alleged bill that the defendant excepted to such action of the court. This is all, so far as the record shows, that the defendant did towards procuring a bill of exceptions to be signed.

It may be surmised that the court refused to sign the proposed bill of exceptions because of the recital which preceded the commencement of the testimony, in which it was stated that the evidence thereafter set out was all the evidence introduced \*and received [560] on the trial of the cause, while the evidence thus certified omitted all mention of the exhibits which were offered and received in evidence by the referee, and to which attention was directed by him in his report, and upon which his report was to some extent based. The proposed bill contained nothing but the oral evidence alleged to have been given on the trial of the cause before the referee. Whatever may have been the reason, the fact is that the bill of exceptions was not signed or in any manner authenticated by the judge of the court or by the referee, or even by the stenographer taking the evidence. Although exceptions to the report of the referee seem to have been filed and those exceptions overruled by the court in ordering judgment upon the report of the referee, the defendant never made any motion for a new trial.

After the writ of error was sued out and the appeal taken to the supreme court of the territory, counsel for the plaintiff in that court moved to strike from the transcript filed such part thereof as purported to set forth the evidence adduced on the hearing of the cause sought to be reviewed, and to affirm, with damages for the delay, the judgment of the trial court, and to enter judgment in this (territorial) court against the appellant for the reasons stated by him in such motion, among which was that no motion for a new trial had been made below. Thereafter the court decreed that the motion of the defendant in error and appellee to affirm the judgment on the ground that no motion for a new trial was filed in said cause, and to enter the same against the appellant and the sureties on her supersedeas bond, should be sustained and the rest of the motion overruled, and thereupon the judgment was affirmed against the appellant and the sureties on her supersedeas bond, together with the costs of the supreme court. Judgment having been entered, the defendant appealed therefrom to this court.

After the appeal was taken application was made on the part of the appellant to the supreme court of the territory to find the facts in accordance with the requirements of the act of Congress, and the court denied such application, and ordered it to be certified here that, for the reasons dis-

closed by the judgment, that court was unable to find the facts, the appeal not having been perfected in such manner as to bring them before that court, and this denial was certified by its chief justice. The supreme court decided that in order to bring before it the facts in a case tried before a court or referee it was necessary that a motion for a new trial should be made in the court below, and if such motion were not made the facts in the case were not brought before the appellate court on the writ of error or appeal.

This matter of practice in the courts of the territory is based upon local statutes and procedure, and we are not disposed to review the decision of the supreme court in such case. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727. Our jurisdiction to review judgments of territorial courts is found in the statute approved April 7, 1874, chapter 80, entitled "An Act Concerning the Practice in Territorial Courts, and Appeals Therefrom." 18 Stat. at L. 27.

In cases not tried by a jury the record is brought before us by appeal, and on that appeal the act provides that, "instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree," etc.

This statute constitutes our only right of review on appeals from the territorial courts. *Apache County v. Barth*, 177 U. S. 538, 541, 44 L. ed. 878, 879, 20 Sup. Ct. Rep. 718; *Grayson v. Lynch*, 163 U. S. 468, 473, 41 L. ed. 230, 232, 16 Sup. Ct. Rep. 1064.

In the absence of any findings by the supreme court of the territory, and also being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case. The refusal of the supreme court to make findings is justified by its certificate that the facts were not before it. The report of the referee authorized the judgment that was entered, and there is nothing whatever in the record to show that any error has been committed in the trial of the case. *The judgment is therefore affirmed.*

[562] \*ANTONE MARKS, *Plff. in Err.*,  
v.

J. M. SHOUP.

(See S. C. Reporter's ed. 562-567.)

*Attachment—levy—liability of officer.*

- 1 A writ of attachment, though voidable, when it has the seal of the court and everything else on its face to give it apparent valid-

NOTE.—As to when ministerial officer is protected in the execution of regular process—see note to *Erskine v. Hohnbach*, 20 L. ed. U. S. 745.

ity, is a sufficient protection to an officer who is bound to obey it, for making a levy under it.

2. A levy of an attachment upon goods in the hands of a third person, without leaving a certified copy of the writ and a notice specifying the property attached with the person having possession of the same, is invalid under 1 Ill. (Or.) Code, ed. 1887, § 149, subs. 2, 3, and constitutes no defense to the officer when sued for taking the goods.

[No. 82.]

*Submitted February 28, 1901. Decided May 13, 1901.*

IN ERROR to the District Court of the United States for the District of Alaska to review a judgment for defendant in an action for alleged unlawful levy of an attachment. *Reversed.*

The facts are stated in the opinion.

*Messrs. W. W. Dudley and L. T. Michener* submitted the cause for plaintiff in error. *Messrs. W. E. Crews and J. H. Cobb* were with them on the brief:

A writ of attachment issued upon an affidavit which wholly fails to specify the amount of indebtedness claimed is void.

*Drake, Attach. 7th ed. §§ 87a-89a.*

Where there is no jurisdiction over the person of defendant, and the affidavit for attachment is fatally defective in wholly failing to state some fact prescribed by law as essential to its issuance, then the whole proceeding is *coram non jure* and void.

*Drake, Attach. 7th ed. § 89.*

The levy of a writ of attachment upon goods is void where the return shows that it was made simply by posting a copy of the writ of attachment on the doors of the storehouse containing the goods.

*Schneider v. Sears*, 13 Or. 69, 8 Pac. 843.

A levy of a writ of attachment upon personal property in the possession of one other than defendant in the writ can only be made, under the laws of Oregon in force in Alaska, by giving notice of the levy and delivering a copy of the writ to the person in possession of such property. If made in any other manner it is void.

*Spaulding v. Kennedy*, 6 Or. 208; *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623; *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392; *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530.

Where an officer is sued by one person for a seizure of goods under a writ against another under whom the plaintiff claims, the officer cannot raise the issue of fraud in the transfer to the plaintiff by the person named as defendant in the writ, unless he first shows a valid writ and a valid levy thereof on such goods; and, unless he does so, the question of fraud *vel non* is wholly immaterial.

*Bump, Fraud. Convey. p. 453; Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392; *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623.

The title of a vendee of a fraudulent vendee of goods can only be defeated by showing participation in or notice of the fraud on the part of the second vendee.



*Walker v. Collins*, 1 C. C. A. 646, 4 U. S. App. 406, 50 Fed. 737; *Hinds v. Keith*, 6 C. C. A. 233, 13 U. S. App. 222, 314, 57 Fed. 10; *Wise v. Jeffries*, 2 C. C. A. 432, 7 U. S. App. 275, 51 Fed. 641.

*Messrs. S. M. Stockslager and George C. Heard* submitted the cause for defendant in error. *Mr. Arthur K. Delaney* was with them on the brief:

The writs of attachment and the levies thereunder were valid and afforded a perfect protection to the marshal. The levy upon and seizure of the goods by the marshal thereunder vested the court with jurisdiction. Where jurisdiction appears, the proceedings of the court cannot be collaterally attacked, nor its errors or mistakes, if any, corrected or examined when brought up, collaterally.

*Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 449, 9 L. ed. 490; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Matthews v. Densmore*, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126; *Kempe v. Kennedy*, 5 Cranch, 173, 3 L. ed. 70; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381.

The transfers from Levy, through Levine and Kendall, to plaintiff in error, are void. And where this is the case the rights of creditors are the same as if the conveyances had never been made.

*Page v. Grant*, 9 Or. 116; *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537; *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612; *Lyons v. Leahy*, 15 Or. 8, 13 Pac. 643. And see *Patrick v. Smith*, 2 Pa. Super. Ct. 113; *Thompson v. Crane*, 73 Fed. 327; *Dorrance v. McAlister*, 34 C. C. A. 28, 63 U. S. App. 614, 91 Fed. 614; *Sonnenheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233.

Under the testimony of the plaintiff in error, which is uncontradicted, the contracts of sale are clearly within the statute of frauds.

*Newman v. Newman*, 7 Kan. App. 77, 52 Pac. 908.

The contract of loan between plaintiff in error and Levy is void for usury.

*Re Pittock*, 2 Sawy. 416, Fed. Cas. No. 11,189; *United States v. 372 Pipes of Distilled Spirits*, 5 Sawy. 421, Fed. Cas. No. 16,505; *Bank of United States v. Owens*, 2 Pet. 536, 7 L. ed. 511.

[562] \*Mr. Justice McKenna delivered the opinion of the court:

This is an action for damages, brought by the plaintiff in error, who was also plaintiff in the court below, and we will therefore so designate him, against the defendant, by virtue of his office, caused by the taking from the possession of the plaintiff of a certain stock of goods, wares, and merchandise.

The goods originally belonged to one Joe Levy, who sold them to one Levine by verbal sale, and as a part of the consideration Levine assumed to pay a debt due to the plaintiff. Levine sold them to one Kendall, who assumed to pay the same debt. Kendall sold and delivered them to plaintiff.

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The defendant was at the time of the taking of the goods marshal of Alaska, and he justified the taking under and by virtue of attachments issued out of the district court against Levy, one in the case of *Powers Dry Goods Co. v. Levy*, and the other in the West Coast Grocery Co. v. Levy, and claimed that the transfers by Levy were in fraud of his creditors.

The plaintiff replied that he had bought the goods from third persons for a valuable consideration, denied all fraud, and further pleaded that, during all the time from prior to the commencement of the actions mentioned in defendant's answer until and at the time of the taking, he was in the actual and exclusive possession of the goods, and denied that defendant ever made any levy whatever upon said goods.

Defendant filed a supplemental answer at the trial, setting up that the attachments had merged in judgments upon which executions had issued, the goods sold, and the judgments satisfied.

The case was tried before a jury, and resulted in a verdict for the defendant.

Motion for a new trial was made and overruled, and judgment entered for defendant. This writ of error was then sued out.

In the attachment suits against Levy summons was issued, but not served, and substituted service was afterward obtained by publication. The affidavits for the attachments did not mention the amount of indebtedness claimed, and the sufficiency of the substituted service and the validity of the judgment based upon it are attacked on that ground.

It is also contended that the levies of the attachments were invalid; and error is assigned on the admission of the testimony and in giving instructions to the jury.

(1) The laws of Oregon were in force in Alaska at the time of the attachments. 23 Stat. at L. 24, chap. 53. The provision for attachments was as follows:

"A writ of attachment shall be issued by the clerk of the court in which the action is pending whenever the plaintiff or anyone in his behalf shall make an affidavit showing:

"1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract." 1 Hill's (Or.) Code, ed. 1887, § 145.

It is contended that these provisions were not complied with, and the attachments were therefore void, and, they being void, there was no foundation for the judgments. This court has ruled already as to that contention in the case of *Matthews v. Densmore*, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126, and other cases. In *Matthews v. Densmore* the claim of a defect in the affidavit invalidating the attachment was directly passed on, and of the attachment it was said:

"It may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity,

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if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts."

(2) The answer of the defendant alleged that the writs of attachment in the actions mentioned were placed in his hands for service, and by virtue of them he "duly levied upon all the goods, wares, and merchandise set forth in the plaintiff's complaint herein, and ever since that time has held and now holds the same as said United States marshal under and by virtue of said writs."

His returns upon the writs were as follows:

"I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit: All of the goods, wares, and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third streets in the town of Juneau, district of Alaska, by posting a copy of said writ of attachment on the front door of said building; also, eleven (11) cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouses of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all of the above-described personal property of the above-named defendant now in my possession.

"Dated at Juneau, Alaska, May 14, 1898."

It will be observed that the returns are somewhat vague as to whose possession the [565] property was in at the time of levy. If the fact can be said to have been put in issue by the pleadings the only evidence in the case was given by the plaintiff as follows:

"About the 10th day of May, 1898, I was the owner and in the possession of a stock of goods, wares, and merchandise in Juneau, Alaska. The goods were in the building on Seward street, next to B. M. Behrends. On or about that date the United States deputy marshal, W. D. Grant, came to the store and took the goods out of my possession. I declined to surrender possession, but the deputy marshal forcibly put me out of the building, took the key out of my pocket, and locked the front door."

The truth of this was not questioned, and it must be accepted as established that at the time of the levy the property was in the possession of the plaintiff. What is the effect of it? In other words, was the levy made, as described in the return of the defendant, legal?

The statute provided as follows:

"The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: . . .

"2. Personal property, capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property at-

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tached, with the person having the possession of the same." 1 Hill's (Or.) Code, ed. 1887, § 149, subs. 2 and 3.

These provisions were passed upon in *Spaulding v. Kennedy*, 6 Or. 208. The facts of the case as stated by the court were as follows:

"Litchenthaler and Simpson were, on the 9th of November, 1875, the owners of a certain mare, the property in dispute, upon which they executed a chattel mortgage of that date in favor of the Granger Market Company. This mortgage was duly recorded, and remained unsatisfied at the commencement of this action. Subsequently Litchenthaler and Simpson delivered the mare to the plaintiff upon a second chattel mortgage \*by them in his favor, executed subsequently [566] to the one in favor of the Granger Market Company.

"In March, 1876, one James Welch obtained a judgment against the Granger Market Company, upon which an execution was issued, and placed in the hands of Kennedy, the appellant, who was a constable. Kennedy under this execution levied, as it is claimed, upon the mare, as the property of the Granger Market Company, by taking her from the possession of one Stemme, the bailee of the plaintiff Spaulding. Spaulding brought this action to recover possession."

The court said:

"It was the object of the levy to subject the right of the Granger Market Company to execution, and in order to do so, and by a levy and sale transfer this right to an execution purchaser, the officer must pursue the course pointed out by the statute."

And, after quoting the statute, said further:

"This property not being in the possession of the Granger Market Company at the time of the levy, the officer could not, by virtue of his writ, lawfully take it from the possession of a third person in whose possession he found it, and he committed a trespass in so doing. It is claimed that this statute is simply intended to protect those in possession of property who may have a lien on it by virtue of which they may be entitled to redeem it. This may be the object of the statute. The statute provides that such persons, when summoned as garnishees, shall answer and show by what title they hold the property; but the sheriff, when he finds the property which he supposes belongs to the judgment debtor in the possession of third persons, has no right to determine the right of that possession, except in the manner provided by law."

The same principle was expressed in *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623, and in *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392.

The cases cited by defendant in error are not to the contrary. *Page v. Grant*, 9 Or. 116, was a direct attack, after execution returned unsatisfied, upon a sale claimed to be fraudulent. *Lyons v. Leahy*, 15 Or. 8, 13 Pac. 643, and *Philbrick v. O'Connor*, \*15 Or. [567] 15, 13 Pac. 612, and *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537, were creditors' bills



brought to set aside deeds for real estate after return of execution unsatisfied. It follows that the levy was invalid and could constitute no defense to the defendant, and the jury should have been so instructed.

(2) The error assigned on instructions not disposed of by the above reasoning it is not necessary to consider. We may say, however, that we have grave doubts of their correctness.

*Judgment reversed*, with costs, and cause remanded, with directions to grant a new trial.

GEORGE H. N. LUHRS, Appt.,

v.

WILLIAM A. HANCOCK, Lilly B. Hancock,  
and Thomas W. Pemberton.

(See S. C. Reporter's ed. 567-574.)

*Adoption of common law—effect on prior law as to married women—lien of judgment on land fraudulently conveyed—insanity of grantor—collateral attack on foreclosure judgment.*

1. The adoption of the common law of England by Ariz. Laws 1885, No. 68, so far as that law is not repugnant to or inconsistent with the Constitution of the United States, Bill of Rights, or laws and customs of the territory, does not include an adoption of the common-law rule which precludes a husband from making a conveyance directly to his wife without the intervention of a trustee, since the pre-existing laws of the territory provide for community property of husband and wife, allowing the wife to have separate property and the absolute disposition thereof.
2. A judgment against a debtor does not become a lien on land fraudulently conveyed by him before the judgment.
3. The title of a purchaser on a sale under a judgment of foreclosure cannot be attacked collaterally on the ground of the insanity of a mortgagor.

[No. 176.]

*Argued and Submitted March 7, 1901. Decided May 13, 1901.*

**NOTE.**—On the adoption of the common law in the United States—see McKennon v. Winn (Okla.) 22 L. R. A. 501, and note.

As to gifts or conveyances from husband to wife—see notes to Richardson v. Louisville & N. R. Co. (Ala.) 2 L. R. A. 716; Morgan v. Ball (Cal.) 5 L. R. A. 579; Wheeler v. Selden (Vt.) 12 L. R. A. 600; Bank of United States v. Lee, 10 L. ed. U. S. 81; and Stickney v. Stickney, 33 L. ed. U. S. 136.

As to the lien of a judgment on land fraudulently conveyed—see note to Russell v. Chicago Trust & Sav. Bank (Ill.) 17 L. R. A. 345.

As to conclusiveness of judgments generally—see note to Sharon v. Terry (C. C. N. D. Cal.) 1 L. R. A. 572; Bollong v. Schuyler Nat. Bank (Neb.) 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 577; Morrill v. Morrill (Or.) 11 L. R. A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 75; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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**A** PPEAL from a decision of the Supreme Court of the Territory of Arizona affirming a judgment in an action of ejectment. *Affirmed.*

See same case below, 57 Pac. 605.

The facts are stated in the opinion.

Mr. L. E. Payson submitted the cause for appellant:

Statutory requirements as to conveyances of homesteads apply to deeds made by householders to their wives.

*Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Hagerty v. Hagerty*, 149 Ill. 655, 36 N. E. 981; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 799; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.* 134 Ill. 647, 10 L. R. A. 220, 25 N. E. 772; *Connor v. McMurray*, 2 Allen, 202; *Castle v. Palmer*, 6 Allen, 403; *Thompson, Homesteads & Exemp.* § 474; *Barber v. Babel*, 36 Cal. 21.

In ejectment, where one party relies upon title derived through a deed made by husband to wife as a gift, when the husband did not at the time retain sufficient property to pay existing debts, a sale of such lands upon execution by a creditor whose debt existed at the time the property was deeded to the wife, and a deed under such sale, will prevail against the title so derived through the wife.

*Terry v. O'Neal*, 71 Tex. 594, 9 S. W. 673; *Belt v. Raguet*, 27 Tex. 481.

Where a husband conveys property to his wife to defraud creditors, it is immaterial as to the rights of the creditors whether the wife participates in the fraud or not.

*Knapp v. Day*, 4 Colo. App. 21, 34 Pac. 1008.

When a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be subjected to judgments against him.

*Ryan v. Meyer*, 108 Mich. 638, 66 N. W. 667.

A voluntary conveyance by way of gift by a husband to his wife in fraud of creditors is void, whether or not the wife knew of or participated in the fraudulent intent of the husband.

*Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429.

Where the husband conveys property to the wife, the burden is on the wife to show that the transaction was not fraudulent as to existing creditors.

*Claplin v. Ambrose*, 37 Fla. 78, 19 So. 628; *Manning v. Carruthers*, 83 Md. 1, 34 Atl. 254; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Seasongood v. Ware*, 104 Ala. 212, 16 So. 51.

To render a voluntary conveyance by a husband to his wife valid as against prior creditors, the burden of proof is on the grantee to show that the debtor retained sufficient property to pay his debts.

*Hoffman v. Nolte*, 127 Mo. 120, 29 S. W. 1006.

A conveyance by an insolvent debtor to his wife is presumptively fraudulent as to his creditors, and the burden is on one claiming through it to prove the contrary.

*Glass v. Zutavern*, 43 Neb. 334, 61 N. W. 579.

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**Mr. A. S. Worthington** argued the cause, and, with **Mr. O. F. Ainsworth**, filed a brief for appellees:

The deed was valid, because in 1886 it was legal in Arizona for a husband to convey real estate to his wife without the intervention of a trustee.

*Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908.

It was legal in Arizona, at the time of the deed from Hancock to his wife, for a husband to deed a homestead to his wife without his wife's signing the deed.

*Thompson, Homestead & Exemp.* § 473; *Burkett v. Burkett*, 78 Cal. 310, 3 L. R. A. 781, 20 Pac. 715; *Stevens v. Castel*, 63 Mich. 111, 29 N. W. 828; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441; *Riehl v. Bingenheimer*, 28 Wis. 84; *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420; *Holmes v. Carley*, 31 N. Y. 289; *Furrow v. Athey*, 21 Neb. 671, 33 N. W. 208; *Johnson v. Brauch*, 9 S. D. 116, 68 N. W. 173.

This deed from Hancock to his wife was a valid deed because it was not in fraud of creditors; for, as this property was Hancock's homestead, his creditors could have no recourse against it even if not transferred by him to his wife; hence they lost nothing by the transfer.

*Bump, Fraudulent Convey.* p. 242; *Hixon v. George*, 18 Kan. 253; *Monroe v. May*, 9 Kan. 476; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148; *Cipperly v. Rhodes*, 53 Ill. 346; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817.

Exempt property may be transferred by the owner, even as a gift to his wife, free from any claims of his creditors.

*Bailey v. Littell*, 24 Nev. 294, 53 Pac. 308; *Waugh v. Bridgeford*, 69 Iowa, 334, 28 N. W. 626; *Robb v. Brewer*, 60 Iowa, 539, 15 N. W. 420; *Isgrigg v. Pauley*, 148 Ind. 436, 47 N. E. 821; *Bank of Bladen v. David*, 53 Neb. 608, 74 N. W. 42.

There was no error in rejecting the evidence as to Mrs. Hancock's insanity, because, even if the deed to her were not absolutely effectual, it would only be voidable at her option; it would not be subject to attack by a third party.

1 *Dembitz, Land Titles*, p. 420; 3 *Washb. Real Prop.* 5th ed. pp. 264, 265.

Even if Mrs. Hancock were insane at the time she and her husband executed the mortgage, the mortgage could only be overthrown at her option or that of her representatives.

*Ingraham v. Baldwin*, 9 N. Y. 45; *Kilbee v. Myrick*, 12 Fla. 419.

The judgment rendered in the suit foreclosing the mortgage cannot be collaterally attacked in this ejectment suit on the ground that Mrs. Hancock was insane.

*Van Fleet, Collateral Attack*, ¶ 616; *Foster v. Jones*, 23 Ga. 168; *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213; *Maloney v. Dwey*, 127 Ill. 395, 19 N. E. 848; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Heard v. Sack*, 81 Mo. 610; *Mc-*

*Cormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Lauprey v. Nudd*, 29 N. H. 299; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Henry v. Brothers*, 48 Pa. 70; *Wood v. Bayard*, 63 Pa. 320; *Grier's Appeal*, 101 Pa. 412; *Denni v. Elliott*, 60 Tex. 337.

\***Mr. Justice McKenna** delivered the opinion [568] of the court:

This is an appeal from the judgment of the supreme court of Arizona, affirming the judgment of the district court of the third judicial district of the territory, rendered in an action of ejectment originally brought against Hancock and his wife, and to which action Pemberton was afterwards made a party.

The facts as found by the supreme court are as follows:

"This was an action by the appellant to recover possession of five certain lots in the city of Phoenix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading 'not guilty,' and setting up the statute of limitations in bar of the plaintiff's right to recover. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross complaint, also pleaded his ownership and possession of said premises, and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

"The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton derive title. The said premises were inclosed as one tract, with a dwelling house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affection, \*deeded the same by a direct conveyance [569] to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of \$4,000. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa county against the said William A. Hancock for the sum of \$2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife,



but the said real estate was formally sold under said execution to the plaintiff George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of \$2,600, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises."

The supreme court also certified that the exceptions on the trial to the rulings of the court were: (1) To the admission of the deed dated February 27, 1886, from Hancock to his wife. (2) The rejection of evidence tending to prove that Hancock made an application for a homestead under the public land laws of the United States, and filed an application in the land office of Tucson, completed his homestead proofs, and received a certificate from the receiver for the land applied for. A certified copy of the papers was offered in evidence, but ruled out. (3) The rejection of evidence of the insanity of Mrs. Hancock at the time she executed the mortgage to Robert Allstatter, the foundation of Pemberton's title. (4)

[570] The admission in evidence \*of the note and mortgage over the objection of plaintiff claiming Mrs. Hancock insane and incompetent to make them.

We are confined to the assignment of errors based on these rulings. *Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; *Young v. Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802; 18 Stat. at L. 27, chap. 80.

(1) The ground of objection to the deed is that it is void as a conveyance because void at common law, void under the statute restricting the conveyance of homesteads, and void because a fraud upon creditors, "and especially the plaintiff, whose debt against Hancock then existed."

It is conceded that part of the property was a homestead in 1883, at the time of the commencement of the suit by Herrick and Luhrs, but that before judgment the homestead had ceased to exist, because, under the statute of the territory passed March 10, 1887, a declaration in writing was necessary to be filed and recorded in the office of the county recorder to preserve the homestead exemption. In other words, it is conceded that the property was a homestead when Hancock executed the deed to his wife in 1886, but it is claimed that, the deed being

void and the property ceasing to be a homestead in 1889, it became subject to his debts.

Two questions arise: The validity of the deed, and the continuance of the homestead. We need not now express an opinion as to the latter. The former should be answered in the affirmative. The contention is that the deed was void because it was made directly by Hancock to his wife without the intervention of a trustee, and the contention is claimed to be supported by act No. 68 of the laws of the territory. That act provided as follows:

"The common law of England, so far as it is consistent with and adapted to the natural and physical condition of this territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or Bill of Rights, or laws of this territory, or established customs of the people of this territory, is hereby adopted and shall be the rule of decision in all the courts of the territory."

It will be observed, not the common law unqualifiedly was \*made the rule of decision,[571] but that law as modified by the conditions of the territory; and changes in the common-law relation between husband and wife had been expressed in the statutes prior to the passage of the act of 1885. A community of property of the marriage was provided for; each of the spouses could have separate property, and of hers she had the absolute disposition. The separate legal individuality of the wife, therefore, was recognized, and the doctrine which confounded her being with that of her husband was abolished. The conditions had passed away which caused it to exist. New and more natural conditions had arisen, and the act of 1885 adopted the common law only so far as it suited to those conditions. This was the view of the supreme court of the territory, and we adopt it. That learned court could certainly know what the natural conditions of the territory and the necessities of its people were, and how far consistent with them the laws of a past time were.

Indeed, the modification of the common law as to the property relations of husband and wife generally in this country was expressed by this court in *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908. In that case the assignee in bankruptcy brought suit to set aside two deeds made by Clifton to his wife, executed, as it was contended, to defraud creditors. They were asserted to be void for the reason, among others, "because made directly to his wife, without the intervention of a trustee, and so passed no interest to her." To the contention it was replied that the deeds were voluntary settlements upon his wife. "And," Mr. Justice Field said, speaking for the court, "it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee,—whether it be by direct conveyance from the husband or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which



would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond [572] \*the control or interference of her husband, though formerly held to be indispensable, is no longer required." This doctrine applies to a homestead as well as other real estate, unless the laws of the territory prescribe the form or put limits upon the alienation of a homestead. It is claimed that the law does, and § 2141 of the Compiled Laws of 1887 is cited. The paragraph is as follows: ". . . no mortgage, sale, or alienation of any kind whatever of such land (the homestead) by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

A statute similar to that of Arizona came up for construction in *Burkett v. Burkett*, 78 Cal. 310, 3 L. R. A. 781, 20 Pac. 715, and following the principle of other cases in the same court and cases in other states, it was held that the object of homestead laws was to protect the wife and through her the family, and that a conveyance of the homestead by the husband to the wife was not forbidden by the statute, and was therefore valid. The following cases were cited: *Spoon v. Van Fossen*, 53 Iowa, 494, 5 N. W. 624; *Green v. Farrar*, 53 Iowa, 426, 5 N. W. 557; *Thompson, Homesteads*, § 473; *Platt, Rights of Married Women*, § 70, p. 225; *Riehl v. Bingenheimer*, 28 Wis. 86; *Baines v. Baker*, 60 Tex. 140; *Ruohs v. Hooke*, 3 Lea, 302, 31 Am. Rep. 642; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441.

But, independent of other cases, the court said it would not "hesitate to hold such conveyances valid," and disregarded as unimportant the differences which were pointed out between the statutes of the states whose decisions were cited and the statute of California.

The contrary has been held by the supreme court of Illinois in *Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co.* 134 Ill. 647, 10 L. R. A. 220, 25 N. E. 772, but the reasoning of the other cases we think is the better, and, besides, their number is not without weight.

The supreme court of California held, as the supreme court of Arizona held in the case at bar, that by a conveyance of the husband to the wife the property did not lose its homestead character. As the title certainly passed, that is unimportant; and equally unimportant whether the homestead [573] was or was \*not divested by the act of 1887, in the view we take of the effect of appellant's judgment against Hancock. It cannot prevail against the mortgage of Allstatter unless it became a lien upon the land covered by the homestead. It is so contended, but unjustifiably. The deed from Hancock to his wife was prior to the judgment. The mortgage to Allstatter was subsequent to the judgment, but prior to the  
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levy of the execution, and the latter can only relate to and be supported by the judgment, if the judgment became a lien upon the property. It has been held in some jurisdictions that a judgment against a debtor becomes a lien on land fraudulently conveyed by him. In other jurisdictions it has been held otherwise, and this court has held otherwise. *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827, was a creditors' bill to set aside fraudulent conveyances, and a question arose as to the effect of the judgment upon land previously conveyed. The court said: "The judgment obtained by Mills and Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

The rule and the reason for it are admirably expressed by Judge Deady in *Re Estes*, 6 Sawy. 467, 3 Fed. Rep. 141, as follows:

"In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing is not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. . . . Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors \*proceeding in the mode prescribed by [574] law, and even then not as against a bona fide purchaser. . . . The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."

(2) The assignment of error based on the ruling of the court in rejecting evidence of an application by Hancock to enter a homestead under the public land laws is disposed of by the views expressed above. As the title passed to Mrs. Hancock by the deed to her from her husband, and from them to Pemberton through the mortgage executed to Allstatter, it is not necessary to consider, as we have said, whether the property continued or ceased to be a homestead.

(3) The third and fourth exceptions to  
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testimony were based on the alleged insanity of Mrs. Hancock when she executed the note and mortgage to Allstatter. But we do not think that inquiry was open to the appellant. The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside. 159 U. S. 547, 40 L. ed. 255, 16 Sup. Ct. Rep. 74. Besides, the title of Pemberton, one of the defendants in error, comes through a judgment against Mrs. Hancock, and that cannot be attacked collaterally. *Ingraham v. Baldwin*, 9 N. Y. 45; *Kilbee v. Myrick*, 12 Fla. 419; *Foster v. Jones*, 23 Ga. 168; *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213; *Maloney v. Dewey*, 127 Ill. 395, 19 N. E. 848; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Boycr v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Heard v. Sack*, 81 Mo. 610; *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Lamprey v. Nudd*, 29 N. H. 299; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Henry v. Brothers*, 48 Pa. 70; *Wood v. Bayard*, 63 Pa. 320; *Grier's Appeal*, 101 Pa. 412; *Denni v. Elliott*, 60 Tex. 337.

The other questions discussed by counsel we do not think it is necessary to consider. Judgment affirmed.

[575] \*FLORENCE AUDUBON and John W. Hulse, Assignee of William H. Smith, Appls.,

v.

ROBERT W. SHUFELDT.

(See S. C. Reporter's ed. 575-580.)

*Bankruptcy—discharge as affecting claim for alimony.*

▲ claim for alimony, whether for arrears accrued prior to an adjudication in bankruptcy, or for instalments accruing thereafter, does not constitute a provable debt under the bankrupt act of July 1, 1898, chap. 541, and is not barred by the bankrupt's discharge.

[No. 217.]

*Argued April 8, 1901. Decided May 20, 1901.*

APPEAL from an order of the Supreme Court of the District of Columbia sitting in bankruptcy granting a discharge in bankruptcy covering arrears of alimony. *Reversed.*

The facts are stated in the opinion.

Mr. Henry Randall Webb argued the cause and filed a brief for appellants:

A decree for alimony has been held to be a judgment, not for the enforcement of a contract, but for the enforcement of a duty in the performance of which the public, as well as the parties, is interested.

*Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *Noyes v. Hubbard*, 64 Vt. 302, 15 L. R. A. 394, 23 Atl. 727; *Romaine v. Chauncey*, 120 N. Y. 566, 14 L. R. A. 714, 29 Atl. 826; *Linton v. Linton*, L. R. 15 Q. B. Div. 239. 181 U. S.

The husband is bound to support the wife, yet this duty is an imperfect obligation, which is not technically a debt. He does not owe her any specific amount of money, but he owes a duty to her which may be enforced by the order of the court compelling him to pay her alimony.

*Ex parte Perkins*, 18 Cal. 60; *Tolman v. Leonard*, 6 App. D. C. 233.

Arrears of alimony do not constitute a provable debt which can be discharged in bankruptcy.

*Re Anderson*, 97 Fed. 321; *Re Shepard*, 97 Fed. 187; *Re Smith*, 3 Am. B. R. 68; *Re Nowell*, 99 Fed. 931.

Permanent alimony is regarded rather as a portion of the husband's estate, to which the wife is equitably entitled, than a debt.

*Re Lachemeyer*, Fed. Cas. No. 7,966; *Re Garrett*, 2 Hughes, 235, Fed. Cas. No. 5,252; *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 822.

The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction.

*Tolman v. Leonard*, 6 App. D. C. 233; *Re Lachemeyer*, Fed. Cas. No. 7,966; *Van Buskirk v. Mulock*, 18 N. J. L. 188; *Alexander v. Alexander*, 13 App. D. C. 334, 45 L. R. A. 806; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817.

Mr. John T. Deweese argued the cause and filed a brief for appellee:

Alimony is not one of the four exceptions to provable debts made by § 17 of the bankruptcy law of 1898.

*Re Houston*, 94 Fed. 119; *Re Van Orden*, 96 Fed. 86; *Re Challoner*, 98 Fed. 82.

\*Mr. Justice Gray delivered the opinion of [575] the court:

This was an appeal from an order of the supreme court of the District of Columbia sitting in bankruptcy, granting a discharge to Robert W. Shufeldt.

Shufeldt had been adjudged a bankrupt April 5, 1899, on his petition alleging that he was indebted to the amount of \$4,538.33, and had no assets which were not exempt under the bankrupt act of 1898. The debts from which he sought release were as follows:

Secured debt to Washington National Banking and Loan Association.....	\$3200 00
Unsecured debts as follows:	
Florence Audubon..	\$800 00
William H. Smith..	150 00
Lewis J. Yeager....	150 00
Sundry small debts.	238 33
	<hr/> 1338 33
	4538 33

Shufeldt was, and had been for several years before filing his petition in bankruptcy, a surgeon with the rank of captain in the United States army, on the retired list, and was in receipt of a salary of \$175 a month, his pay as such retired officer.

[576] \*The debt of \$3,200 was the debt of himself and his wife, secured on land in Takoma Park, Montgomery county, Maryland, conveyed by him to his wife in March, 1898, without consideration.

The debt of \$800 represented arrears of alimony, granted to his former wife, Florence Audubon, on February 25, 1898, by a decree of the circuit court of Montgomery county, in the state of Maryland, in a cause of divorce, directing him to pay alimony to her at the rate of \$50 a month, beginning April 1, 1898. No part of that alimony has been paid.

About March 1, 1898, Shufeldt left Montgomery county, and took up his residence in the city of Washington, in the District of Columbia. A suit in equity has been instituted and is still pending in the supreme court of the District of Columbia, to enforce the aforesaid decree for alimony, and to make him pay the alimony in arrear.

The debt of \$150 to William H. Smith was a promissory note given for taking testimony in the divorce suit under a commission from the Maryland court, and was duly assigned to John W. Hulse before the filing of the petition in bankruptcy.

The debt of \$150 to Lewis J. Yeager was for professional services rendered in the District of Columbia, in the equity suit aforesaid.

The small debts for \$238.33 were contracted for supplies furnished to Shufeldt and his family before the filing of the petition in bankruptcy.

After the filing of the petition in bankruptcy, Florence Audubon filed in court her claim for \$800, being the arrears of alimony, describing it as "a debt" due by him to her; and voted thereon at the meeting of creditors for the election of a trustee. She afterwards filed a memorandum directing the withdrawal of her claim; but no order of the court to that effect was passed.

It was objected that the claim for alimony was not a provable debt under the bankrupt act, and should be excepted from the list of debts for which a discharge in bankruptcy might be granted. The court overruled the objection, and granted the discharge, being of opinion that the arrears of alimony which had accrued against the bankrupt up to the [577] time of the adjudication \*in bankruptcy constituted a provable debt, in the sense of the bankrupt act of 1898; but that the discharge could not affect any instalments accruing since that adjudication. Florence Audubon appealed to this court.

By § 4 of the bankrupt act of July 1, 1898, chap. 541, "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." 30 Stat. at L. 547. An officer in the army falls within this description; and it may be that he is not bound to include his pay in his schedule. *Flarty v. Odum* (1790) 3 T. R. 682; *Apthorpe v. Apthorpe* (1887) L. R. 12 Prob. Div. 192. Our bankrupt act contains no such provision as the English bankruptcy act 1883, authorizing the court, when the bankrupt is an officer in

the army or navy, or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *Re Ward* [1897] 1 Q. B. 266. But the question now before us is not whether his pay can be reached in bankruptcy, but whether he is entitled to a discharge from the arrears of alimony due to his former wife.

The bankrupt act of 1898 provides in § 1 that a "discharge" means "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act;" and includes, in § 63, among the debts which may be proved against his estate, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing" at the time of the petition in bankruptcy, whether then payable or not, and debts "founded upon a contract, expressed or implied." 30 Stat. at L. 544, 563, chap. 541.

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, \*and may therefore be there [578] enforced by suit. *Barber v. Barber* (1858) 21 How. 582, 16 L. ed. 226; *Lynde v. Lynde* (1901) 181 U. S. 183, ante, 810, 21 Sup. Ct. Rep. 555. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction.

In the state of Maryland and in the District of Columbia alimony is granted by decree of a court of equity. *Wallingsford v. Wallingsford* (1825) 6 Harr. & J. 485; *Crane v. Meginnis* (1829) 1 Gill & J. 463, 19 Am. Dec. 237; *Jamison v. Jamison* (1847) 4 Md. Ch. 289; *Tolman v. Tolman* (1893) 1 App. D. C. 299; *Tolman v. Leonard* (1895) 6 App. D. C. 224; *Alexander v. Alexander* (1898) 13 App. D. C. 334, 45 L. R. A. 806. And, as the court of appeals of the District of Columbia has more than once said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good



cause shown to the court having jurisdiction." 6 App. D. C. 233, 13 App. D. C. 352, 45 L. R. A. 813.

Under the bankrupt act of 1867 it was held by the district court of the United States for the southern district of New York, in an able opinion by Judge Choate which is believed to be the only one on the subject under that act, that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable debt nor barred by a discharge. *Re Lachemeyer* (1878) 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966. Like decisions have been made by Judge Brown in the same court under the present bankrupt act. *Re Shepard*, 97 Fed. Rep. 187; *Re Anderson*, 97 Fed. Rep. 321. And the same result has been reached in a careful [579] opinion by Judge Lowell in the district court for the district of Massachusetts. *Re Nowell*, 99 Fed. Rep. 931.

In *Menzie v. Anderson* (1879) 65 Ind. 239, the supreme court of Indiana held that a judgment for alimony was not a "debt growing out of or founded upon a contract, express or implied," within the meaning of a statute exempting certain property from execution for such a debt.

In *Noyes v. Hubbard* (1892) 64 Vt. 302, 15 L. R. A. 394, 23 Atl. 727, it was held by the supreme court of Vermont that a decree for alimony, not being a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties were interested, was not barred by a discharge in insolvency.

In *Romaine v. Chauncey* (1892) 129 N. Y. 566, 14 L. R. A. 712, 29 N. E. 826, it was held by the court of appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made specific and measured by the decree of the court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted.

In *Barclay v. Barclay* (1900) 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, it was adjudged by the supreme court of Illinois that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy; and the court said: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. . . . It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for 181 U. S.

alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change \*the amount to be paid[580] by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

In England it seems to be the law that alimony is neither discharged nor provable in bankruptcy. *Linton v. Linton* (1885) L. R. 15 Q. B. Div. 239; *Hawkins v. Hawkins* [1894] 1 Q. B. 25; *Watkins v. Watkins* [1896] P. 222; *Kerr v. Kerr* [1897] 2 Q. B. 439.

The only cases brought to our notice which tend to support the decision below are recent decisions of district courts, in which the authorities above cited are not referred to. *Re Houston*, 94 Fed. Rep. 119; *Re Van Orden*, 96 Fed. Rep. 86; *Re Challoner*, 98 Fed. Rep. 82.

The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy or barred by the discharge.

The order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plff. in Err.,

v.

WIRT ADAMS.

(See S. C. Reporter's ed. 580-583.)

Error to state court—construction of state statutes—adopting decision of state court.

A construction of state statutes adopted by the court of last resort in that state will be adopted by the Supreme Court of the United States, even in a case where that court may exercise an independent judgment, if there is any reasonable doubt on the question.

[No. 35.]

Petition for rehearing distributed to court January 28, 1901. Leave granted to file petition February 25, 1901. Decided May 20, 1901.

NOTE.—That the United States Supreme Court will not review decisions of state courts construing state statutes, unless specially authorized—see note to *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

As to construction and effect of state laws and constitutions and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to when the United States Supreme Court follows decisions of state courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

IN ERROR to the Supreme Court of the State of Mississippi. Petition for rehearing. *Denied*.

[581] \*Statement by Mr. Justice **Brown**:

This was a petition for a rehearing of the case reported in 180 U. S. 1, *ante*, 395, 21 Sup. Ct. Rep. 240, upon the ground that the taxes for the year 1892 were separable from taxes for the succeeding years, inasmuch as the taxes for that year had been completely levied and assessed on September 22, 1892, and that the claim of the state, if any, had fully accrued at least one month before the articles of consolidation were executed (October 24, 1892), and that the judgment therefore gave to the consolidation a retrospective effect.

*Messrs. William D. Guthrie, J. M. Dickinson, Edward Mayes, and Noel Gale* filed a brief for plaintiff in error in support of the petition for rehearing.

*Messrs. F. A. Critz, Marcellus Green, and K. C. Beckett* filed a brief for defendant in error, opposed.

Mr. Justice **Brown** delivered the opinion of the court:

The decision of this case was based upon the theory that all the taxes involved in the case, from 1892 to 1897, accrued subsequent to the consolidation of October 24, 1892, which was held by this court to create a new corporation, subject to existing laws, and particularly to that provision of the Constitution of 1890, "that every new grant of corporate franchise shall be subject to the provisions of the Constitution." No suggestion was made, in the argument or briefs of the railroad company, of any distinction in respect to the liability of the company between the taxes of the year 1892 and those of subsequent years, and none such was recognized by the court in its opinion; but we are now asked to hold that the taxes for the year 1892 accrued before the consolidation

[582] of October 24, and were \*consequently unaffected by that consolidation, and that with respect to such taxes the right of commutation or exemption, contained in § 21 of the charter of the Mobile & Northwestern Railway Company, attached and operated to exempt the company from the payment of taxes for the year 1892.

We have not found it necessary to decide whether a party, upon a petition for a rehearing in this court, may avail himself of a point not taken in the court of original jurisdiction, or upon either one of two appeals to the supreme court, nor in the assignment of errors in this court, nor even called to our attention in the briefs or arguments of counsel, as we are of opinion that upon the merits the petition must be denied.

Whatever force we might be disposed to give to prior adjudications of the supreme court of Mississippi upholding these exemptions, there can be no doubt that that court has expressly held that the taxes for the year 1892 did not accrue until after the consolidation of October 24 of that year, and hence

that this case does not fall within those adjudications. We quote the following from the opinion of the court of February 20, 1899, upon a second appeal to that court: "So far as concerns the argument that the appellants relied on the case of *Mississippi Mills v. Cook*, 56 Miss. 40, and that, if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of *Mississippi Mills v. Cook* is wholly unavailing as to these taxes." 77 Miss. 270, 316, 24 So. 200, 317, 28 So. 956.

Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the Constitution, we do not feel called upon to decide. The statutes of the state of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 \*accrued prior to October 24 of that [583] year are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Flash v. Conn.*, 109 U. S. 371, 379, 27 L. ed. 966, 969, 3 Sup. Ct. Rep. 263; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *New Orleans Bd. of Liquidation v. Louisiana*, 179 U. S. 622, *ante*, 347, 21 Sup. Ct. Rep. 263.

Had the opinion above cited involved the construction of § 21 of the Mobile & Northwestern charter,—that is, the contract for commutation or exemption,—it would have directly involved a Federal question; but it did not. It was an opinion as to when, under the general laws of the state of Mississippi, a claim for taxes accrued, and a distinct ruling that such taxes did not accrue until after a certain date. *Raymond v. Longworth*, 14 How. 76, 79, 14 L. ed. 333, 334; *Bailey v. Magwire*, 22 Wall. 215, 22 L. ed. 850. For the reasons above stated we accept the views of the supreme court of Mississippi as to the proper construction of these laws.

*The petition for a rehearing must therefore be denied.*



(584) \*JOSEPH SCHLITZ BREWING COMPANY, Appt.,  
v.  
UNITED STATES.

(See S. C. Reporter's ed. 584-589.)

*Drawback of duties—exporting of bottled beer.*

A drawback of duties upon imported bottles and corks used in the manufacture of bottled beer cannot be allowed under the tariff act of 1890, § 25 (26 Stat. at L. 567, 617, chap. 1244), allowing drawback of duties on imported materials used in the manufacture of exported articles, since the bottles and corks are not "imported materials," but finished products and usable for any liquor which the importer may choose to put in them; and the fact that the beer must be steamed after bottling, to kill yeast germs, and for that purpose must be inclosed in some vessel to prevent the escape of the carbonic acid gas, does not convert the bottle from an incasement into an ingredient.

[No. 232.]

*Argued April 11, 1901. Decided May 20, 1901.*

**A** PPEAL from a judgment of the Court of Claims on a petition for a drawback of duties upon hops, barley, and bottles and corks used for bottling beer exported. *Affirmed.*

**Statement by Mr. Justice Brown:**

This was a petition for a drawback upon hops and barley to the amount of \$2,371.35, and upon bottles and corks to the amount of \$9,817.97, used in the manufacture of bottled beer for export.

The court of claims made a finding of facts, the substance of which is set forth in the margin, and gave judgment for the first item, but rejected the second, and the claimant appealed.†

**NOTE.**—As to actions to recover back payment of duties under protest—see note to *Greely v. Thompson*, 13 L. ed. U. S. 397.

†Findings of Fact.

The following are the facts of the case as found by the court:

I. The claimant is a corporation organized under the laws of the state of Wisconsin.

II. Between the 1st day of February, 1893, and the 26th day of October, 1894, the claimant exported from the port of Milwaukee, Wisconsin, bottled beer. The hops, barley, bottles, and corks used in the manufacture of this bottled beer had been imported into the United States from foreign countries, and duties had been paid thereon upon importation. The bottled beer was manufactured by the claimant at Milwaukee, Wisconsin. The imported materials used in the manufacture, when exported, were identified, the quantity of the materials used and the amount of duties paid thereon ascertained, and the fact of the manufacture of the articles in the United States and their exportation were determined under regulations prescribed by the Secretary of the Treasury. The total amount of the duties paid on the materials mentioned so used and exported was \$12,189.32, 181 U. S.

Mr. William B. King argued the cause, and, with Mr. George A. King, filed a brief for appellant.

Assistant Attorney General Pradt argued the cause and filed a brief for appellee. Contentions of counsel sufficiently appear in the opinion.

\*Mr. Justice Brown delivered the opinion [586] of the court:

This is a claim for a drawback of duties upon certain imported bottles and corks alleged to have been used in the manufacture of bottled beer, subsequently exported.

By § 25 of the tariff act of 1890 (26 Stat. at L. 567, 617, chap. 1244), "where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." The object of this section is evidently to stimulate domestic manufactures by allowing to the manufacturer a rebate of duties paid upon imported materials used by him in such product.

The theory of the claimant in this connection is that bottled beer is really a different article from ordinary beer, and requires \*a [587] process of manufacture in which bottles and corks are a material ingredient. Its argument is thus stated in the petition:

"In the manufacture of beer for export it becomes necessary to kill the yeast in the beer in order to prevent second fermentation and consequent ruin of the beer, and, in order to destroy the germs of the yeast, the finished beer must be steamed to the degree necessary to kill such germs, and for that purpose the beer must be inclosed securely in some vessel to prevent the escape of the carbonic acid gas, and of all such vessels a bottle manufactured of glass is the one best adapted for that purpose. Such beer, after being subjected to the process of steaming, is materially different from the beer before being subjected to steaming, and in order to create such different article a closed glass

divided as follows: Upon the bottles and corks, \$9,817.97; upon the hops and barley, \$2,371.35.

III. The Treasury Department has not refused to pay the drawback upon the hops and barley, but such drawback could be paid under the regulations of the department. It refuses to pay the drawback upon the bottles and corks for the reason stated in the following official letter dated March 24, 1893:

(Here follows certain correspondence summarized in the opinion.)

VII. The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use, both because the materials must be selected with greater care, and the process must be conducted differently in order that the bottled product may keep without change under varying conditions of climate, temperature, position, and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of al-

bottle is indispensable, and the bottles and corks, forming a portion of the complete manufactured article known as 'bottled beer,' are, as well as the hops and barley entering into the same, a necessary component part of the article when completed and in a condition ready for export."

It seems there has been some difference of opinion among the Treasury officials upon this subject, since on March 31, 1886, the then Secretary of the Treasury decided, under a statute similar to the one above cited, that a drawback should be allowed, not only for the hops, rice, and barley used in the manufacture of the beer, but for the bottles and corks, and in an official table of drawback duties, published August 17, 1886, bottles and corks imported and used in bottling beer were specifically named as entitled to the benefit of a drawback to the full amount of the duty paid. This ruling remained in force until October 28, 1890, when the assistant secretary decided that imported bottles used in the bottling of fermented liquors made here from domestic grains and hops were not entitled to a drawback under the tariff act of 1890; but, notwithstanding this ruling, it would appear that the drawback continued to be allowed and paid until March 24, 1893, when, in a letter to the collector of customs of New York, the Secretary overruled and rescinded the earlier decisions, and has since refused to allow the drawback.

In our view, the question presents no difficulty whatever. \*Under the statute, the

drawback is allowed only upon "imported materials . . . used in the manufacture of articles manufactured or produced in the United States," and subsequently exported. By this is undoubtedly meant that the imported materials must enter into and form one of the ingredients of the manufactured article, as did the hops and barley upon which the drawback was allowed, and properly allowed, by the court of claims. But the bottles and corks are not "imported materials" at all, but finished products, and usable for any liquor which the importer may choose to put in them. Neither are they ingredients used in the manufacture of exported or any other kind of beer, in any proper sense of the term, but simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use of for the proper preservation of his product. Bottled beer is still beer, made of the same ingredients as ordinary beer, though made with greater care, and to speak of the bottles and corks as ingredients of the beer is simply an abuse of language.

The fact that the beer must be steamed after bottling to a point necessary to kill the germs of yeast, and for that purpose must be inclosed in some vessel to prevent the escape of the carbonic acid gas, only shows that the beer is bottled before it is finally manufactured and ready for the market. This process certainly does not convert a bottle from an incasement into an ingredient. In this particular, beer does not

albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization.

IX. After beer intended for bottling for export is placed in the barrels the following processes occur:

The barrels are hoisted to the required height of the filling machine, the stamp is taken off, canceled, and replaced, the keg is opened, a faucet entered in the lower hole, and the beer drawn from the barrel into the filling machine and through a proper disposal of siphons into the bottles. The bottles are then sent to the corking machines and corked; a thin metal cap is placed over the cork for the protection of the cork, and a wire attached to the neck of the bottle and wound over the cork. The bottles are then placed in the steaming boxes, and these boxes carried to a steaming vat, which is filled with water and steam turned into the water, raising its temperature to about 150° and remaining at that temperature for about one hour, when it is cooled down to about 80° or 90°. This process, known as pasteurizing, is for the purpose of destroying living yeast cells, and is necessary for beer bottled for export.

Pasteurizing can be done in a large vessel before bottling, but the beer would become again impregnated by contact with the atmosphere when afterwards drawn into bottles.

This process must be conducted carefully, because if the temperature rises too high the beer gets an unpalatable taste and the albuminoids remaining in it are more apt to be eliminated, resulting in a loss of clearness, which renders the beer unsalable.

This pasteurization may be omitted in the case of bottled beer for local use.

The bottles, previous to their use, undergo a special washing process with hot water and soda, so arranged that the bottles are filled and emptied continuously. They are then washed in a tank filled with lukewarm water, on the outside by hand and on the inside by brushes in the washing machine, and then rinsed with cold water before being placed in the racks to be filled.

Old as well as new bottles are used.

X. In making bottled beer, from the time of purchase of the ingredients until the completion of the finished product, the process must be so managed as to diminish the albuminoids. When prepared as stated in the foregoing findings, bottled beer can stand the heat at the equator without being spoiled.

XI. Beer bottled for export is understood to be beer intended for shipment, whether to domestic or foreign points, and for use other than local and immediate. When beer is bottled for local and immediate use, it may be the same beer as hereinbefore described and prepared in the same manner as for export, including pasteurization, or it may be the same beer prepared in the same manner without pasteurization, or it may be ordinary keg beer, differing from bottled beer for export in the particulars described in findings VII. and VIII., and without pasteurization.

XII. When bottled beer is sold to retailers, it is delivered in cases of bottles and an extra charge is made to the purchaser for the case and bottles, which charge is credited to his account on the return of the case and bottles. A similar practice obtains on the sale of the bottled beer by the case by retailers to their consumers.



materially differ from a hundred other articles which require to be incased for their proper preservation. Thus, champagne and other sparkling wines must be bottled while yet effervescing, or they will lose the tang which gives them their principal value. The same remark may be made of Apollinaris and other effervescing waters, though not manufactured, and of certain canned fruits and vegetables which are required to be incased while hot and still in the process of preservation.

The claim is by no means so strong a one for the allowance of a drawback as was the *Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 337, in which imported shooks were used in the manufacture of boxes subsequently exported to foreign countries. We held in that case [589] that boxes constructed of shooks which \*were imported in bundles of ends, sides, tops, and bottoms, and needed only to be put together in the United States and certain nailing and trimming, the whole value of which was equal to about one tenth of the value of the boxes, were not "wholly manufactured" in the United States within Rev. Stat. § 3019, and the Treasury Regulations of 1884.

It may be entirely true that, if this drawback be not allowed, the duties upon the bottles and corks will preclude the manufacturer from competing in foreign markets with foreign brewers, since he must necessarily export his beer in imported bottles, while his foreign competitor may use bottles manufactured in his own country. Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force.

*The judgment of the Court of Claims is right, and it is therefore affirmed.*

JOHN P. MALLETT and C. B. Mehegan,  
Plffs. in Err.,  
v.

STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 589-601.)

*Criminal law—appeal by state—ex post facto law—equal protection of the laws.*

1. Federal questions raised by petition for rehearing after a state court has filed its opin-

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the right of a state to appeal in a criminal case—see *People ex rel. Hodson v. Miner* (Ill.) 19 L. R. A. 342, and note.

As to what laws are *ex post facto*—see notes to *State v. Cooler* (S. C.) 3 L. R. A. 181; *Ant-181 U. S.*

lon, but before that has been certified down, and when that court entertains the petition and proceeds to discuss and decide those questions, are not raised too late for the purpose of a writ of error from the Supreme Court of the United States.

2. The provision for an appeal by the state in a criminal case from the grant of a new trial, which was enacted by the North Carolina act of March 6, 1899, is not *ex post facto* in violation of U. S. Const. art. 1, § 10, as applied to cases in which the trial had been had, though the new trial had not been granted, before the statute was passed.
3. The allowance of an appeal to the state from the court of one district, but not from another district, of the state in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws guaranteed by U. S. Const. 14th Amend.
4. A Federal question in respect to admission of evidence cannot be passed upon by the Supreme Court of the United States on writ of error to a state court, when the question as to the evidence was not dealt with by the state court as a Federal question.

[No. 189.]

*Argued April 8, 1901. Decided May 20, 1901.*

IN ERROR to the Supreme Court of North Carolina to review a decision reversing a judgment in a criminal case. *Affirmed.*

See same case below, 125 N. C. 718, 34 S. E. 651.

Statement by Mr. Justice Shiras:

\*In September, 1898, John P. Mallett and [590] Charles B. Mehegan were indicted and tried in the criminal court of the county of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment in the common jail. They appealed to the superior court. The record was certified up by the clerk of the criminal court on April 1, 1899. The superior court reversed the verdict and judgment, and granted a new trial. From this judgment of the superior court the state appealed, on July 7, 1899, to the supreme court, which reversed the judgment of the superior court, and remanded the cause to the criminal court, with directions that the sentence imposed by that court should be carried into execution.

At the time of the commission of the offense, and at the time of the trial in the criminal court of Edgecombe county, the state of North Carolina was not entitled to appeal to the supreme court of the state

*derson v. O'Donnell* (S. C.) 1 L. R. A. 632; *Calder v. Bull*, 1 L. ed. U. S. 648; *Sturges v. Crowninshield*, 4 L. ed. U. S. 529; *Re Medley*, 33 L. ed. U. S. 835; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; and *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

As to equality of rights and privileges—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

from the judgment of the superior court granting the defendants a new trial. There are two district criminal courts in the state,—the eastern and the western. In the eastern district, in which the county of Edgecombe is situated, the state, since March 6, 1899, by legislation of that date, is allowed to appeal to the supreme court from a judgment of the superior court granting a defendant a new trial, but such right of appeal is not allowed to the state from judgments of the superior court in cases on appeal from the western \*district criminal court. It thus appears that the right of appeal from the superior court to the supreme court was conferred upon the state after the commission of the offense and the trial in the criminal and before the superior court had granted a new trial.

From the judgment of the supreme court of the state a writ of error was allowed to this court.

Mr. F. H. Busbee argued the cause and Mr. R. O. Burton filed a brief for plaintiffs in error:

No particular form of words or phrases in which the claim of Federal rights must be asserted has ever been declared necessary. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such a manner as to bring them to the attention of that court.

*Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.

*Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

The court clearly having jurisdiction should see to it that the rights of a party to the protection of the Federal Constitution, brought to the attention of the state court, should not be ignored on any question of verbiage or insufficient statement.

*O'Neil v. Vermont*, 144 U. S. 359, 36 L. ed. 465, 12 Sup. Ct. Rep. 693.

The statute giving the right of appeal to a state is *ex post facto* as to this case, and void under art. 1, § 10, of the Constitution.

*Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *United States v. Hall*, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; *State v. Keith*, 63 N. C. 140; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

The change of the statute law, whereby an appeal by the state is allowed from the eastern district, but denied in all other portions of the state, is a denial of the equal protection of the laws, which is forbidden by the 14th Amendment.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Stratton v. Morris*, 89 Tenn. 497, 12 L. R. A. 1016

70, 15 S. W. 87; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128.

Procedure, being a matter of general law, must be regulated by the same law throughout the state.

*Silberman v. Hay*, 59 Ohio St. 582, 44 L. R. A. 264, 53 N. E. 258.

A law is not general because it operates upon all within a class, unless there is a substantial reason why it is made to operate upon that class only, and not generally upon all.

*Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Sutton v. State*, 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697.

Messrs. J. C. L. Harris and B. G. Green argued the cause and filed a brief for defendant in error:

Statutes regulating the mode of procedure in the prosecution of antecedent crimes are not *ex post facto*, and it is in the power of the legislature to change the form and method of procedure in any manner which, in relation to the offense or its consequences, does not alter the situation of the accused to his disadvantage.

12 Am. & Eng. Enc. Law, 2d ed. p. 533; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; *Gibson v. Mississippi*, 162 U. S. 566, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

The finding of an indictment by a grand jury of less than thirteen is not a denial of due process of law.

*Talton v. Mayes*, 163 U. S. 376, 41 L. ed. 196, 16 Sup. Ct. Rep. 986.

A law is not *ex post facto* because it changes the manner of summoning and making up the jury as applied to past offenses.

*Gibson v. Mississippi*, 162 U. S. 566, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Perry v. Com.* 3 Gratt. 632.

The reduction of the number of peremptory challenges allowed the accused is not *ex post facto*.

*South v. State*, 86 Ala. 617, 6 So. 52; *State v. Ryan*, 13 Minn. 370, Gil. 343.

Permitting an amendment of a pending indictment is not *ex post facto*.

*Lasure v. State*, 19 Ohio St. 43; *State v. Manning*, 14 Tex. 402.

A law authorizing the jury to fix the punishment at the trial is not *ex post facto*, although under the law in force at the time of the commission of the offense the court fixed the punishment.

*Holt v. State*, 2 Tex. 363.

Making the court the judge of the law, whereas at the time of the offense the jury was the judge thereof, is not *ex post facto*.

*Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911.

Nor is the reduction of the time within which the accused is required to challenge veniremen.

*State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

A retrospective statute regulating the



ground for challenge of jurors is not *ex post facto*.

*State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

A statute depriving the counsel for the prisoner of the closing argument is not *ex post facto*.

*People v. Mortimer*, 46 Cal. 114.

A statute which abolishes an existing court, or confers an additional jurisdiction upon it, or diminishes or enlarges the powers thereof, or creates a new court, is not *ex post facto*.

*Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Wales v. Belcher*, 3 Pick. 508; *Com. v. Phillips*, 11 Pick. 28; *State v. Jackson*, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829.

Special legislation is not obnoxious to the last clause of the 14th Amendment, if all persons subject to it are treated alike.

*Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Whenever the law operates alike upon all persons and property similarly situated, equal protection cannot be said to be denied.

*Walston v. Nevin*, 126 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

The 14th Amendment does not prohibit legislation limited as to objects or territory, but merely requires that all persons subject to it be treated alike under like circumstances and conditions.

*Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989.

A state is not thereby prohibited from prescribing the jurisdiction of its several courts, either as to territorial limits, or the subject-matter, amount, or formality of their respective decrees.

*Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Bolln v. Nebraska*, 176 U. S. 88, 44 L. ed. 384, 20 Sup. Ct. Rep. 287.

*Messrs. Zeb. V. Walser and C. A. Cook* filed an additional brief for defendant in error:

This court has no jurisdiction, as the record does not disclose the fact that any Federal question was raised in the trial of the case in either of the courts in which it was heard.

*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

The suggestion of a Federal question comes too late where it is first raised in an application for reargument.

*Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Nothing is made criminal which was theretofore innocent and lawful, by N. C. Laws 1899, chap. 471, § 6; nor is the punishment changed which was attached to the crime of  
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conspiracy to defraud at the time the offense was committed; nor are the rules of evidence changed so as to require less or different testimony to convict the plaintiffs in error.

*Cooley*, Const. Lim. 5th ed. p. 327; *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; *Hopt v. Utah*, 110 U. S. 587, 28 L. ed. 267, 4 Sup. Ct. Rep. 202; 12 Am. & Eng. Enc. Law, p. 535, and cases cited; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

Plaintiffs in error are not denied the equal protection of the laws as provided by the 14th Amendment to the Constitution of the United States, because the state is allowed to appeal in the eastern district and is not allowed such appeal in the western district.

*Guthrie*, 14th Amend. chap. 4; *Missouri v. Lewis*, 101 U. S. 23, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

\*Mr. Justice Shiras delivered the opinion[591] of the court:

Before considering the errors assigned by the plaintiffs in error to the judgment of the supreme court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the state to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.

It is, of course, obvious that there was no opportunity for the defense to raise in the criminal court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the supreme court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the superior court. It is true that in that court error was alleged to the action of the criminal court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection; and that contention was sustained by the superior court, and the new trial was granted for that and other reasons. But it does not \*appear that the superior[592] court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the supreme court of the state, and were by that court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the supreme court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed, but before it had been certified  
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down, the defendants filed a petition for re-argument, and presented the Federal questions on which they rely. The supreme court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the supreme court of a state after that court has pronounced its final decision. *Locber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Sayward v. Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 768; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.

But those were cases in which the supreme court of the state refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the supreme court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651. Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action.

The first contention we encounter in the assignments of error is that, as the statute which provides for an appeal from the superior court to the supreme court in criminal cases was not passed until after the commission of the offense charged and the trial in the criminal court, it was, as against the plaintiffs in error, *ex post facto* and in violation of art. 1, § 10, of the Constitution of the United States.

[593] \*The opinion of the supreme court stating the facts and disposing of this question is brief, and may be properly quoted:

"The next exception in the petition is that at the time of the commission of the offense the statute allowed no appeal to the state from the ruling of the superior court judge. But the defendants had no 'vested rights' in the remedies and methods of procedure in trials for crime. They cannot be said to have committed this crime relying upon the fact that there was no appeal given the state in such cases. If they had considered that matter they must have known that the state had as much power to amend § 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the state from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the superior court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the state, in a still higher court. The appeal was certified up to the superior court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the eastern district criminal court

(chapter 471, Laws 1899) was ratified March 6, 1899."

The subject has been several times considered by this court. The first case was that of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, where the important decision was made that the provision prohibiting *ex post facto* laws had no application to legislation concerning civil rights. But the opinion, delivered by Mr. Justice Chase, contains a classification of the criminal cases in which the provision is applicable:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the \*time of [594] the commission of the offense in order to convict the offender."

In *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, a law which excluded a minister of the gospel from the exercise of his clerical functions, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was held to be an *ex post facto* law, because it punished, in a manner not before prescribed by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.

In *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, will be found an elaborate review of the history of the *ex post facto* clause of the Constitution, and of its construction by the Federal and the state courts. Kring was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the supreme court of Missouri. A previous sentence pronounced on his plea of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that, by the force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime; and it was held, four of the justices dissenting, that, as to this case, the new law was an *ex post facto* law, and that he could not again be tried for murder in the first degree.

In *Hopt v. Utah*, 110 U. S. 574, 587, 28 L. ed. 262, 267, 4 Sup. Ct. Rep. 202, 209, one of the questions presented was whether a law which made it competent for witnesses to testify to the commission of a crime who were incompetent to so testify at the time the crime was so committed was an *ex post facto*



law, and it was unanimously held otherwise. *Kring v. Missouri* was cited and relied on by the plaintiff in error, and was disposed of by the court, per Mr. Justice Harlan, in the following observations.

[595] "That decision proceeded upon the ground that the state Constitution deprived the accused of a substantial right which the \*law gave him when the offense was committed, and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree.

Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions [596] upon the competency of certain \*classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

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In *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904, it was held that the Mississippi Code, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect; it did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender; that the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed; that the mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

In *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922, it was held that an act of the legislature of Missouri, providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage. In the opinion in this case the previous decisions were again reviewed, and the following passage from *Cooley's Treatise on Constitutional Limitations* was quoted with approval.

"So far as mere modes of procedure are concerned a party \*has no more right, in a [597] criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chap. 9, p. 272, 5th ed. See likewise *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Applying the principles established by these cases to the facts of the present case, we think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater



than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged.

It must not be overlooked that, when the plaintiffs in error perfected their appeal from the criminal court, by procuring its certification, on April 1, 1899, to the superior court, the new law, ratified on March 6, 1899, provided that the state could have the decision of that court reviewed by the supreme court.

Upon the whole, therefore, we agree with the supreme court of North Carolina in holding that the law granting the right of appeal to the state from the superior to the supreme court of the state was not an *ex post facto* law within the meaning of the Constitution of the United States.

[598] The further contention, that the plaintiffs in error were denied the equal protection of the laws because the state was allowed \*an appeal from the superior court of the eastern, and not from the western, district of the state, is not well founded.

In *Missouri v. Lewis*, 101 U. S. 23, *sub nom. Bowman v. Lewis*, 25 L. ed. 989, it was held that, by the 14th Amendment of the Constitution of the United States, a state is not prohibited from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject-matter, amount, or finality of their respective judgments or decrees; and that where, by the Constitution and laws of Missouri, the St. Louis court of appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties, and the supreme court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the state, such an adjustment of appellate jurisdiction is not forbidden by anything contained in the 14th Amendment. It was said by Mr. Justice Bradley, giving the opinion of the court:

"Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. . . . If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It

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means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of the \*line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision."

The principles of this case have been approved and applied in several subsequent cases. *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. ed. 986, 990, 13 Sup. Ct. Rep. 105; *Hodgson v. Vermont*, 168 U. S. 272, 42 L. ed. 464, 18 Sup. Ct. Rep. 80; *Holden v. Hardy*, 169 U. S. 384, 42 L. ed. 788, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

We therefore see no error in the action of the supreme court of North Carolina in holding that the state has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts.

There remains to consider the contention that, in the trial in the criminal court, by the use of certain books of account belonging to them, the plaintiffs in error were thereby made to be witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

In the petition for a rehearing in the supreme court, which, as we have seen, is the only part of the record on which the plaintiffs in error can rely as raising Federal questions, the point was thus presented:

"That prior to the beginning of this action an attachment against the property of the defendants was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in the case. By virtue of said attachment the sheriff of Edgecombe county seized the ledger and counter book of the defendants and has kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants \*were offered in evidence. The defendants objected; the objection was overruled, and the defendants excepted. In this the defendants submit there was error. For it is, in effect, making the defendants give evidence against them-

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selves under the principles laid down in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. At the argument of this case at this term counsel had not found this authority, and their argument did not go upon this ground. Since said hearing they found said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the court of the defendants' right to a new trial, if the matter could be brought to its attention."

The only ground of objection shown by the record to have been taken by defendants' counsel to the admission of this evidence was "because the testimony now offered was subsequent to the examination in the supplementary proceedings."

Nothing seems to have been claimed, either in the criminal court or in the superior court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution. The supreme court thus treated the subject:

"We will consider now the only exception which the petition to reargue insists the judge of the superior court should have passed upon and held in favor of the defendants, i. e., that the sheriff, by attachment, having seized the ledger and counter book of the defendants, they were put in evidence against them. There was certainly no error in using the defendants' own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. *State v. Graham*, 74 N. C. 648, 21 Am. Rep. 493. Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in the possession of the prisoner, that fact cannot be used against him. Here the books came legally into the possession of another, and the tell-tale entries were competent against the parties making them in the course of their business."

It therefore appears by the statement of the plaintiffs in error in their petition for a reargument that no Federal question was [601] \*raised or considered in the criminal court or in the superior court, in respect to the admission of the evidence, so that there was no basis on which to claim error in this respect in those courts. Nor did the supreme court, in passing upon the contention, deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the state, and there is, therefore, nothing in its action for us to review.

But we do not wish to be understood as implying that, even if this question had been duly presented in the state courts as a Federal question, there was error in admitting the evidence complained of.

*The judgment of the Supreme Court of North Carolina is affirmed.*

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ROLLINSON COLBURN and Others, *Appts.*,  
v.  
ROBERT E. GRANT, Executor, and Others.

(See S. C. Reporter's ed. 601-609.)

*Trusts—liability for default of cotrustee—laches.*

1. An abandonment of discretionary power by a trustee to a cotrustee, which will make the former liable for the latter's defalcation, is not shown by the mere fact that the latter collected and misappropriated funds belonging to the estate, and that some ministerial duties under the trust may have been relinquished to him, where it does not appear when or how he obtained control of the fund which he misappropriated, or that it may not have been done shortly before his death and the discovery of the defalcation.
2. The fact that no intention to hold a trustee for the defalcation of a cotrustee was ever disclosed until more than two years after the former's death and nearly six years after the latter's death tends to show that the effort to so hold him was an afterthought, not entitled to the approval of a court of equity.

[No. 221.]

*Argued and Submitted April 8, 9, 1901.  
Decided May 20, 1901.*

**A** PPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District dismissing a bill in equity. *Affirmed.*

See same case below, 16 App. D. C. 107.

Statement by Mr. Justice Shiras:

This is an appeal from a decree of the court of appeals of the District of Columbia, which affirmed a decree of the supreme court of the District dismissing a bill in equity, which had been filed in that court. The complainants were legatees of one Augustus G. P. Colburn, and their trustee, Franklin H. Mackey, against Robert E. Grant, the executor of the estate of \*George Fitz James [902] Colburn, a deceased trustee of the estate of said Augustus Colburn, for an accounting, it being alleged that there had come into the hands of said trustee and his cotrustee, both of whom were deceased, a large sum of money, namely, \$28,000, and that only \$5,000 thereof had been accounted for. The codefendants of the defendants' executor were those persons who would be entitled to distribution of his testator's estate. The case was heard upon the pleadings and an agreed statement of facts.

The stipulation of facts was as follows:

"In order to obviate the expense of taking

NOTE.—On responsibility of cotrustees for their acts—see *Bruen v. Gillet* (N. Y.) 4 L. R. A. 529, and note.

As to laches as a defense—see notes to *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; *Middletown v. Newport Hospital* (R. I.) 1 L. R. A. 191; *Calhoun v. Delhl & M. R. Co.* (N. Y.) 8 L. R. A. 248; and *Coffey v. Emigh* (Colo.) 10 L. R. A. 125.

testimony in relation thereto, it is hereby stipulated and agreed that the following are conceded as facts, and that the statements herein may be read and taken in this cause as established.

"That the complainant Franklin H. Mackey, as trustee, was appointed by decree of this court in equity cause No. 18,728, and has qualified as such.

"That the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of Hervey Colburn, who was a brother to Augustus G. P. Colburn.

"That the complainants Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn and Louise B. Colburn are the only children of H. Hobart Colburn, a deceased child of the said Hervey Colburn; that said H. Hobart Colburn predeceased the said George Fitz James Colburn and that all the above-named parties are now of full age.

"That George Fitz James Colburn died in September, 1897, unmarried and without issue, his wife having died before him, and that all the brothers and sisters of Augustus G. P. Colburn predeceased the said George Fitz James Colburn except P. D. Miranda Kimball, who died on the 22d day of December, 1897.

"That under the will of the said Augustus G. P. Colburn the said George Fitz James Colburn and John W. Taylor were named as trustees, without bond, for the management of the trust portion of said estate, with power to sell the same.

[603] "That the real estate in the city of Newark, state of New Jersey, mentioned in the will of the said Augustus G. P. Colburn, was sold by said trustees shortly after the death of the \*testator, the net proceeds arising therefrom amounting to \$27,000, which was paid part in cash and the remainder in subsequent instalments, the latter instalments being collected by the said Taylor.

"That the said George Fitz James Colburn removed from the city of Newark in the year 1873 to the city of Washington, District of Columbia, where he resided, except for a few months, up to the day of his death.

"That John W. Taylor, one of the said trustees, was a prominent lawyer of the city of Newark at the time of his appointment, and continued so to be up to the date of his death in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death by his own hands on November 20, 1893.

"That after the death of the said Taylor it was found that he had squandered many estates under his custody, amongst others the said estate of Augustus G. P. Colburn, except the sum of \$5,000, which was under the exclusive control of the said George Fitz James Colburn, and which latter sum of \$5,000 has been turned over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18,728.

"That the said trust estate, except the said sum of \$5,000 referred to, was by the said George Fitz James Colburn left solely to the collection, management, and discre-

tion of the said Taylor, who handled said sum without the co-operation, supervision, or knowledge of the said George Fitz James Colburn, the latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

"Upon the death of said Taylor, trustee, the said George Fitz James Colburn, as surviving trustee, made claim against the estate of said Taylor for the amount of the trust fund by him squandered, as aforesaid, and upon said claim of \$22,000 he received a dividend of \$3,342.45.

"That by papers-writing dated respectively September 6, 9, and 11, 1895, Rev. Edward A. Colburn, Rollinson Colburn, and H. Hobart Colburn released all claim to the said \$3,342.45 unto \*the said George Fitz James Colburn, and that thereupon the said George Fitz James Colburn purchased an annuity for himself, which he enjoyed until his death. Said paper-writing is in the following form: 'I hereby give my full assent that my cousin, George Fitz James Colburn, shall have full right to use the sum of \$3,342.45 received by him from his father's estate, should he so have need, and do resign any interest I may have in said sum of \$3,342.45 if he so desire to use it.' Originals of above paper to be filed in this suit."

*Mr. Franklin H. Mackey* argued the cause and filed a brief for appellants.

*Mr. J. Heldsworth Gordon* submitted the cause for appellees.

Contentions of counsel sufficiently appear in the opinion.

\**Mr. Justice Shiras* delivered the opinion [604] of the court:

The case was heard in the supreme court of the District on bill, answers, and an agreed statement of facts. Some complaint is made in appellants' brief of the alleged fact that the court treated certain allegations in the answer of the defendant executor as evidence, although an answer under oath had been dispensed with, and it is said that only those portions of the answer which admitted the allegations of the bill, or contained admissions against interest, should have been considered.

We are inclined to think that, upon the record made up and presented at the hearing, the court had a right to consider all the allegations of the answer. No replication, putting the allegations of the answer in issue, appears to have been filed, and the court may have well supposed that the complainants had agreed to have the case disposed of on bill, answers, and stipulation. If such a course was a surprise to counsel, application should have been made to have the decree suspended, and for leave to take rebutting evidence.

However, we have examined and compared the respective allegations of the bill and answer, and do not perceive that, even upon the theory of appellants' counsel, any such substantial \*difference in the facts could have [605]



been made to appear as would have justified a different result.

Not only, then, is there an agreement as to the controlling facts, but there also seems to be little or no controversy in respect to the principles of law involved. The learned counsel for the appellants concedes, in effect, the propositions of law found in the opinion of the court of appeals, but contends that a proper application of those propositions would call for a different decree.

The purpose of the bill is to have the estate of George Fitz James Colburn held liable for a defalcation by John W. Taylor, who was united with said Colburn in the administration of a trust estate created by the will of Augustus G. P. Colburn, father of George F. J. Colburn.

The father, who was a resident of Newark, New Jersey, died on May 27, 1872, and in his will, dated May 25, 1872, devised to said son, for and during his natural life, a certain dwelling house and lot in said city, with power to the trustees named in the will, who were his said son and John W. Taylor, to sell the same at any time, and to invest the proceeds of such sale as advantageously as possible, and to pay over the income arising therefrom to his said son during his life. Shortly after the death of the testator the trustees sold this real estate for the sum of \$27,000, which was paid partly in cash and partly in instalments. George F. Colburn subsequently removed to the city of Washington, where he died in September, 1897.

John W. Taylor was a prominent lawyer in the city of Newark at the time of his appointment, and continued so to be up to the date of his death, and was regarded by the general public as a man of business integrity at the time of his death by his own hand on November 20, 1893.

After Taylor's death it was discovered that he had squandered many estates in his custody, among others the said estate of Augustus G. P. Colburn, except the sum of \$5,000, which was under the exclusive control of George F. J. Colburn, and which latter sum is not in controversy here.

Upon the death of Taylor, George F. J. Colburn, as surviving trustee, made claims against the estate of Taylor for the amount [606] of his defalcation in the estate of Augustus G. P. Colburn, and upon said claim of \$22,000 he received a dividend of \$3,342.45. The amount so received was subsequently, with the consent of the residuary legatees under his father's will, invested by George F. J. Colburn in an annuity for himself, which he enjoyed until his death.

Without going into further details, it is evident, and, indeed, is conceded, that George F. J. Colburn was not involved in the dishonest acts of his cotrustee, and which resulted in the loss of the larger part of the trust estate. Nor is it contended that, as a matter of law, was George F. J. Colburn liable for the malfeasance of his cotrustee.

What is contended is that an abandonment of discretionary power by a trustee to a cotrustee, where the trust is entitled to the united discretion of both, is such an act of

supine negligence as to render the trustee who has abandoned his active participation in the management of the trust liable for the losses occasioned by the misconduct of the cotrustee; that George F. J. Colburn did so abandon his functions as trustee, and that accordingly he was, and his estate now is, liable for the money misapplied by Taylor.

The courts below did not refuse to recognize the soundness of appellants' statement of the law as a general proposition, and, indeed, stated it strongly in the following language:

"Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, discretion, and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."

But it was the opinion of those courts that, while such is the general doctrine, yet that the facts of the present case do not call for its application; that the conduct of Colburn was not in the nature of an abandonment by him of duties devolved upon him as trustee under his father's will.

The supreme court thus expressed its conclusion:

"After a loss has occurred, as in this case, by the positive fault of someone, it may be easy to say how it could have been prevented; but in order to hold someone else fairly responsible, \*the point of view held by the [607] party sought to be made liable, at and before the loss occurred, is the only safe point of view to assume. . . . From the light of the circumstances shown, I cannot convince myself that George F. J. Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor."

The court of appeals, after a full statement of the facts and the law applicable thereto, expressed the following conclusion:

"But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz James Colburn or any proof of negligence on his part in the supervision of the trust in such manner as to render him or his estate liable.

"It is true that it is said in the statement that the trust estate, to the extent of \$22,000 was left by Colburn to 'the collection, management, and discretion solely of Taylor,' and that Taylor 'handled said sum without the co-operation, supervision, or knowledge of Colburn.' But this is not sufficient. The statement may be consistent with the relinquishment only by Colburn of the ministerial duties which he might well have intrusted to Taylor. In order to hold Colburn responsible there should be some evidence of abandonment by him of the discretionary duties which it was not proper for him to delegate to his cotrustee.

"It is very evident that the testator had confidence in Taylor, whom he designates as his friend, and who was in all probability his legal adviser; and the joinder of Taylor

in the trust is, under the circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor other than to collect the rents and to remit them [608] to Colburn in Washington, and this duty had been left exclusively to him, we do not think that it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise? It does not anywhere in the record appear how this fund of \$22,000, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having been once invested, there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold; and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed. At all events, we cannot assume the contrary in the absence of proof. We cannot assume that the money became due, and that Taylor received it and reinvested it without the concurrence of Colburn, or that he wholly failed to reinvest it and converted it to his own use. That Taylor obtained control of the fund and misappropriated it is very clear, but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misappropriation may have been an afterthought. We cannot infer delinquency on the part of Colburn when there is no more proof than is contained in this record that, by his abandonment of his trust, or by his negligence in the supervision of it, he had put it in the power of his cotrustee to prove faithless in his duty. Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment [609] nor negligence is to be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the in-

ference, and we do not find that proof in the statement of facts contained in this record."

Another fact in this case is not without weight.

After Taylor's death, and when it appeared he was a defaulter, Colburn at once presented a claim, as cotrustee, against his estate, and was allowed a dividend in the sum of \$3,342.45. Thereupon the residuary legatees consented in writing that Colburn should have a right to use said sum in the purchase of an annuity on his own account.

While we are not disposed to accept the suggestion, on behalf of the appellees, that by consenting to such a use by Colburn of the money received from the estate of Taylor, the residuary legatees were estopped from claiming liability for the rest of the fund misapplied by Taylor, we yet think that such a consent tends strongly to show that the residuary legatees, who were fully aware of all the facts and circumstances, did not regard Colburn's conduct as subjecting him to liability for Taylor's misconduct. And the further fact, shown by the record, that no intention to hold Colburn for Taylor's defalcation was ever disclosed till more than two years after Colburn's death, and nearly six years after that of Taylor, tends to show that the effort to so hold him is an afterthought, not entitled to the approval of a court of equity.

The treatment of facts and law in the opinions of the courts below, contained in the record, was so full and satisfactory as to relieve us from further discussion.

*The decree of the Court of Appeals of the District of Columbia is affirmed.*

\*AMERICAN SUGAR REFINING COM-[610]  
PANY, *Petitioner*,  
v.

UNITED STATES.

(See S. C. Reporter's ed. 610-614.)

*Duty on sugars—grade improved by drainage—assessment on improved grade.*

Sugar Imported from Brazil, which has diminished in weight by a decrease of moisture, but improved in quality thereby, so that the quantity received here is worth as much as the original quantity shipped in Brazil, may be appraised for duties according to the grade of the sugar as it is received here, instead of its grade as it was shipped from Brazil, under the customs administrative act 1890, § 19, providing for duty upon imported merchandise assessed upon the market value in the markets of the country from whence imported and in the condition in which it was bought and sold for exportation, since the article upon which duty must be laid is that which is "imported."

[Nos. 225 and 236.]

*Argued April 12, 1901. Decided May 20, 1901.*

ON WRITS OF CERTIORARI to the  
United States Circuit Court of Appeals  
181 U. S.



for the Second Circuit to review a decision affirming an appraisement of imported sugars. *Affirmed.*

See same case below, 40 C. C. A. 84, 99 Fed. 716.

The facts are stated in the opinion.

**Mr. H. B. Closson** argued the cause, and, with **Mr. John E. Parsons**, filed a brief for petitioner:

The essential feature of the taxation of a civilized government is that it is absolutely fixed, uniform, calculable in advance; never imposed *ex post facto*.

*Merritt v. Welsh*, 104 U. S. 694, 26 L. ed. 896.

Unless constrained by clear evidence, in the language of the statute itself, of such an intention, the courts do not insert into a general provision of a statute an exception which the legislature has failed to express, however convinced they may be, by considerations outside of such language, that the legislature, if its attention had been called to the point, would itself have inserted the exception.

*Ibid.*; *Lake County Comrs. v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 8 Am. Dec. 467; *Farmers' Loan & T. Co. v. Oregon & C. R. Co.* 24 Fed. 407.

This rule of construction is applicable to all statutes, and with especial force to those imposing taxes and duties. As to these, it is supplemented by this extension of it, that if the literal construction of the language used enables the importer to escape with a less tax than a looser and more liberal construction of it would impose, the importer is entitled to the literal interpretation.

*United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

It is undeniable that Congress contemplated the possibility of a change in the condition and consequently in the value of merchandise during the voyage of importation; for there is an uncompromisingly clear provision for the case in which such a change during the voyage shall be in the direction of a deterioration in condition, and a consequent decrease in the value of merchandise.

Customs administrative act 1890, § 23 (26 Stat. at L. chap. 407).

Thus, the importer of window glass or pineapples in good condition when paid for and shipped pays duty on his merchandise at its value in that condition, although it be delivered to him at the end of the voyage, the glass in shattered and worthless fragments (*United States v. Bache*, 8 C. C. A. 258, 20 U. S. App. 286, 59 Fed. 762), and the pineapples as decayed and equally worthless "slush" (*Stone v. Lawder*, 41 C. C. A. 621, 101 Fed. 710).

Inasmuch as it is sugar, and not sucrose, which is subject to duty and required to be appraised, the inquiry of the appraiser must be as to the value of each pound of sugar at

the time and place as of which he is required to value it.

*Earnshaw v. Cadwalader*, 145 U. S. 247, 36 L. ed. 693, 12 Sup. Ct. Rep. 851.

It is only so much of the sugar as actually reaches the United States and is landed there—to wit, in the cases at bar about 84 per cent of the amount exported—that the appraiser can appraise.

*Marriott v. Brune*, 9 How. 619, 13 L. ed. 282; *Shaw v. Dix*, 72 Fed. 166.

It is a wholly immaterial fact that the probable loss, during the voyage, of a given percentage of the sugar shipped, is considered by the purchaser and seller when the contract of sale is made, and is in a way provided for, either by discount from the current market price, or by a guaranty that the loss shall not exceed a fixed percentage, or both.

*United States v. Southmayd*, 9 How. 637, 13 L. ed. 290.

The construction given by the court of appeal to the words, "in the condition in which the merchandise is bought for exportation," confessedly ignores the literal meaning of the act, in order to impose a heavier tax on the importer than he would otherwise have to bear. This is never permitted.

*United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

To the conditions presented by the sugar tariff adopted by Congress, the importer had the right to adjust his business; and if, under the tariff of 1894, he found it to be to his advantage thereafter to import a larger percentage of green and wet sugars and a smaller percentage of dry or cured sugars than theretofore, the opportunity to lessen thereby the cost to himself of his raw material is a wholly legitimate one.

*Seeberger v. Farwell*, 139 U. S. 610, 35 L. ed. 298, 11 Sup. Ct. Rep. 650; *Merritt v. Welsh*, 104 U. S. 694, 26 L. ed. 896.

**Assistant Attorney General Hoyt** argued the cause and filed a brief for respondent:

The effect of the 16th section of the tariff act of 1842 (which is substantially preserved in §§ 10 and 19 of the customs administrative act of 1890) was, whenever an ad valorem duty was imposed, to charge it only upon the amount of merchandise actually imported.

*Brune v. Marriott*, Taney, 132, Fed. Cas. No. 2,052.

Duty is to be assessed, not upon the weight of sugar in the invoice, but upon the weight when landed, although no express direction is contained in any law to make an allowance for loss of weight of sugar by drainage, and although the aggregate value is thus reduced below the aggregate cost named in the invoice.

*Marriott v. Brune*, 9 How. 619, 13 L. ed. 282; and see *Lawrence v. Caswell*, 13 How. 488, 14 L. ed. 235.

The case of *United States v. Southmayd*, 9 How. 637, 13 L. ed. 290, is of the greatest authority and signification in the government's favor. The court obviously would



have sustained an addition to the invoice price if the evidence had justified that course.

The condition as imported is the test of dutiability.

*Worthington v. Robbins*, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; *United States v. Schoverling*, 146 U. S. 76, 36 L. ed. 893, 13 Sup. Ct. Rep. 24.

*Solicitor General Richards* and *Assistant Attorney General Hoyt* filed a brief for respondent in opposition to the petition for certiorari.

[610] \*Mr. Justice McKenna delivered the opinion of the court:

These two cases were argued and submitted together. They involve the appraisal of certain sugars imported from Brazil. The sugars were shipped "green," that is, contained moisture. A certain per cent of this moisture drained on the voyages, and the sugars became thereby more valuable. In other words, as the sugars diminished in weight they increased in value, being worth as much here as the original quantity shipped in Brazil. This is always true of Brazilian sugars, and is recognized by the trade, and is made a basis of settlement between vendor and vendee. The "settlement test" was used by the appraisers in ascertaining the value of the sugars in Brazil in

[611] the \*condition they arrived here. Mr. Sharretts, a member of the general board of appraisers, testified in No. 236 (and there was no opposing testimony) as follows:

"The price paid for sugars of this description from Brazil is a conditional one, the stipulation being that they will give a certain price, with a proviso that the decrease or loss of weight in decreased moisture shall not exceed a certain point. Therefore, in determining what the real price to be paid for that sugar was, it was necessary to determine what the test was in the United States. By an agreement between the board of general appraisers and the government on the one side and the importers on the other, we accepted in all cases the settlement test as controlling; that is, the test upon which the commercial transaction was made was the test which we accepted as the controlling one in determining the quantity or percentage of sugar on which duty was to be paid. In this particular case the board found or the board made a return upon the settlement test. On that settlement test they made the report and found the value to be equal to 11s. 11d. per 100 kilos or per ton, the equivalent for this sugar of the same test as that which arrived in the United States, in the country of exportation. In other words, they held that the diminished quantity of sugar arriving in the United States was worth just as much as they paid for the original quantity as shipped from Brazil. We therefore found it on the basis of the settlement test to be 11s. 11d."

Duties were levied by the collector upon the increased valuation of the sugars. The importers protested, claiming that the duties were illegally exacted. The action of the

collector was affirmed by the board of general appraisers, and successively by the circuit court and the circuit court of appeals. The cases were then brought here.

Under § 182½ of the tariff act of 1894 the rate of duty was fixed at 40 per cent; but upon what valuation? Counsel for petitioner says:

"In each of these importations the appraiser ascertained that the market value of the sugar when shipped was a certain amount per hundredweight. To this valuation, in each case, he made an addition of a certain further amount per hundredweight \*to represent a supposed increase of its value [612] during the voyage owing to drainage. Duty was accordingly assessed at 40 per cent, not of the value of the sugar per hundredweight 'at the time of the exportation to the United States,' 'on the day of actual shipment,' and 'in the condition in which such merchandise is there bought and sold for exportation to the United States,' but at 40 per cent of its greater value per hundredweight in its condition when landed."

It is apparent that the increase in value offsets the decrease in weight,—that is, the total value of the invoice was not increased. Where, then, was there injury to petitioner? The claim is that duties should have been levied according to the condition in which the sugars had been bought in Brazil, but the claim ignores one element of that condition,—the very element which made the condition,—and ignoring it the claim is attempted to be justified by § 19 of the customs administrative act of 1890. The section provides as follows:

"That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. . . . That the words 'value' or 'actual market value,' whenever used in this act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in this section." [26 Stat. at L. 131, chap. 407.]

We do not think the statute is very obscure. Passing by the consideration of § 23, (inserted in the margin)†, we may say, as

†Sec. 23. "No allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned, provided the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice."



was decided in *Marriott v. Brune*, 9 How. 619, 13 L. ed. 282, and *\*United States v. Southmayd*, 9 How. 637, 13 L. ed. 290, imported merchandise is that which arrives in this country, and it is upon that duties are to be paid. Those cases passed on imports of sugars which had lost weight by drainage on the voyages. The controversy was whether duties should be levied upon the weight of the sugars when shipped, or upon their weight when they arrived, which was less on account of drainage and waste to the extent of 5 per cent, than when they were shipped. The court sustained the latter view, saying: "The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here. That is what is imported,—for nothing is imported until it comes within the limits of the port." The evidence in those cases also showed that the quality of the sugars was less on account of the drainage. "Nor is his sugar improved in quality," the court said, "by the drainage, so as to raise any equity against him (the importer) by it."

The evidence in the case at bar is that the sugars had improved in quality,—becoming a higher grade of sugar, and necessarily, under the principle of the cited cases, it was that grade which was imported. Why, then, should they not have paid duty according to that grade? It was that grade, to use the language of *Marriott v. Brune*, which went "into the consumption of the country,"—it was that grade which went "into competition with our domestic manufactures."

But, it is contended, that was not their  
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condition when shipped. In one sense it was not, nor did the importers seek to pay duty on the sugars in the condition in which they were shipped. An element of that condition escaped, and it was calculated that it would escape, and the price to the importer was to be adjusted by it. With no decrease in the value of its sugars, petitioner claims a decrease of duties which the law fixes by value. The petitioner wants the benefit of the weight of the old condition and the benefit of the quality of the new.

\*To dwell upon the relative conditions of [614] the sugars is misleading. They are really not the same articles, and it is upon the imported article the duty must be laid. This is the purpose of the statute. It is "such merchandise" which is imported and which is subject to an ad valorem duty according to its market value from whence it has come. And the practical justness of the rule is illustrated by this case. It is true that a witness testifying generally as to drainage from sugar cargoes said "it (the drainage) might be worth more and it might not be worth much." But what it was worth in the present case was not testified to. Whatever it was worth, it was petitioner's property, and whether it was worth reclamation was for petitioner to judge. Besides, the ultimate valuation of the appraisers is not contested. Their authority is to make it. As the court of appeals said, "the legality of the appraisement is questioned, not its accuracy or its equity." [40 C. C. A. 86, 99 Fed. 718.] We have no doubt about its legality, and the judgments are affirmed.





# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[615] \*CHARLES A. GREGORY, *Appellant*, v. MARY H. PIKE. [No. 413.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. F. A. Brooks for appellant.

Mr. T. H. Talbot for appellee.

April 15, 1901. *Dismissed* for the want of jurisdiction.

TERRITORY OF OKLAHOMA, Upon the Relation of S. P. RIDINGS, County Attorney of Grant County, *Appellant*, v. T. P. NEVILLE *et al.*, as the Board of County Commissioners of Grant County *et al.* [No. 272.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Messrs. John W. Shartel and J. R. Keaton for appellant.

Mr. Horace Speed for appellees.

April 29, 1901. *Dismissed* for the want of jurisdiction, on the authority of *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; *Thomas v. Wooldridge*, 23 Wall. 283, 288, 23 L. ed. 135, 136.

GIDEON MANCHESTER, *Plaintiff in Error*, v. CENTRAL BAPTIST CHURCH, *ETC.* [No. 311.]

In Error to the Supreme Court of the State of Rhode Island.

Mr. James F. Jackson for plaintiff in error.

Mr. Wm. P. Sheffield, Jr., for defendant in error.

May 13, 1901. *Dismissed* for want of jurisdiction.

CHARLES W. NORDSTROM, by his Next Friend, J. HENRY DENNING, *Appellant*, v. A. T. VAN DE VANTER, Sheriff, *etc.*, *et al.* [No. 388.]

Appeal from the Circuit Court of the United States for the District of Washington.

Mr. James Hamilton Lewis for appellant.

Messrs. Walter S. Fulton and F. B. Crosthwaite for appellees.

[616] May 13, 1901. Order *affirmed*, with costs, on the authority \*of *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; and see *State v. Nordstrom*, 21 Wash. 403, 58 Pac. 248; *Nordstrom v. Moyer*, 170 U. S. 703, 42 L. ed. 1218, 18 Sup. Ct. Rep. 944; *Nordstrom v. Washington*, 164 U. S. 705, 41 L. ed. 1183, 17 Sup. Ct. Rep. 997; *Craemer v. Washington*, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.  
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GRAND ISLAND & WYOMING CENTRAL RAILROAD COMPANY *et al.*, *Appellants*, v. THOMAS SWEENEY. [No. 469.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Chas. F. Manderson and N. K. Griggs for appellants.

Mr. Chas. W. Brown for appellee.

May 20, 1901. *Dismissed* for want of jurisdiction.

CHARLES W. NORDSTROM, *Plaintiff in Error*, v. STATE OF WASHINGTON. [No. 389.]

In Error to the Supreme Court of the State of Washington.

Mr. James Hamilton Lewis for plaintiff in error.

Messrs. Walter S. Fulton and F. B. Crosthwaite for defendant in error.

May 28, 1901. Judgment *affirmed*, with costs, on the authority of *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Nordstrom v. Van De Vanter*, 181 U. S. 615, *ante*, 1029, 21 Sup. Ct. Rep. 923, and cases cited.

\*BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS, *Petitioner*, v. UNITED STATES *ex rel.* ANN WARNER *et al.* [No. 606]; and BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS, *Petitioner*, v. UNITED STATES *ex rel.* JOHN FISHER *et al.* [No. 607.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Branch K. Miller for petitioner.

Messrs. Richard De Gray, J. D. Rouse, Wm. Grant and H. M. Jordan for Warner *et al.*

Messrs. Charles Louque and E. Howard McCaleb for Fisher *et al.*

April 8, 1901. *Denied*. Mr. Justice White and Mr. Justice Peckham took no part in the consideration and disposition of these applications.

PASSAIC PRINT WORKS, *Petitioner*, v. ELY & WALKER DRY GOODS COMPANY. [No. 594.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Frederick V. Van Vorst for petitioner.

Mr. Wm. B. Thompson for respondent.

April 15, 1901. *Denied*.

AARON A. PARKER *et al.*, *Petitioners*, v. JOHN W. SQUIRES. [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Wm. J. Gray* for petitioners.

*Mr. Ronald Kelly* for respondent.

April 15, 1901. *Denied*.

MICHAEL KELLY, *Petitioner*, v. JUTTE & FOLEY COMPANY. [No. 623.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. E. Spencer Miller* for petitioner.

*Mr. Richard P. White* for respondent.

April 15, 1901. *Denied*.

DAVID V. RIEGER, *Petitioner*, v. UNITED STATES. [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Frank Hagerman and Willard P. Hall* for petitioner.

*The Attorney General and Wm. H. Wallace* for respondent.

April 15, 1901. *Denied*.

HARTFORD FIRE INSURANCE COMPANY, *Petitioner*, v. ALBERT A. WILSON *et al.* [No. 625.]

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Messrs. Alexander Wolf and Samuel B. Paul* for petitioner.

*Mr. Henry P. Blair* for respondents.

April 15, 1901. *Granted*.

S. M. BURT *et al.*, *Petitioners*, v. UNION CENTRAL LIFE INSURANCE COMPANY. [No. 610.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. A. W. Terrell* for petitioners.

April 22, 1901. *Granted*.

[618]\* ALLEGHENY OIL COMPANY, *Petitioner*, v. HIRAM A. SNYDER *et al.* [No. 617.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. W. H. H. Miller and Jos. B. Chapman* for petitioner.

*Messrs. D. A. Hollingsworth and Edward McSweney* for respondents.

April 22, 1901. *Denied*.

GEORGE GILLMOR *et al.*, *Petitioners*, v. H. W. BROWN *et al.* [No. 618.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. W. H. H. Miller and Jos. B. Chapman* for petitioners.

*Messrs. D. A. Hollingsworth and Edward McSweney*, for respondents.

April 22, 1901. *Denied*.

NEW YORK LIFE INSURANCE COMPANY, *Petitioner*, v. JAMES ALLISON. [No. 619.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. E. E. McCall, G. W. Hubbell, and F. D. McKenney*, for petitioner.

*Mr. A. J. Dittenhofer* for respondent.

April 22, 1901. *Denied*.

TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY *et al.*, *Petitioners*, v. MARK T. COX *et al.* [No. 631.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Lawrence Maxwell, Jr., and S. O. Puckens*, for petitioners.

*Messrs. John G. Williams and G. W. Wickersham* for respondents.

April 22, 1901. *Denied*.

MAXIMILIAN W. FALK, *Petitioner*, v. UNITED STATES. [No. 633.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Mr. Edwin Forrest* for petitioner.

*The Attorney General, Solicitor General Richards, and Thomas H. Anderson* for respondent.

April 22, 1901. *Denied*.

MILTENBURGER LAWDER *et al.*, *Petitioners*, v. WILLIAM F. STONE, Collector. [No. 632.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Messrs. Edward S. Hatch and Thomas P. Wickes* for petitioners.

*The Attorney General and Mr. Solicitor General Richards* for respondent.

April 29, 1901. *Granted*.

FERDINAND L. LOEB *et al.*, *Petitioners*, v. UNITED STATES. [No. 640.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. W. Wickham Smith and Chas. Curie* for petitioners.

\**The Attorney General and Solicitor General Richards* for respondent.

April 29, 1901. *Denied*.

WILLIAM R. TUCKER, Vice Consul, etc., *Petitioner*, v. UNITED STATES *ex rel.* LEO ALEXANDROFF. [No. 642.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. F. R. Coudert, Jr., Paul Fuller, and John F. Lewis* for petitioner.

April 29, 1901. *Granted*.



JOHN FRANCIS *et al.*, *Petitioners, v. UNITED STATES*. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Miller Outcalt and Thomas F. Shay* for petitioners.

April 29, 1901. *Granted*.

WILLIAM E. HALE, as Receiver, *Petitioner, v. EDWARD P. ALLINSON*. [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. M. H. Boutelle, Joseph K. McCammon, and James H. Hayden* for petitioner.

*Mr. John G. Johnson* for respondent.

May 13, 1901. *Granted*.

REPUBLIC OF COLOMBIA, *Petitioner, v. CAUCA COMPANY et al.* [No. 638.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Messrs. Calderon Carlisle and Wm. G. Johnson* for petitioner.

No appearance for respondent.

May 13, 1901. *Denied*.

MART JONES, *Petitioner, v. WALKER NEWTON*. [No. 643.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Messrs. Samuel Park and R. G. Bickford* for petitioner.

*Mr. Thomas Evans* for respondent.

May 13, 1901. *Denied*.

NEW ENGLAND RAILROAD COMPANY, *Petitioner, v. RUTH E. HYDE*. [No. 645.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Messrs. Frank A. Farnham and F. D. McKenney* for petitioner.

*Mr. Donald G. Perkins* for respondent.

May 13, 1901. *Denied*.

PEYTON ROWAN *et al.*, *Petitioners, v. E. T. IDE*. [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[620] \**Messrs. Wm. A. Gunter and Thomas H. Clark* for petitioners.

No appearance for respondent.

May 13, 1901. *Denied*.

WESTERN UNION TELEGRAPH COMPANY, *Petitioner, v. FRANCIS N. BURGESS*. [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Rush Taggart, Geo. H. Fearons and Henry Newbegin* for petitioner.

No appearance for respondent.

May 13, 1901. *Denied*.

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LOUISVILLE TRUST COMPANY, Trustee, *Petitioner, v. LEONARD COMINGOR*. [No. 653.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Augustus E. Willson*, for petitioner.

May 13, 1901. *Granted*.

ANTON MENCKE, *Petitioner, v. CARGO OF JAVA SUGAR, ETC.* [No. 655.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. J. Parker Kirlin* for petitioner.

*Mr. Wilhelmus Mynderse* for respondent.

May 13, 1901. *Granted*.

JOSEPH BANCROFT & SONS COMPANY, *Petitioner, v. VICTOR G. BLOEDE*. [No. 636.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Messrs. John N. Steele and Herbert H. Ward* for petitioner.

*Messrs. Geo. R. Willis and Robert Biggs* for respondent.

May 20, 1901. *Denied*.

UNITED STATES *ex rel.* COTTER T. BRIDE, *Petitioner, v. HENRY B. F. MACFARLAND et al.* [No. 661.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Mr. O. B. Hallam* for petitioner.

*Messrs. Andrew B. Duvall and Clarence A. Brandenburg* for respondents.

May 20, 1901. *Denied*.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner, v. SALLIE E. HILLMON*. [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Edward S. Isham, William G. Beale, Gilbert E. Porter, and James W. Green* for petitioner.

*Messrs. C. F. Hutchings and L. B. Wheat* for respondent.

May 20, 1901. *Granted*.

WILLIAM H. WRIGHT *et al.*, *Petitioners, v. UNITED STATES*. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

\**Messrs. J. D. Rouse, Wm. Grant, and H. [621] M. Jordan* for petitioners.

*The Attorney General, Solicitor General Richards, and Wm. W. Howe* for respondent.

May 20, 1901. *Denied*.

UNITED STATES, *Petitioner*, v. ROBERT MC-BRATNEY. [No. 670.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*The Attorney General, Solicitor General Richards, and Assistant Attorney General Hoyt* for petitioner.

*Messrs. W. Wickham Smith and Charles Curie* for respondent.

May 20, 1901. *Denied*.

EDMUND ZACHER, as Receiver, *Petitioner*, v. FIDELITY TRUST & SAFETY VAULT COMPANY *et al.* [No. 673.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Alexander Pope Humphrey* for petitioner.

*Messrs. W. O. Harris and John G. Simrall* for respondents.

May 20, 1901. *Denied*.

PRESIDENT AND DIRECTORS OF INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*, v. STEAMSHIP ST. HUBERT. [No. 675.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. Francis S. Laws and John F. Lewis* for petitioner.

*Mr. J. Parker Kirlin* for respondent.

May 20, 1901. *Denied*.

CITY OF PIERRE, *Petitioner*, v. GODFREY DUNSCOMB *et al.* [No. 656.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Ivan W. Goodner* for petitioner.

*Messrs. Michael H. Cardozo and A. B. Kittredge* for respondents.

May 20, 1901. *Denied*.

UNITED STATES, *Petitioner*, v. C. E. LACKEY. [No. 671.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*The Attorney General and Solicitor General Richards* for petitioner.

*Mr. Robert F. Hill* for respondent.

May 27, 1901. *Denied*.

UNION STEAMBOAT COMPANY, *Petitioner*, v. ERIE & WESTERN TRANSPORTATION COMPANY *et al.* [No. 674.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. J. J. Darlington and C. E. Kremer* for petitioner.

*Messrs. F. H. Canfield and Harvey D. Goulder* for respondents.

May 27, 1901. *Granted*.

\*LEICESTER MILLS COMPANY *et al.*, *Petitioner*—[622] *ers*, v. JOHN G. POWELL *et al.* [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Hector T. Fenton* for petitioners.

*Mr. Charles Howson* for respondents.

May 27, 1901. *Denied*.

PAUL SHEAN SANITARY PLUMBING & MANUFACTURING COMPANY *et al.*, *Petitioners*, v. GUARANTY TRUST COMPANY OF NEW YORK [No. 678]; and GEORGE A. CHRISTIE *et al.*, *Petitioners*, v. GUARANTY TRUST COMPANY OF NEW YORK [No. 679].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. J. W. Terry and A. B. Browne* for petitioners.

*Messrs. Julian T. Davies, R. S. Lovett, and Brainard Tolles* for respondents.

May 27, 1901. *Denied*.

TRUST COMPANY OF NORTH AMERICA, *Petitioner*, v. MANHATTAN TRUST COMPANY. [No. 683.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Charles Henry Jones* for petitioner.

*Mr. Geo. W. Wickersham* for respondent.

May 27, 1901. *Denied*.

CITY OF HURON, *Petitioner*, v. EVERETT M. WARREN [No. 581]; CITY OF HURON, *Petitioner*, v. ISAAC L. ELLWOOD [No. 582]; and CITY OF HURON, *Petitioner*, v. EDWARD D. SHEPARD [No. 644].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. John Wood* for petitioner.

*Mr. Wm. M. Jones* for Warren.

*Mr. C. O. Bailey* for Ellwood.

*Mr. John L. Pyle* for Shepard.

May 28, 1901. *Denied*.

BEN DE LEMOS, *Petitioner*, v. UNITED STATES. [No. 635.]

Petition for a Writ of Certiorari or Mandamus to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Thomas H. Clark and F. G. Caffey* for petitioner.

*The Attorney General and Assistant Attorney General Beck* for respondent.

May 28, 1901. *Denied*.

BOARD OF EDUCATION OF THE CITY OF PIERRE, *Petitioner*, v. HECTOR MCLEAN. [No. 672.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Ivan W. Goodner* for petitioner.

*Mr. Robert W. Stewart* for respondent.

May 28, 1901. *Denied*.



[623] DANIEL E. DOUGHERTY, *Petitioner*, v. \*UNITED STATES [No. 680]; JAMES P. FARRAHER, *Petitioner*, v. UNITED STATES [No. 681]; and MICHAEL F. LAVIN, *Petitioner*, v. UNITED STATES [No. 682].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Francis B. Bracken* for petitioner.

*The Attorney General and Assistant Attorney General Beck* for respondent.

May 28, 1901. *Denied*.

HUGHES COUNTY, SOUTH DAKOTA, *Petitioner*, v. CRAWFORD LIVINGSTON. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Thompson P. Estes and Ivan W. Goodner* for petitioner.

*Mr. Edward C. Stringer* for respondent.

May 28, 1901. *Denied*.

BRITISH & FOREIGN MARINE INSURANCE COMPANY (LIMITED), *Petitioner*, v. INTERNATIONAL NAVIGATION COMPANY [No. 697]; INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*, v. INTERNATIONAL

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Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Treadwell Cleveland* for petitioners in Nos. 697-699.

*Mr. Lewis Cass Ledyard* for petitioner in No. 700.

*Mr. Henry Galbraith Ward* for respondent.

May 28, 1901. *Denied*.

MODERN WOODMEN OF AMERICA, *Petitioner*, v. UNION NATIONAL BANK OF OMAHA. [No. 703.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. John L. Kennedy* for petitioner.

No appearance for respondent.

May 28, 1901. *Denied*.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1900.

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# THE DECISIONS

OF THE

## Supreme Court of the United States

AT

OCTOBER TERM, 1900.

[1] •ELIAS S. A. DE LIMA *et al.*, *Plffs. in Err.*,  
v.  
GEORGE R. BIDWELL.

(See S. C. Reporter's ed. 1-220.)

*Duties—importations from Porto Rico—what constitutes foreign country—action to recover back exactions of money as duties—exactions on goods not imported—choice of remedy.*

1. The right of a defendant to contest the jurisdiction of a state court in which the action is brought, and the sufficiency of the facts set forth to constitute a cause of action, is not lost by the removal of the cause to a Federal court upon defendant's own petition.
2. The remedy by an appeal to the board of general appraisers from a decision of the collector, which is given by the customs administrative act of June 10, 1890 (26 Stat. at L. 131, chap. 407), does not extend to a review of the question whether the article was imported or not, or whether it was or was not brought from a foreign country.
3. The right which the owner of merchandise may have against a collector, in cases not falling within the customs administrative act, to recover money exacted as duties, is not taken away by the repeal of U. S. Rev. Stat. § 3011, or by the provision of § 25 of the

NOTE.—As to actions to recover back payment of duties under protest—see note to *Greely v. Thompson*, 13 L. ed. U. S. 397.

On choice of remedy—see *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 145, and note; *Conrow v. Little* (N. Y.) 5 L. R. A. 693, and note; *Terry v. Munger* (N. Y.) 8 L. R. A. 216, and note; *Crossman v. Universal Rubber Co.* (N. Y.) 13 L. R. A. 91, and note; *Millis v. Parkhurst* (N. Y.) 13 L. R. A. 472, and note.

That statutes are to be considered prospective unless expressly made retroactive, or unless it is necessary to construe them as retroactive in order to give effect to their provisions—see *Stewart v. Vandervort* (W. Va.) 12 L. R. A. 50, and note. And see note to *Barnitz v. Beverly*, 41 L. ed. U. S. 93.

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customs administrative act, declaring that no collector shall be liable on account of his rulings or decisions as to duties, or the collection of any dues, charges, or duties on or on account of such merchandise.

4. A right of action against a collector to recover back moneys exacted by him, under color of the revenue laws, upon goods which have never been imported at all, but which the plaintiff entered as imported merchandise, with a protest against the exaction of duties upon them as such, in order to prevent the seizure of the property, is not waived by the failure to refuse to enter the goods and then bring an action of replevin to recover their possession, since, if replevin would lie, the plaintiff might waive the tort and proceed in assumpsit.
5. The island of Porto Rico, after its cession to the United States by the treaty with Spain, which was proclaimed at Washington on April 11, 1899, though it had not been formally embraced by Congress within the customs union of the states, was no longer "foreign country" within the meaning of the Dingley tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11), providing for duties upon articles "imported from foreign countries."
6. Any recognition by Congress of the right to collect duties upon importations from Porto Rico, or of the status of that island as a foreign country, which was made by the act of Congress of March 24, 1900 (31 Stat. at L. 51, chap. 91), applying for the benefit of Porto Rico the amount of the customs revenue received on importations from that island since its evacuation by the Spanish forces, can have no retroactive effect as to moneys theretofore paid as duties under protest, for which an action to recover back had already been brought.

[No. 456.]

Argued January 8, 9, 10, 11, 1901. Decided May 27, 1901.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustain-

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ing a demurrer in an action removed from a state court and brought to recover back duties on goods imported from Porto Rico. *Reversed.*

**Statement by Mr. Justice Brown:**

[2]

This was an action originally instituted in the supreme court of the state of New York by the firm of D. A. De Lima & Co. \*against the collector of the port of New York, to recover back duties alleged to have been illegally exacted and paid under protest upon certain importations of sugar from San Juan, in the island of Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States.

Upon the petition of the collector, and pursuant to Rev. Stat. § 643, the case was removed by certiorari to the circuit court of the United States, in which the defendant appeared and demurred to the complaint upon the ground that it did not state a cause of action, and also that the court had no jurisdiction of the case. The demurrer was sustained upon both grounds, and the action dismissed. Hence this writ of error.

In this and the following cases, which may be collectively designated as the "Insular Tariff Cases," the dates here given become material:

In July, 1898, Porto Rico was invaded by the military forces of the United States under General Miles.

On August 12, 1898, during the progress of the campaign, a protocol was entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. 30 Stat. at L. 1742.

On October 18 Porto Rico was evacuated by the Spanish forces.

On December 10, 1898, such treaty was signed at Paris (under which Spain ceded to the United States the island of Porto Rico), was ratified by the President and Senate February 6, 1899, and by the Queen Regent of Spain March 19, 1899. 30 Stat. at L. 1754.

On March 2, 1899, an act was passed making an appropriation to carry out the obligations of the treaty.

On April 11, 1899, the ratifications were exchanged, and the treaty proclaimed at Washington.

On April 12, 1900, an act was passed, commonly called the Foraker act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1, 1900.

**Mr. Frederic R. Condoert, Jr.**, argued the cause, and, with *Messrs. Charles Frederick Adams* and *Paul Fuller*, filed a brief for plaintiffs in error:

The remedy provided by the customs administrative act was not available, inasmuch as plaintiff does not "concede that the sugar is imported merchandise."

*Re Fassett*, 142 U. S. 486, 35 L. ed. 1089, 12 Sup. Ct. Rep. 295.

The act of 1890 has not prevented the

bringing of such an action as the present (in a case such as that set up by the complainant herein) by its repeal of §§ 2931, 3011 of the Revised Statutes, and its provision that collectors should not be liable for or on account of any of the matters mentioned in that connection in § 25 of the act.

That the good faith of the collector and his deposit of the money in the treasury is not in law a bar to a "judgment" against him, as distinguished from an "execution," is made entirely clear by the explicit provision of U. S. Rev. Stat. § 989, which was not repealed by the customs administrative act of 1890.

*The Conqueror*, 166 U. S. 124, 41 L. ed. 944, 17 Sup. Ct. Rep. 510; *Cruckshank v. Bidwell*, 176 U. S. 81, 44 L. ed. 381, 20 Sup. Ct. Rep. 280.

Under the Constitution of the United States a treaty is the supreme law of the land.

Marshall, Ch. J. in *Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *Chinese Exclusion Case*, 130 U. S. 600, 32 L. ed. 1073, 9 Sup. Ct. Rep. 623; *Head Money Cases*, 112 U. S. 597, *sub nom. Edye v. Robertson*, 28 L. ed. 803, 5 Sup. Ct. Rep. 247; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

By the treaty of cession, Porto Rico became a part of the United States.

The government of the United States may sustain, as to any given territory, three relations: (1) Sovereign jurisdiction; (2) temporary occupation of foreign soil; (3) foreign territory over which it has no jurisdiction.

In the last case it has no relations with the inhabitants; in the second it is merely the *de facto* sovereign over certain territory. This sovereignty cannot, under the Constitution, affect the political status of the inhabitants, since the allegiance they owe to the United States is but temporary and only as an incident of war, their former allegiance reverting with the return of the former sovereign.

*United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562; *Fleming v. Page*, 9 How. 615, 13 L. ed. 281.

In the first case—and that is the position of Porto Rico—the power of Congress over the political status is plenary. Political rights are franchises which may be given or taken away by Congress in the territories, i. e., the places over which it has exclusive local jurisdiction.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

Granting that, by the treaty, the inhabitants of Porto Rico acquired neither civil nor political rights, yet that did not make Porto Rico a foreign country.

A foreign country is a country under a sovereignty other than that of the United States.

*United States v. Haywood*, 2 Gall. 501, Fed. Cas. No. 15,336; *King v. Parks*, 19 Johns. 375; *Stairs v. Peaslee*, 18 How. 526, 15 L. ed. 476.

The clause of the treaty leaving the determination of the "civil rights and political status" of the native inhabitants to Con-



gress was merely declaratory of the power given by the Constitution to withhold political rights and franchises and to establish civil government and enact municipal law in all places where no state government exists.

If the law or treaty making power enacts that the territory over which the military arm of the government has extended shall come under the permanent absolute sovereign jurisdiction of the United States, a new and different status arises. The former sovereign then loses all right of reverter, and the territorial limits of the United States are in so far enlarged.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

It is therefore erroneous to say that it is not acquisition of soil which extends our constitutional boundaries.

The agencies of the government acting in Porto Rico had the powers, and only the powers, conferred by the Constitution, and in their actions they were subjected to all its applicable limitations, restrictions, prohibitions, or delegations.

Congress cannot make any law in violation of the prohibitions of the Constitution.

*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 963; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 874, 19 Sup. Ct. Rep. 580; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Black v. Jackson*, 177 U. S. 363, 44 L. ed. 807, 20 Sup. Ct. Rep. 648.

The Constitution is not a physical substance. It is in the nature of a grant or power, or what would be termed in private law a power of attorney. A real constitution is a grant of rights or powers by a sovereign. The sovereign cannot be limited, for he is the source of all law.

*Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

The limitations of the Constitution upon the Federal government are not limitations upon the American nation.

*M'Culloch v. Maryland*, 4 Wheat. 416, 4 L. ed. 603.

As a territorial government, Congress has all the powers which it possesses as a Federal government, and, together therewith, all the powers which the state governments possess, save such powers as may be expressly inhibited to both governments by the Constitution and reserved to the people.

*First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

The territories are nothing more than outlying dominion of the United States.

*Ibid.*

The question of the status of Porto Rico under the presidential government cannot affect this case.

As long as war lasts the Executive continues his military rule as commander in chief.  
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Upon ratification of the treaty of peace he continues his rule under his general duty and power to execute the laws, but as a *de facto* civil government pending any action of Congress for the government of new territory.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Leitensdorfer v. Webb*, 20 How. 177, 15 L. ed. 891.

The law of the old government of ceded territory only remains in force where it is not in contravention of the Constitution or the laws of the United States which might possibly apply to new territory.

*Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Fleming v. Page*, 9 How. 615, 13 L. ed. 281; *Leitensdorfer v. Webb*, 20 How. 177, 15 L. ed. 891.

As soon as the military status ceases and a *de facto* civil government is carried on, the immunities of the Constitution for the protection of life, liberty, and property operate as restraints upon the government.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

From the time that the vast tract of unorganized land came within the sovereign dominion and jurisdiction of the United States under the treaty with England of September 3, 1783, that term ceased to mean only the states united.

The Federalist, No. 38.

The uniformity clause in the Federal Constitution is not in the nature of a law itself, but prohibits the Congress from passing certain laws.

The Constitution intended that all the inhabitants of states and territories under the sovereign dominion of the United States should have the equal protection of the laws and the Constitution.

Bradley, J., in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Loughborough v. Blake*, 5 Wheat. 324, 5 L. ed. 100.

In the naturalization law the term "United States" was used both in the sense of states united and as including the territories as well as the states.

1 Stat. at L. 1795; *Elk v. Wilkins*, 112 U. S. 102, 28 L. ed. 647, 5 Sup. Ct. Rep. 41.

The word "states" or "Union" may include the District of Columbia, although, strictly speaking, the District of Columbia is not a state.

*Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

The meaning given to the term "United States" by Chief Justice Marshall, as the equivalent of the great American Empire, was the meaning intended by the 14th Amendment.

*United States v. Wong Kim Ark*, 169 U. S. 667, 42 L. ed. 897, 18 Sup. Ct. Rep. 456; *Slaughter-House Cases*, 16 Wall. 74, 21 L. ed. 408.

The cases relating to the territorial courts do not affect the question as to whether territory newly acquired by treaty and as yet unorganized is within the limits of the United States and subject to the uniformity clause of the Constitution. The most that these cases decide is that the territorial

courts are not the courts mentioned in the Constitution. The ultimate ground upon which the decisions do and must rest is the fact that territories are not states, and therefore the constitutional courts would be inapplicable to them.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119.

There need be no concern over the effect of the naturalization of the uncivilized tribes which may inhabit the possessions acquired under the treaty of Paris. There is nothing in the Constitution which confines the regulation of our intercourse with uncivilized tribes within our borders to North American Indians.

*United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The status of the inhabitants is a matter apart from and outside the principles governing this case.

The word "citizen" has two meanings. It means in the first sense, primarily and properly, the persons exercising political rights, and members of the ruling body politic. In the second sense it is applicable to the whole people of any nation without regard to the former government. Citizenship in the latter sense means simply subject to the allegiance of a particular state or nation. In this sense it has precisely the same meaning as the term "subject."

Story, Const. §§ 1932-1934, Cooley's ed. and notes.

Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the King is born his subject without reference to the political status or condition of its parents. Birth and allegiance go together.

1 Bl. Com. 366; 2 Kent, Com. 39, 43; *Inglish v. Sailor's Snug Harbour*, 3 Pet. 120, 7 L. ed. 625; *United States v. Rhodes*, 1 Abb. C. C. 40, Fed. Cas. No. 16,151; *Lynch v. Clorke*, 1 Sandf. Ch. 630.

To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction,—that is, in its power and obedience.

*McKay v. Campbell*, 2 Sawy. 129, Fed. Cas. No. 8,840; see also *Elk v. Wilkins*, 112 U. S. 99, 28 L. ed. 645, 5 Sup. Ct. Rep. 41.

"Nationals" [all persons subject to the allegiance of the state] are divided into two classes: those possessing political rights and those who do not possess them. The latter class would include women, minors, and persons who, for a variety of reasons other than alienage, do not possess the political franchise.

*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627.

The 14th Amendment, declaring that all persons born or naturalized in the United States and subject to its allegiance are citizens, uses the word in the sense of "national" or "subject."

Encyclopædia Political Science, art. *Nationality*.

The natives of Porto Rico and the other

ceded islands are United States nationals, or, as the learned Attorney General prefers to term them, American subjects. They are subjects or nationals in the same sense that women, minors, and inhabitants of Oklahoma and Arizona are subjects or nationals. Persons in states requiring an educational qualification for voting, who cannot attain to this qualification, are also in this position.

*United States v. Wong Kim Ark*, 169 U. S. 667, 42 L. ed. 897, 18 Sup. Ct. Rep. 456.

The dismemberment of populated territory from a state on the one hand, and its incorporation into a new nationality on the other, operate as a collective naturalization *ipso facto*.

Traité des Personnes, pt. 1, tit. 2, § 1, cited by Lawrence, Appendix to Wheaton, 897; Pradier Fodéré, Droit International Public, ed. of 1885, vol. 3, p. 721; Calvo Droit International Theorique et Pratique, ed. 1896, vol. 4, p. 394; Halleck, Internat. Law, § 13, p. 824; 1 Phillimore, p. 449, ed. 1879.

The treaty thus confers upon the inhabitants the "nationality of the territory to which they belong." As to Porto Rico, that nationality is of course the United States.

*Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 162, 36 L. ed. 109, 12 Sup. Ct. Rep. 375.

A special stipulation in a treaty of cession, for the naturalization of the inhabitants of the annexed territory, is merely declaratory of the rule of international law.

*United States v. Wong Kim Ark*, 169 U. S. 667, 42 L. ed. 897, 18 Sup. Ct. Rep. 456.

The 14th Amendment, enacting the common-law rule of citizenship into the dignity of constitutional provision, settles the status of persons born since the cession.

*Ibid.*

The inhabitants of Porto Rico who were born subsequent to the cession, and who do not owe any direct immediate allegiance to any foreign nation, are citizens or subjects of the United States.

It is erroneous to assume that the decision in this case can or will involve the right of the United States to own, possess, or govern colonies. The only question involved is as to how the United States shall govern its colonies. From the beginning it has possessed colonies or dependencies.

2 Morris, Colonization, p. 292.

The argument from the consequences which may attend upon the interpretation of a constitutional provision is not always the best argument, but is one which may sometimes be considered.

*Maxwell v. Dow*, 176 U. S. 590, 44 L. ed. 600, 20 Sup. Ct. Rep. 448, 494.

We assert that the only consequence which the government of the United States fears from an adverse decision is the necessity for free trade between the new possessions or colonies and the states of the United States.

The Constitution prescribes a method for its amendment which may be readily applied whenever the people agree with the contentions of the government in the present case, and determine that the limitations imposed upon their agents have ceased to be a bene-



fit, or have become an obstacle to the good government for which they sought.

*Pollock v. Farmers' Loan & T. Co.* 158 U. S. 634, 39 L. ed. 1124, 15 Sup. Ct. Rep. 912; *McPherson v. Blacker*, 146 U. S. 36, 36 L. ed. 877, 13 Sup. Ct. Rep. 3; *Maxwell v. Dow*, 176 U. S. 617, 44 L. ed. 610, 20 Sup. Ct. Rep. 448, 494; Washington, Farewell Address.

*Mr. Paul Fuller* filed a brief for plaintiffs in reply.

For his contentions, see his brief as reported in *Downes v. Bidwell*, post, 1088.

*Solicitor General Richards* argued the cause and filed a brief for defendant in error:

The defendant collector would not have been justified in disregarding the plain mandate of the law to collect the duties *prima facie* payable, upon the claim simply that the place from which they were imported was a part of the United States and the goods therefore not subject to duty. Having performed the duty which the law required of him, he is not responsible personally for his official action, § 25 of the customs administrative act exempting him from liability therefor.

*Arnson v. Murphy*, 109 U. S. 240, 27 L. ed. 921, 3 Sup. Ct. Rep. 184; *Schoenfeld v. Hendricks*, 152 U. S. 691, 38 L. ed. 601, 14 Sup. Ct. Rep. 754.

The President during military occupation has the authority to establish a provisional civil government with full powers, which shall be continued in force until the government created by Congress takes hold.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 689; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891; *The Grapeshot*, 9 Wall. 129, sub nom. *The Grapeshot v. Wallerstein*, 19 L. ed. 651; *Mechanics' & Traders' Bank v. Union Bank*, 22 Wall. 276, 22 L. ed. 871.

The military authority occupying conquered territory may impose such duty on goods imported into it as it sees fit.

*United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562.

The United States may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

If territory may be acquired for such purpose, it certainly may be taken and held upon such terms and conditions as may be proper and necessary to carry the purpose into effect.

The term "the United States" may mean the territory which governs, or the territory over which the government extends. The former is the constitutional, the latter the international, or it may be the legislative, sense. In the latter sense states and territories, all places subject to the jurisdiction of the national power, combine to constitute what Chief Justice Marshall in *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98, termed the "American Empire," "Our Great Republic."

A citizen of the District of Columbia is 182 U. S.

not a citizen of a state, and cannot use the United States courts as such.

*Hepburn v. Ellzey*, 2 Oranch, 445, 2 L. ed. 332.

It is obvious that this ruling applies, and indeed it was subsequently held to apply, to the citizens of the territories.

Although the Indian territory is within the exterior boundaries of the United States, the provision of the Constitution requiring excises to be uniform throughout the United States does not apply within the Indian territory.

*Cherokee Tobacco Case*, 11 Wall. 616, sub nom. *207 Half-Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 227.

The power of Congress to govern ceded territory is inevitable and absolute, and the limitations of the Constitution upon the exercise of the judicial power of the United States are confined to the states.

Marshall, Ch. J. in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

The doctrine thus enunciated by the great Chief Justice has been approved and followed by his successors in a long line of cases.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47; 5 Sup. Ct. Rep. 747; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The states may do away with indictment by grand jury and trial by a petit jury in criminal cases, and no fundamental rights under our Constitution or form of government are violated by so doing.

*Hurtado v. California*, 110 U. S. 516, 23 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

If the constitutional guaranties relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a territory when organizing a state, why should they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

Until the progress of the people of these new possessions will permit the organization of courts and juries after our system, the constitutional guaranties for punishing crime by the processes of the Anglo-Saxon law must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned.

*Re Ross*, 140 U. S. 453, sub nom. *Ross v. McIntyre*, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

In dealing with our new possessions, due regard for their traditions should be shown. They have been accustomed to the jurisprudence of the civil law. It would be the

height of tyranny and oppression to compel them to abandon it without good cause.

*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

An article of export from any state, within the meaning of the constitutional provision that "no tax or duty shall be laid on articles exported from any state" is an article shipped from the United States to some foreign port.

*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

Goods shipped from the United States to Porto Rico are not exports.

*Ibid.*

Congress possesses over Porto Rico the entire dominion and sovereignty, national and municipal, Federal and state.

*Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The territorial governments are legislative governments and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and the state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the Constitutional provisions in respect to state and Federal jurisdiction.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119.

Has Congress under the general right of sovereignty existing in the government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the territories of the United States, any less power in raising territorial revenue than a state, if unrestrained by its own organic law, might exercise in raising revenue within its borders?

*McAllister v. United States*, 141 U. S. 174, 190, 35 L. ed. 693, 698, 11 Sup. Ct. Rep. 949.

In the Constitution of the United States, in the legislation of Congress, in the decisions of this court, the distinction has been drawn, in pertinent cases, between "the United States" and the territories thereof.

Act of Congress of March 2, 1807 (2 Stat. at L. 426); act of Congress of April 20, 1818 (3 Stat. at L. 450); *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959.

Acquired territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty of cession, or on such as the new master shall impose.

Marshall, Ch. J., in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 541, 7 L. ed. 242.

Conquests made under the war-making power of the President do not enlarge the boundaries of the Union, or extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. The United States, it is true, may extend its boundaries by conquest or treaty, but this can be done only by the treaty-making power or the legislative authority.

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Taney, Ch. J., in *Fleming v. Page*, 9 How. 602, 13 L. ed. 276.

The Spanish municipal law, including customs regulations, continued in force, subject to modification by the President acting under belligerent rights, until, after cession by treaty, Congress should legislate for the new territory, although Spain, after the conquest of Porto Rico and after the signing of the Protocol, had no authority to grant a title to land or a public franchise in Porto Rico.

*Davis v. Concordia Police Jury*, 9 How. 289, 13 L. ed. 142; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Haver v. Yaker*, 9 Wall. 32, *sub nom. Jecker v. Magee*, 19 L. ed. 571.

In view of the stress laid upon "the spirit of the Constitution" by opposing counsel, not inappropriate for consideration are the words of Mr. Justice Miller in *Hepburn v. Griswold*, 8 Wall. 603, 9 L. ed. 513: "This whole argument of the injustice of the law,—an injustice which, if it ever existed, will be repeated by now holding it wholly void,—and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the national legislature."

Although this language was used in a dissenting opinion, the views of the minority were subsequently adopted as the conclusion of the court.

*Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; *Legal Tender Case*, 110 U. S. 421, *sub nom. Juilliard v. Greenman*, 28 L. ed. 204, 4 Sup. Ct. Rep. 122.

The Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract.

*Legal Tender Case*, 110 U. S. 421, *sub nom. Juilliard v. Greenman*, 28 L. ed. 204, 4 Sup. Ct. Rep. 122.

Attorney General Griggs also argued the cause for defendant in error:

The uniformity clause of the Constitution refers to the states, and not to territories.

The historical reasons for its insertion into the Constitution prove this.

The phrase "throughout the United States," elsewhere used in the Constitution, refers only to the states.

U. S. Const. art. 1, § 8, ¶ 4, art. 2, § 1, ¶ 3; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

The power to tax within the limits of territory is not derived from art. 1, § 8, ¶ 1, but from the general power to make all needful

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rules and regulations respecting the territory belonging to the United States.

The states by their compact of submission to the government organized under the Constitution were to stand on a perfect equality with each other. The Congress was forbidden to exercise any discrimination between the states or their several ports.

There are obvious reasons of prudence and policy for not requiring the revenue laws, which must be uniform throughout the states, to be uniform also throughout the territories. This is expressly decided to be so as to direct taxes.

*Loughborough v. Blake*, 5 Wheat. 324, 5 L. ed. 100.

There were reasons why the limits of taxation upon the states should be fixed by the Constitution.

Equality between the states was the prime and most evident object to be attained. To that end were established the rule of apportionment as to direct taxes, and the rule of conformity throughout all the states as to duties, imposts, and excises.

2 Story, Const. §§ 957, 1013, 1014, 1016.

It is not necessary to rely upon "inherent powers" in order to sustain the authority of Congress to govern territory. The power to govern territory is expressly conferred.

Congress in the exercise of its power to legislate as a local legislature for the District of Columbia, like any state legislature, unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.

*Loughborough v. Blake*, 5 Wheat. 324, 5 L. ed. 100; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427.

Taking into consideration the relation of the Federal government to territory; the fact that it is the common property of all the states; that the general government through Congress must support and administer the government of the territory if it is to have any government; that Congress alone has the power, and the discretion as well, to say whether there shall be any organized government in any particular territory, and what such government, if allowed, shall be,—it is necessary to concede the broadest discretion to Congress in determining the means by which and the sources from which the revenue to carry on the government of such territory shall be raised.

The legality of the collection of duties on imports from Porto Rico between the date of evacuation and the date on which the Porto Rico act took effect has been expressly recognized and confirmed by Congress in the act entitled "An Act Appropriating, for the Benefit and Government of Porto Rico, Revenues Collected on Importations therefrom Since its Evacuation by Spain, and Revenues hereafter Collected on such Importations under Existing Law," approved March 24, 1900.

Acts of 56th Congress, 1st Sess. p. 51.

Congress has always considered something  
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more than the term "United States" to be necessary when it designed a statute to extend to territory.

The internal revenue laws are one instance.

See especially the act of 1868 (15 Stat. at L. 125, §§ 104–107). See also U. S. Rev. Stat. §§ 1891, 2145.

The views which the government's counsel have maintained in these arguments were shared by Thomas H. Benton, thirty years a senator from Missouri.

See Benton's Historical and Legal Examination of the Dred Scott Case, pp. 26, 29, 69.

For additional contentions of the Attorney General see his brief as reported in *Goetze v. United States*, post, 1065.

\*Mr. Justice Brown delivered the opinion [174] of the court:

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

1. Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the circuit court as a Federal court, we should be obliged to say that the defendant was not in a position to make this claim, since the case was removed to the Federal court upon his own petition. It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction, to hold that, where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a Federal court, he is estopped to deny that such removal was lawful if the Federal court could take jurisdiction of the case, or that the Federal court did not have the same right to pass upon the questions at issue that the state court would have had if the cause had remained there. Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. *Cowley v. Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

This, however, is more a matter of words than of substance, as the defendant unquestionably has the right to show that the state court had no jurisdiction, or that the complaint did not set forth facts sufficient to constitute a cause of action. This we understand to be the substance of the defense in this connection.

By Rev. Stat. § 2931, it was enacted that the decision of \*the collector "as to the rate [175] and amount of duties" to be paid upon imported merchandise should be final and conclusive, unless the owner or agent entered a protest and within thirty days appealed therefrom to the Secretary of the Treasury; and, further, that the decision of the Secretary should be final and conclusive, unless suit were brought within ninety days after the decision of the Secretary. By Rev. Stat.



§ 3011, any person having made payment under such protest was given the right to bring an action at law and recover back any excess of duties so paid.

The law stood in this condition until June 10, 1890, when an act known as the customs administrative act was passed (26 Stat. at 131, chap. 407) by which the above sections (Rev. Stat. §§ 2931, 3011) were repealed and new regulations established, by which an appeal was given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," if such duties were paid under protest, to a board of general appraisers whose decision should be final and conclusive (§ 14) "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification," unless within thirty days one of the parties applied to the circuit court of the United States for a review of the questions of law and fact involved in such decision. § 15. It was further provided that the decision of such court should be final, unless the court were of opinion that the question involved was of such importance as to require a review by this court, which was given power to affirm, modify, or reverse the decision of the circuit court.

The effect of the customs administrative act was considered by this court in *Re Fasset*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295, in which we held that the decision of the collector that a yacht was an imported article might be reviewed upon a libel for possession filed by the owner, notwithstanding the customs administrative act. It was held that the review of the decision of the board of general appraisers, provided for by § 15 of that act, was limited to decisions of the board "as to the construction of the law and the facts respecting the [176] classification" of "imported merchandise" and the rate of duty imposed thereon under such classification," and that it did not bring up for review the question whether an article be imported merchandise or not, nor, under § 15, is the ascertainment of that fact such a decision as is provided for. Said Mr. Justice Blatchford: "Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector had no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the district court on which the rights of the libellant depend."

"Under the customs administrative act the libellant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular

certificate to that effect." It was held that the libel was properly filed.

The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country; in other words, whether they were imported at all as that word is defined in *Woodruff v. Parham*, 8 Wall. 123, 132, 19 L. ed. 382, 384. We think the decision in the *Fasset Case* is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the board of general appraisers; and that whether they were imported merchandise for the reasons given in the *Fasset Case*, that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case the article is not imported.

Conceding, then, that § 3011 has been repealed, and that no remedy exists under the customs administrative act, does it follow that no action whatever will lie? If there be an admitted \*wrong, the courts will look [177] far to supply an adequate remedy. If an action lay at common law, the repeal of §§ 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the board of general appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by § 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise," or any other matter which the importer might have brought before the board of general appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the customs administrative act. If the position of the government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position. But we are not without authority upon this point.

The case of *Elliot v. Swartwout*, 10 Pet. 137, 9 L. ed. 373, was an action of assumpsit against the collector of the port of New York to recover certain duties upon goods alleged to have been improperly classified. It was held that as the payment was purely voluntary, by a mutual mistake of law, no action would lie to recover them back, although it would have been different if they had been paid under protest. Said Mr. Justice Thompson: "Here, then, is the true distinction: when the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot



be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." If the payment of the money be accompanied by a notice to the collector that the duties charged are too high, and that the person paying intends to sue to [178] recover back the amount erroneously \*paid, it was held that such action must lie "unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress." The case recognized the fact that, with respect to money paid under a mistake of law, the collector stood in the position of an ordinary agent, and could be made personally liable in case the money were paid under protest.

This decision was made in 1836. Apparently in consequence of it an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States; and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this court in *Cary v. Curtis*, 3 How. 236, 11 L. ed. 576, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in *Arnson v. Murphy*, 109 U. S. 238, 240, 27 L. ed. 920, 921, 3 Sup. Ct. Rep. 184, 186: "Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839 (5 Stat. at L. 349, 727, chap. 22). This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, 23 L. ed. 730; until repealed by implication by the act of June 30, 1864" (13 Stat. at L. 214, chap. 171, § 14), carried into the Revised Statutes as §§ 2931 and 3011. In the same case of *Arnson v. Murphy*, 109 U. S. 238, 27 L. ed. 920, 3 Sup. Ct. Rep. 184, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliott v. Swartwout* was recognized, but so far as respected *customs cases* (i. e., classification cases) was held to be superseded by the statutes. So in *Schoenfeld v. Hendricks*, 152 U. S. 691, 38 [179] L. ed. 601, 14 Sup. Ct. Rep. 754, \*it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an

importation of merchandise, the remedy given through the board of general appraisers being exclusive.

The criticism to be made upon the applicability of these cases is that they dealt only with *imported* merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the customs administrative act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat. § 989, provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury.

We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the *Fassett Case*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295, the proceeding was \*by libel for [180] possession of the vessel, which is analogous to an action of replevin at common law; but it would appear that Rev. Stat. § 934, would stand in the way of such a remedy here, since by that section "all property taken or detained by any officer or other person *under authority of any revenue law* of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." If the words "under authority of any revenue law" are to be construed as if they read "under color of any revenue law," it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

We are all of opinion that this action was properly brought.

2. Whether these cargoes of sugar were



subject to duty depends solely upon the question whether Porto Rico was a "foreign country" at the time the sugars were shipped, since the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11), commonly known as the Dingley act, declares that "there shall be levied, collected, and paid upon all articles imported from 'foreign countries' certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. *The Eliza*, 2 Gall. 4, Fed. Cas. No. 4,346; *Taber v. United States*, 1 Story, 1, Fed. Cas. No. 13,722; *The Adventure*, 1 Brock. 235, 241, Fed. Cas. No. 93.

The status of Porto Rico was this: The island had been for some months under military occupation by the United States as a conquered country, when, by the 2d article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depended solely upon these facts, and the question were broadly presented whether a country which had been ceded to us, the cession accepted, [181] possession delivered, and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser who had accepted the deed, gone into possession, paid taxes, and made improvements without let or hindrance from his vendor. But it is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws, until Congress has embraced it within the general revenue system.

We shall consider this subject more at length hereafter, but for the present call attention to certain cases in this court and certain regulations of the executive departments which are supposed to favor this contention.

In *United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562, which was an action of debt brought by the United States upon a bond for duties upon goods imported into Castine, in the district (now state) of Maine, during its temporary occupation by the British troops in the war of 1812, it was held the action would not lie, though Castine was subsequently evacuated by the enemy and restored to the United States. The court said that, by the military occupation of Castine, the enemy acquired a possession which enabled him to exercise the fullest rights of sovereignty; that the sovereignty of the United States was suspended, and our laws could be no longer rightfully enforced there,

or be obligatory upon the inhabitants; that by the surrender the inhabitants passed under a temporary allegiance to the British government, and were only bound by the laws of that government, and that Castine was during this period to be deemed a foreign port; that goods brought there were subject to duties which the British government chose to impose, and were in no correct sense imported into the United States; and that the subsequent evacuation by the enemy did not change the character of the transaction, since the goods were not liable to American duties when imported. In that case the character of the port, as foreign or \*domestic, was [182] held to depend upon the question of actual occupation, and the right of the defendant determinable by the facts then existing, and, further, that the subsequent reoccupation of the port by the United States was ineffectual to change the right of the defendant or to vest a new right in the United States.

A case, somewhat to the converse of this, was that of *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, which was an action against the collector at Philadelphia, to recover back duties upon merchandise imported from Tampico, in Mexico, during a temporary military occupation of that place by the United States. It was held that, although Tampico was within the military occupation of the United States, it had not ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. In delivering the opinion of the court Mr. Chief Justice Taney observed: "The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. . . . While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist."

This was clearly a sufficient reason for disposing of the case adversely to the importer, but the learned Chief Justice proceeded to put the case upon another ground, that "there was no act of Congress establishing a custom house at Tampico, nor authorizing the appointment of a collector; and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law, where the voyage is from one port of the United States to another;" that the only \*col- [183] lector was one appointed by the military commander, and that a coasting manifest granted by him could not be recognized in the United States as the document required



by law when the vessel is engaged in the coasting trade, nor exempt the cargo from the payment of duties. He states that this construction of the tariff laws had been uniformly given by the administrative department of the government, and cited the case of *Florida*, after it had been ceded to the United States and the military forces had taken possession of Pensacola: "That is, that, although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress. And it appears that this decision was sanctioned at the time by the Attorney General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the later case, after a customhouse had been established by law [2 Stat. at L. 418, chap. 14] at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department, in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by act of Congress."

[184] While we see no reason to doubt the conclusion of the court that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an \*act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port.

It is not intended to intimate that the cases of *United States v. Rice* and *Fleming v. Page* are not harmonious. In fact, they are perfectly consistent with each other. In the first case it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the *Rice Case* to impose a duty upon goods which might already

have paid a duty to the British commander. It would have been equally unjust in the *Fleming Case* to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States.

The next case is that of *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889. This was an action of assumpsit to recover back moneys paid to Harrison while acting as collector at the port of San Francisco, for tonnage and duties upon merchandise imported from foreign countries into California between February 2, 1848,—the date of the treaty of peace between the United States and Mexico,—and November 13, 1849, when the collector appointed by the President (according to an act of Congress passed March 3, 1849) entered upon his duties. Plaintiffs insisted that, until such collector had been appointed, California was and continued to be after the date of the treaty a foreign territory, and hence that no duties were payable as upon an importation into the United States. The plaintiffs proceeded upon the theory, stated in the *dictum* in *Fleming v. Page*, that duties had never been held to accrue to the United States in her newly acquired territories until provision was made by act of Congress for their collection, and that the revenue laws had always been held to speak only as to the United States and its territories existing at the time when the several acts were passed. The collector had \*been appointed [185] by the military governor of California, and duties were assessed, after the treaty, according to the United States tariff act of 1846. In holding that these duties were properly assessed, Mr. Justice Wayne cited with apparent approval a despatch written by Mr. Buchanan, then Secretary of State, and a circular letter issued by the Secretary of the Treasury, Mr. Robert J. Walker, holding that from the necessities of the case the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government. "The great law of necessity," says Mr. Buchanan, "justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." These letters will be alluded to hereafter in treating of the action of the executive departments.

The court further held in this case that, "after the ratification of the treaty, California became a part of the United States, or a ceded, conquered, territory;" that, "as there is nothing differently stipulated in the treaty with respect to commerce, it became *instantly bound and privileged* by the laws which Congress had passed to raise a revenue from duties on imports and tonnage;" that (p. 193, L. ed. 901) "the territory had been ceded as a conquest, and was to be pre-



served and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

. . . That the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification, . . . and that, until Congress legislated for it, the duty upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison."

[186] \*To the objection that no collection districts had been established in California, and in apparent dissent from the views of the Chief Justice in *Fleming v. Page*, he added (p. 196, L. ed. 902): "It was urged that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied that collection districts and ports of entry are no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nation."

The court also cited the cases of Louisiana and Florida, and seemed to take an entirely different view of the facts connected with the admission of those territories from what had been taken in *Fleming v. Page*. The opinion, which is quite a long one, establishes the three following propositions: (1) That under the war power the military governor of California was authorized to prescribe a scale of duties upon importations from foreign countries to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace. (2) That after such ratification duties were legally exacted under the tariff laws of the United States, which took effect immediately. (3) That the civil government established in California continued, from the necessities of the case, until Congress provided a territorial government.

It will be seen that the three propositions involve a recognition of the fact that California became domestic territory immediate-

ly \*upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California. The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted and a collector is appointed was distinctly repudiated with the apparent acquiescence of Chief Justice Taney, who wrote the opinion in *Fleming v. Page*, and still remained the Chief Justice of the court. The opinion does not involve directly the question at issue in this case: whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in *Cross v. Harrison* were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty would not be considered as imported from a foreign country.

The practice and rulings of the executive departments with respect to the status of newly acquired territories, prior to such status being settled by acts of Congress, is, with a single exception, strictly in line with the decision of this court in *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889. The only possessions in connection with which the question has arisen are Louisiana, Florida, Texas, California, and Alaska. We take these up in their order.

*Louisiana*: By treaty between France and Spain, October 1, 1800 (8 Stat. at L. 202), His Catholic Majesty promised to cede to the French Republic the colony or province of Louisiana; and by treaty between the United States and the French Republic of April 30, 1803, France ceded to the United States, "forever and in full sovereignty, the said territory with all its rights and appurtenances," with a provision (art. 3) "that the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution." This treaty was ratified October 21, 1803. Possession of the territory was not delivered by Spain to France until November 30, 1803, and by France to the United States, December 20, 1803. In the meantime, and on October 31, 1803, Congress authorized the President to take possession of the territory, and to administer it \*until Congress had further acted upon the [188] subject. 2 Stat. at L. 245, chap. 1. On February 24, 1804, Congress passed another act (2 Stat. at L. 251, chap. 13), taking Louisiana within the customs union, and repealing certain special laws laying duties upon goods imported from that territory into the United States. This act was to take effect March 25, 1804. We are, then, concerned only with the interval between December 20, 1803, when possession was delivered to the United States, and March 25, 1804, when the act of February 24 took effect.

In a letter to President Jefferson of July 9, 1803, Mr. Gallatin, then Secretary of the Treasury, expressed the opinion that all the



duties on exports, now payable at New Orleans by Spanish laws, should cease, and all articles the growth of Louisiana, which, when imported into the United States, now pay duty, should continue to pay the same, or at least such rates as would on the whole not affect the revenue. Writings of Gallatin, vol. 1, page 127.

The instructions of the Treasury Department with respect to this interval are contained in a letter by Mr. Gallatin to Governor Claiborne, who was about to start for his post as governor of the new province, under date of October 3, 1803, in which he says: "It is understood that the existing duties on imports and exports, which by the Spanish law are now levied within the province, will continue until Congress shall have otherwise provided." On November 14, 1803, Mr. Gallatin issued an order directed to Mr. Trist, who had been designated as collector of the port of New Orleans, as follows: "You will also be pleased to observe, first, that the taxes and the duties to be collected under your direction are precisely the same which by the existing laws and regulations of Louisiana were demandable under the Spanish government at the time of taking possession. . . . 10. That until otherwise provided for, the same duties are to be collected on the importation of goods in the Mississippi district, from New Orleans, and *vice versa*, as heretofore."

[189] On February 28, 1804, Mr. Gallatin issued a circular letter notifying the collectors of the passage of the act of February 24, and that the same would go into effect March 25, and "that by the 3d section of said act so much of any law or laws imposing \*duties on the importations into the United States of goods, wares, and merchandise from New Orleans, which is the only port of entry in said territories, has been repealed."

These instructions undoubtedly show that Mr. Gallatin treated New Orleans as a foreign port until Congress, by the act of February 24, 1804, admitted it within the customs union, and, so far, is an authority in favor of the position taken by the collector in this case. But it should be borne in mind in this connection, that his instructions to collect duties levied by the *Spanish law* upon foreign importations into New Orleans are manifestly inconsistent with the position subsequently taken by this court in *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, wherein it is said (p. 189, L. ed. 899) of the action of Mr. Harrison in California: "That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States." After saying that this action had been recognized by the President, Mr. Justice Wayne adds: "We think it was a rightful and correct recognition under all the circumstances, and when we say rightful we mean 182 U. S. U. S. Book 45.

that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California." Indeed, it is quite evident from this case that the court took an entirely different view of the relations of California to the Union from that which had been taken by Mr. Gallatin as to Louisiana in his instructions to the collector of New Orleans.

*Florida*: Florida was ceded by Spain to the United States by treaty signed February 22, 1819, but not ratified until October 29, 1820. 8 Stat. at L. 252. By act of March 3, 1821 (3 Stat. at L. 637, chap. 39), Congress authorized the President to take possession of the Floridas and extend thereto the revenue laws of the United States. Possession of East Florida was not delivered until July 10, 1821; nor of West Florida until July 17. It is true that certain ports of Florida were in the military occupation of the United States prior to the actual delivery of possession by \*Spain, but [190] the cession did not take effect until there had been a voluntary and complete delivery under the treaty. As the act extending the revenue laws to the Floridas was passed before the surrender of the province to the United States, there was no interval of time upon which the Treasury Department could act, the provinces, immediately upon the surrender, becoming subject to the act of March 3, 1821.

An opinion of Mr. Wirt, then Attorney General, of August 20, 1821, in the case of *The Olive Branch*, 1 Ops. Atty. Gen. 483, is instructive in this connection as illustrating the views of the administration. After stating that possession of East Florida was not delivered until July 17 (a mistake for July 10), he held that the cargo of *The Olive Branch*, which had cleared from the port of St. Augustine, July 14, was imported into Philadelphia from a foreign port or place, and consequently subject to duty, because possession had not been delivered, citing the case of *The Fama*, 5 C. Rob. 106, and adding: "On the other hand, I apprehend that goods carried into a port of Florida before the delivery, remaining in port on shipboard until after the delivery, and then brought into the United States in the same vessel, or by transshipment into others, having been never entered in the Spanish customhouses, nor landed, nor the duties thereon paid or secured, but having continued all the while water-borne, would be subject to our revenue laws. . . . Our laws impose duties only on goods imported into the United States from some foreign port or place. If, therefore, in the case put, the importation be, in contemplation of law, an importation from the Floridas, the case is not within our laws, because at the time of the importation the Floridas were not foreign ports or places." The learned Attorney General evidently took the view that the Floridas ceased to be a foreign country upon a delivery of possession under the treaty. In a subsequent letter of January 24, 1823 (5 Ops. Atty. Gen. 748), Mr. Wirt admits that he had been misled by



the newspapers in the belief that East Florida had been surrendered prior to July 14, on which day The Olive Branch left St. Augustine, and recommended that the case be sent to the President, as it seemed to involve a dispute with Great Britain.

[191] \**Texas*: On March 1, 1845, Congress adopted a joint resolution consenting to the annexation of Texas upon certain conditions (5 Stat. at L. 797), but it was not until December 29, 1845, that it was formally admitted as a state. 9 Stat. at L. 108. In this interval, and on July 29, 1845, the Secretary of the Treasury issued a circular letter directing the collectors to collect duties upon all imports from Texas into the United States until Congress had further acted. Of course, there could be no question that Texas remained a foreign state until December 29, when she was formally admitted. The circular, therefore, is of no pertinence to the question here involved.

*California*: California was ceded by Mexico to the United States by treaty signed February 2, 1848, ratifications of which were exchanged May 30, 1848, and proclamation made July 4. 9 Stat. at L. 922. On March 3, 1849, an act was passed (9 Stat. at L. 400, chap. 112) including San Francisco within one of the collection districts, and on November 13 the collector appointed by the President entered upon his duties. California had been in our military possession since August, 1847. There was, therefore, an interval of one year and nine months between the date of the treaty, February 3, 1848, and November 13, 1849, when the collector entered upon his duties.

On October 7, 1848, Mr. Buchanan, then Secretary of State, addressed a letter to Mr. Voorhees, already referred to, in which he states that, although the military government ceased to exist with the conclusion of the treaty of peace, it would continue with the presumed consent of the people until Congress should provide for them a territorial government, and then adds: "This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California [192] is within the territory of the United States. I shall not enlarge upon this subject, however, as the Secretary of the Treasury will perform that duty." Ex. Docs. 2d Sess. 30th Cong. vol. 1, p. 47.

Mr. Walker, then Secretary of the Treasury, did perform that duty in a circular letter of the same date to the collectors, in which he instructed the collectors as follows: "First, All articles of the growth, produce, or manufacture of California, shipped therefrom at any time since the 30th day of May

last" (the date when the ratifications were exchanged), "are entitled to admission free of duty into all the ports of the United States; and, second, all articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California." *Ibid.* p. 45. He adds that foreign goods imported into California, not paying duties there, will be subject to duty if shipped thence to any port or place in the United States. In a letter from Mr. Marcy, Secretary of War. to Colonel Mason, the military commander, of October 9, 1848, he uses the same language.

These letters are cited with approval by this court in *Cross v. Harrison*, 16 How. 184, 14 L. ed. 897; and although the question there related only to duties on goods imported from foreign countries, the tenor of the opinion, as already stated, is a virtual indorsement of the position taken by the executive departments. It is evident that the administration took an entirely different view of the law from what had been taken by Mr. Gallatin in his instructions regarding Louisiana, and established a practice which has never since been departed from. of treating territory ceded to the United States and occupied by its troops as being domestic, and not foreign, territory.

This correspondence with reference to California took place in 1848. The decision in *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, was pronounced in 1850; yet as appears from the list of documents submitted by Mr. Johnson upon the argument of that case (p. 611, L. ed. 279) the attention of the court was not called to these instructions, though other letters and circulars were introduced \*bearing date of 1846 and 1847, as well as [193] the treaty of peace of February 2, 1848. Had the correspondence above cited been laid before the court it is incredible that the Chief Justice should have said "that the department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress."

*Alaska*: This territory was ceded to us by Russia by treaty ratified June 20, 1867 (15 Stat. at L. 539), and possession was delivered to us at the same time. No act of Congress extending the revenue laws to Alaska and erecting a collection district was passed until July 27, 1868, 15 Stat. at L. 240, chap. 273. A period of thirteen months then elapsed before Alaska was formally recognized by Congress as within the customs union, yet during that period goods from Alaska were, under a decision of the Secretary of the Treasury, admitted free of duty. By letter of Mr. McCullough, then Secretary of the Treasury, to the collector of the port of New York, dated April 6,



1868, he acknowledges receipt of a request from the Russian minister for the free entry of certain oil shipped from Sitka to San Francisco and reshipped to New York. He states: "The request for the free entry of said oil was made on the ground that the oil was shipped from Sitka after the ratification of the treaty, by which the territory of Alaska became the property of the United States. The treaty in question was ratified on the 20th of June, 1867, and the collector at San Francisco has reported that the manifest of the vessel shows the oil to have been shipped from Alaska on the 6th day of July, 1867, and that the shipment consisted of fifty-two packages. Under these circumstances you are hereby authorized to admit the said fifty-two packages of oil free of duty."

This position was indorsed by the Secretary of State, Mr. Seward, in a letter dated January 30, 1869, in which he said: "I understand the decision of the Supreme Court in the case of *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, to declare its opinion that, upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach \*to and take effect within such territory *ipso facto*, and without any fresh act of legislation expressly giving such extension to the pre-existing laws. I can see no reason for a discrimination in this effect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes."

As showing the construction put upon this question by the legislative department, we need only to add that § 2 of the Foraker act makes a distinction between foreign countries and Porto Rico, by enacting that the same duties shall be paid upon "all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries."

From this résumé of the decisions of this court, the instructions of the executive departments, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the dictum in *Fleming v. Page* (practically overruled in *Cross v. Harrison*), for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient as was held in *Fleming v. Page*; nor is a treaty ceding such territory sufficient without a surrender of possession. *Keene v. M'Donough*, 8 Pet. 308, 8 L. ed. 955; *Pollard v. Kibbe*, 14 Pet. 353, 406, 10 L. ed. 490, 516; *Hallett v. Doe ex dem. Hunt*, 7 Ala. 899; *The Fama*, 5 C. Rob. 106. The practice of the executive departments, thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and 182 U. S.

unless it be clear that such construction be erroneous. *United States v. Johnston*, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446, and other cases cited.

But were this presented as an original question we should be impelled irresistibly to the same conclusion.

By article 2, § 2, of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur;" and by article 6, "this Constitution and the laws \*of the United States[195] which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in *United States v. The Peggy*, 1 Cranch, 103, 110, 2 L. ed. 49, 51: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress." And in *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. ed. 415, 435, he repeated this in substance: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." So in *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." To the same effect are the *Cherokee Tobacco*, 11 Wall. 616, *sub nom.* 207 *Half Pound Papers Smoking Tobacco v. United States*, 20 L. ed. 227, and the *Head Money Cases*, 112 U. S. 580, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in *American Ins.*



[196] *Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 242, 255: "The Constitution confers absolutely upon the government \*of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States, although not an organized territory in the technical sense of the word.

It is true Mr. Chief Justice Taney held in *Scott v. Sanford*, 19 How. 393, 15 L. ed. 691, that the territorial clause of the Constitution was confined, and intended to be confined, to the territory which at that time belonged to or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain, and was not intended to apply to territory subsequently acquired. He seemed to differ in this construction from Chief Justice Marshall in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 242, 255, who, in speaking of Florida before it became a state, remarked that it continued to be a territory of the United States, governed by the territorial clause of the Constitution.

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the *Dred Scott Case*. In the more recent case of *National Bank v. Yankton County*, 101 U.S. 129, 25 L. ed. 1046, it was said by Mr. Chief Justice Waite that Congress "has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states." Indeed, it is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability [197] of the states to act upon the \*subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.

Territory thus acquired can remain a foreign country under the tariff laws only upon one or two theories: Either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the states. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies, not only to minors in existence at the time the statute was enacted, but to all who are subsequently born, and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in art. 1, § 10, that the state shall not do certain things, this declaration operates, not only upon the thirteen original states, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a state. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. So, too, if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power, there could be no doubt that from the day of such cession and the delivery of possession such territory would become a foreign country, and be reinstated as such under the tariff law. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

\*The theory that a country remains foreign [198] with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary, for the adequate administration of a domestic territory, to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes im-



posed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, What is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not.

[199] Will \*acts making appropriations for its postal service, for the establishment of light-houses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.

A single further point remains to be considered: It is insisted that an act of Congress, passed March 24, 1900 (31 Stat. at L. 51), applying for the benefit of Porto Rico the amount of the customs revenue received on importations by the United States from Porto Rico since the evacuation of Porto Rico by the Spanish forces, October 18, 1898, to January 1, 1900, together with any further customs revenues collected on importations from Porto Rico since January 1, 1900, or that shall hereafter be collected under existing law, is a recognition by Congress of the right to collect such duties as upon importations from a foreign country, and a recognition of the fact that Porto Rico continued to be a foreign country until Congress embraced it within the customs union. It may be seriously questioned whether this is anything more than a recognition of the fact that there were moneys in the Treasury not subject to existing appropriation laws. Perhaps we may go further, and say that, so far as these duties were paid voluntarily and without protest, the legality of the payment was intended to be recognized; but it can clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been

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brought. As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent \*act deprive them of [200] the right to prosecute this action would be beyond its power. In any event, it should not be interpreted so as to make it retroactive. *Kennett's Petition*, 24 N. H. 139; *Alter's Appeal*, 67 Pa. 341, 5 Am. Rep. 433; *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Palairer's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *State use of Methodist Episcopal Church v. Warren*, 28 Md. 338.

We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back.

The judgment of the Circuit Court for the Southern District of New York is therefore reversed, and the case remanded to that court for further proceedings in consonance with this opinion.

Mr. Justice **Gray** dissenting:

I am compelled to dissent from the judgment in this case. It appears to me irreconcilable with the unanimous opinion of this court in *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, and with the opinions of the majority of the Justices in the case, this day decided, of *Downes v. Bidwell*, 182 U. S. 244, post, 1088, 21 Sup. Ct. Rep. 770.

Mr. Justice **McKenna**, with whom concurred Mr. Justice **Shiras** and Mr. Justice **White**, dissenting:

Mr. Justice Shiras, Mr. Justice White, and myself are unable to concur in the conclusion of the court, and the importance of the case justifies an expression of the grounds of our dissent.

Settle whether Porto Rico is "foreign country" or "domestic territory," to use the antithesis of the opinion of the court, and, it is said, you settle the controversy in this litigation. But in what sense, foreign or domestic? Abstractly and unqualifiedly,—to the full extent that those words imply,—or limitedly, in the sense that the word "foreign" is used in the customs laws of the United States? If abstractly, the case turns upon a definition, and the issue becomes single and simple, presenting no difficulty, and yet the arguments at bar have ranged over all the powers of government, and this court divides in opinion. If at the time the duties which are complained of were levied, Porto Rico was as much a foreign country as it was before the war with Spain; if it was as much domestic territory as New York now is, there would be no serious controversy in the case. If the former, the terms and the intention of the Dingley act would



apply. If the latter, whatever its words or [201] \*intention, it could not be applied. Between these extremes there are other relations, and that Porto Rico occupied one of them, and its products hence were subject to duties under the Dingley tariff act, can be demonstrated. Indeed, we have the authority of a member of the majority of the court, and the organ of the court's opinion in this case, that even if Porto Rico were domestic territory its products could be legally subjected to tariff duties. This principle is expressed by him in *Downes v. Bidwell*, 182 U. S. 244, post, 1088, 21 Sup. Ct. Rep. 770. The other members of the court, though agreeing with him in the case at bar, do not agree with him in *Downes v. Bidwell*. They assert that Porto Rico, being a territory of the United States, tariff duties on its products are inhibited by the Constitution of the United States. Their judgment and his only unite in the case at bar, and we may assume that the reasoning of the opinion just announced is the road which has brought them together, and, assuming further that such reasoning is the best judicial support of the conclusion it is presented to establish, we address ourselves to the consideration of that reasoning.

(1) The statement of the opinion is that whether the cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a foreign country at the time they were shipped, and a foreign country is defined to be, following Chief Justice Marshall, "one exclusively within the sovereignty of a foreign nation" and without the sovereignty of the United States." This makes sovereignty the test, and gives a rule as sure and exact in its application as it is clear and simple in its expression. There is no difficulty in applying it. Difficulty comes with attempts to limit it. The difference between our country and one not ours would seem to be of substance, not needing words to explain the difference, but defying words to confound it, and having the consequence of carrying, not only one law, but all laws. The court does not go so far, and why? Is there weakness in the logic, or do its consequences repel? The argument of the court certainly proceeds as if the test is universal,—illustrations are used to make it unmistakable.

Under the effect of the treaty of cession and our government of Porto Rico, it is said, [202] if the question was broadly presented \*whether it was "a foreign country or domestic territory," there would be as little hesitation in answering the question as there would be in determining the ownership of a house deeded in fee simple to a purchaser, after he had gone into possession, paid taxes, and made improvements, without let or hindrance from his vendor. And we would have as little hesitation in applying all of the consequences and concomitants of ownership. But we do not care to join issue on an illustration, although it may suggest wrong principles. We submit that the administration of a government has more complexity—must consider more things—than

the management of a piece of real estate. But even the conveyance of real estate may be conditional, all of the incidents of ownership not immediately applying. However, we need not dwell on insufficient analogies. There are better ones. The history of our country has examples of the acquisition of foreign territory,—examples of what relation such territory bears to the United States,—authorities, executive, legislative, and judicial, as to what was wise in statesmanship, as well as what was legal and constitutional, in withholding or extending our laws to such territory; and finding these examples and authorities in the way the opinion of the court attempts to answer or distinguish or overrule them.

*United States v. Rice*, 4 Wheat. 246, 4 L. ed. 562, is reviewed. In that case, Castine, a port of the United States, was in temporary occupation by the British during the war of 1812, and it was declared to be a foreign country within the meaning of our customs laws; as much, the court said by Mr. Justice Story, as if "Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there." In other words, not a cession to another country, but the accidental occupation by the armed forces of another country, made a port in the state of Maine foreign territory. The conclusion had the sanction of great names and the authority of this court. Temporary sovereignty, not permanent dominion, was seemingly made the test.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276, is also reviewed. The case involved the legality of duties levied in Philadelphia upon goods imported from Tampico. Tampico was a port of Mexico temporarily occupied by the United States forces,—the exact condition which, in the *Rice Case*, made a port in one of the states of our Union English territory. Tampico was nevertheless held to be a foreign country within the meaning of our revenue laws. In other words, the military occupation and the sovereignty which attended it, which determined in the *Rice Case*, was rejected in the *Fleming Case*. There is apparent antagonism between the cases, and the court in the case at bar observe it. And, strangely enough, that which is "somewhat of the converse" (to quote the court in the case at bar) of the *Rice Case* is held sufficient for the judgment in the *Fleming Case*, and other grounds of decision are declared to be *dicta*. [203]

An attempt is made, however, to reconcile the cases, and we think they can be reconciled, but not upon the grounds stated by the court in the opinion in the case at bar. Harmony cannot be established between them by that which in the *Fleming Case* is the converse of the *Rice Case*, and by rejecting as *dicta* all other grounds as unnecessary to the judgment in the *Fleming Case*. However, we will proceed to the consideration of the latter case.

Delivering the opinion of the court, Chief Justice Taney substantially said that the boundaries of our country could not be en-



larged or diminished by the advance or retreat of armies, and based his opinion besides and the judgment of the case on the absence of an act of Congress establishing a customhouse at Tampico and authorizing the appointment of a collector, "and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another," and the necessity of a legal permit and coasting manifest was expressly asserted. He further said:

"This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces [204] of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is that, although Florida had by cession actually become a part of the United States and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney General of the United States, the law officer of the government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a customhouse had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress."

The opinion in the case at bar disregards this reasoning and the conclusion from it, and says: "While we see no reason to doubt the conclusion of the court (in *Fleming v. Page*) that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade." Such power, it was said, "a military commander [205] 182 U. S.

may be presumed to have," but, "of course, he would have no power to make a domestic port of what was in reality a foreign port." But why did it remain a foreign port? Castine did not remain a domestic port. We, however, need not dwell any longer on this point, \*for, under the latest utterances of this court, the test of dominion breaks down. Cuba is under the dominion of the United States. We held in the *Neely Case*, 180 U. S. 109, ante, 448, 21 Sup. Ct. Rep. 302, that it is a foreign country.

We think that *Fleming v. Page* is disposed of too summarily by the majority in the case at bar, and we have shown that it is not antagonistic to the *Castine Case*. Both cases recognized inevitable conditions. At Castine the instrumentalities of the custom laws had been divested; at Tampico they had not been divested, and hence the language of the court: "The department, in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress."

We submit that the principle upon which *Fleming v. Page* was based is still a proper principle for judicial application. Does it not make government provident, not haphazard, ignoring circumstances and producing good or ill accidentally? Does it not leave to the executive and the legislative departments that which pertains to them? Did it not stand as a guide to the executive, —a warrant of action, so far as action might affect private rights? Indeed, what is of greater concern, so far as action might affect great public interests? It should, we submit, be accepted as a precedent. It is wise in practice; considerate of what government must regard, and of the different functions of the executive, legislative, and judicial departments and of their independence. Why should it, then, be discarded as *dictum*? If constancy of judicial decision is necessary to regulate the relations and property rights of individuals, is not constancy of decision the more necessary when it may influence or has influenced the action of a nation? If the other departments of the government must look to the judicial for light, that light should burn steadily. It should not, like the exhalations of a marsh, shine to mislead.

The case of *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, is relied on especially. The curiosity of that case is that all parties cite it, and this court even finds it as convenient and as variously adaptive. \*It there- [206] fore challenges the application of the wise maxim expressed by Chief Justice Marshall, "That general expressions in every opinion are to be taken in connection with the case in which those expressions are used." And certainly to ascertain the meaning of the court we must see what was before the court, and interpret its opinion by that, and, if there is confusion in its language, it may resolve itself into satisfactory meaning.



It is cited to sustain the proposition that immediately upon the cession of territory it becomes a part of the United States, "instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage." This is the strongest expression of the case. It is attempted to be made its controlling one,—the point decided. It was neither the point decided nor was it the controlling expression. It was immediately accompanied by the qualification, "as there is nothing differently stipulated in the treaty in respect to commerce." The effect of the qualification the opinion in the present case does not explicitly notice, and we shall attempt to show with what meaning the expression was used, and what was decided.

The case involved the legality of duties on imports into California between the 3d of February, 1848, and the 13th of November, 1849. The time was divided by the plaintiffs in the case "into two portions," the court said, "to each of which they supposed that different rules of law attached;" and, further, that "the claim covered various amounts of money which were paid at intervals between the 3d day of February, 1848, and the 13th of November, 1849." The first of those dates was that of the treaty of peace between the United States and Mexico, and the latter when Mr. Collicr, a person who had been regularly appointed collector at that port, entered upon the performance of the duties of his office. "During the whole of this period it was alleged by the plaintiffs that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries."

Meeting the contention and replying to it fully, the court held that the duties were legally levied and collected during the whole of the period—from the 3d of February, [207] 1848, until some time "in the following fall"—under the war tariff instituted by Governor Mason; after that under the Walker tariff. In other words, before and after cession, under the war tariff. Speaking of that tariff the court said: "They (duties) were paid until some time in the fall of 1848, at the rate of the war tariff, which had been established early in the year before by the direction of the President of the United States." And speaking of the action of Governor Mason and the law which sanctioned it, it was further said:

"He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with

the power also to admit new states into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so, as it was continued until the people of the territory met in \*convention to [208] form a state government, which was subsequently recognized by Congress under its power to admit new states into the Union."

And further replying to the contention that there was neither treaty nor law permitting the collection of duties, "it having been shown that the ratification of the treaty made California a part of the United States, and that as soon as it became so the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right."

An important inquiry is, When did the laws cease "*which had been instituted for the regulation of the territory as a belligerent right*," and how did they cease? The answer is instant,—they ceased when the President withdrew them and because he withdrew them. The laws of Congress did not instantly apply upon the cession. There was an interval of time during which they did not apply, and if there can be such interval, who is to judge of what duration it shall be? Who can but the political department of the government? and how impracticable any other ruling would be. It is not for the judiciary to question it. It involves circumstances which the judiciary can take no account of or estimate. It is essentially a political function.

We have quoted largely from *Cross v. Harrison* because it is made the pivot of the opinion of the court in the present case, and we will recur to it again. But it should be said now that some of the expressions may be accounted for and understood by the state of precedent opinion.

It is a matter of some surprise that the only explicit provision of the Constitution of the United States in regard to the territory not embraced within the jurisdiction of a state is expressed in the following provision: "The Congress shall have power to



dispose of and make all needful rules and regulations respecting the territory or other property of the United States." What was meant by it, what its relation was to other provisions of the Constitution, was the subject of discussion. Gouverneur Morris, who wrote the provision, subsequently declared [209] \*that it was intended to confer power to govern acquisitions of territory as "provinces and allow them no voice in our councils." He admitted, however, that it was not expressed more pointedly in order to avert opposition. In his mind it certainly contemplated the government of after-acquired territory. In *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691, however, the provision was declared to be confined, and was intended to be confined, to the territory which at that time belonged to the United States. "It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more." This conclusion was claimed to be established by the history of the times, "as well as the careful terms in which the article is framed." We will not stop to reconcile this conflict between him who wrote the provision and the court who interpreted it. The conflict was but an incident in the evolution of opinion. And there were other conflicts, or rather diversities of view, caused or encouraged by the silences of the Constitution. That instrument contained no provision for acquiring new territory. The power was derived from the powers of making war and of making peace, and might be accomplished by conquest or by treaty. There was a question, however, of the effect of an acquisition. It is certain that Mr. Jefferson doubted the power of incorporating new territory into the Union without an amendment to the Constitution, and the debates in Congress exhibit the diverse views held by public men on the relation which such territory would bear to the United States, the application of the laws to and the power of Congress over the acquired territory under the Constitution. We shall not stop to quote the debates. That will be done in a subsequent case, and the conclusion which they demonstrate expressed. It is only necessary for us to observe that distinctions always existed between territory which might be acquired (whether by purchase or by conquest) and that which was within the acknowledged limits of the United States, and also that which might be acquired by the establishment of a disputed line. These distinctions were conspicuous in the opinion of Mr. Justice Johnson, at circuit, in the case of *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242. In that case the relation of Florida to the [210] United States \*was necessary to be considered, and of that relation the learned Justice said:

"It is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), within the acknowledged limits of the United States, as also that which is

acquired by the establishment of a disputed line. As to both these, there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession.*" The italics are ours.

All the history and utterances of the past declare the same way.

And how important those utterances and decisive of the present controversy! They were not the utterances of inattention and ignorance, and therefore to be discarded. They were the utterances of men whose actions illustrated them. They were the utterances of men (to borrow the thought of Benton) whose sacrifices made the Constitution possible, whose genius conceived and wrote it. Shall it be said that the farther time separates us from them the better we understand them,—better than they understood themselves?

*American Ins. Co. v. 356 Bales of Cotton* came to this court and was argued by Mr. Webster. We may quote what he said. His views were more than those of an advocate. He expressed them elsewhere when a different, if not higher, duty demanded reflection, consideration, and sincerity. "What is Florida?" he asked. "It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions." And, responding to the argument, the court decided through Chief Justice \*Marshall that the judicial power of [211] the United States, as declared by the Constitution, did not extend to Florida, and the title to 356 bales of cotton was held to pass by a sale under the order of a court, which consisted of a notary and five jurors, established by an act of the governor and council of Florida.

From the light of previous opinions the language of Mr. Justice Wayne, in *Cross v. Harrison*, receives explanation. The treaty with Mexico, following the war, defined the "boundaries of the United States," and made the reclaimed territory, which included California, a part of the United States. In other words, the acquisition (if it can be called such) of California was in recognition of boundaries, and hence the learned Justice called it a part of the United States. But not uniformly. Mark this sentence: "But after the ratification of the treaty, California became a *part of the United States, or a ceded, conquered territory.*" That his language marked a distinction there can be no doubt, but it was of no consequence to observe. The principle enforced did not need

it. In either case the action of the President was the potent thing.

2. The line of judicial precedents relied upon in the opinion of the court in the case at bar ends with *Cross v. Harrison*, and the practice and rulings of the executive departments of the government are considered. They are said to be in accordance with the ruling ascribed to *Cross v. Harrison*, with but a single exception. If there is one legal exception the rule is gone. It is not a case where an exception can prove the rule; it is one where the exception destroys the rule. The exception was Louisiana. Between December 20, 1803, when possession was delivered to the United States, and March 25, 1804, when the act of February 24 became effective, Louisiana was treated as a foreign country under the customs laws; but this, the court in the opinion just announced says, "is manifestly inconsistent with the position subsequently taken by this court in *Cross v. Harrison*, wherein it is said of the action of Mr. Harrison in California: 'That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, [212]\*and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the Executive of the United States, or without any interference to prevent it. Indeed, from the letter from the then Secretary of the Treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet.' After saying that, and this action having been recognized by the President, Mr. Justice Wayne adds: 'We think it was a rightful and correct recognition under all the circumstances, and when we say rightful we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.'"

If the laws of Congress instantly applied, why was the recognition of the President necessary? They could gain no legal efficacy from such recognition which they did not have without it, under the supposition that they applied on cession by their own force. Surely so obvious a consequence would have occurred to the court in *Cross v. Harrison*, and we cannot believe that the court used its language carelessly or uselessly. If the assent and recognition of the President were not necessary, why dwell upon them? Why so confuse the statement of a simple principle,—simple in application and expression,—and cast doubt upon it by unnecessary qualifications? The case, therefore, is not inconsistent with the ruling in regard to Louisiana. For a period of time after the cession of Louisiana, President Jefferson treated it as foreign territory under the custom laws, and duties were levied upon its products, and no one disputed the

legality of it. If the instance was not the same as in *Cross v. Harrison*, the principle was the same. There was not an immediate change upon the cession of either California or Louisiana. In California, duties were levied for a time under the war tariff, and afterwards under the act of Congress; and of the latter it was said: "This last was done with the assent of the Executive of the United States, or without any interference to prevent it." And this, it was further said, was "recognized as \*allowable and lawful by Mr. Polk and his cabinet." [213] We are disposed to ask again, Was the language inadvertent? Did not the court use it with full consciousness of its meaning and its necessity? Was the court in confusion as to the principles which applied, and jumbled them together without seeing or making a distinction between the force of the act of Congress of itself, and the action of the President in giving it efficacy, the necessity of its being recognized as "allowable and lawful by Mr. Polk and his cabinet?" Surely not. Rights were involved which depended upon the legality of the war tariff both before and after cession, and that legality was intended to be and was passed upon and sustained. An automatic effect was not given to the act of Congress as it is given in the case at bar. The act was applied by the President, not in simple execution of it, but as giving it legal effect. And it was this that the court said "was a rightful and correct recognition under all the circumstances." "Rightful" because "it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California." In other words, an act of Congress was not necessary to extend the collection of duties; the power of the President was sufficient, and of that power the court left no doubt. Speaking of the duties which were collected under the war tariff after the cession, it was observed, "but after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory. Our inquiry here is to be, whether or not the cession gave any right to the plaintiffs to have the duties restored to them which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our government to the military governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government which had been instituted during the war was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington."

\*Comment would seem to be unnecessary [214] to make this passage clear. If the act of Congress applied by cession, it applied immediately. It could not be delayed by taking time for notice. Besides, it would by



its own force displace all other provisions, and would not need for operation upon rights or the creation of rights, that the President give instructions or intimations, near or remote, "that the civil and military government which had been instituted during the war was discontinued." But we need not comment further. We may use the language of the court in summarizing its conclusion:

"Our conclusion from what has been said is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

This explicit statement, as well as the analysis and review which have first been made, leaves no ground to sustain the conclusion that *Cross v. Harrison* held that the tariff laws of the United States were immediately operative in California without regard to the exercise of the President's discretion putting them in force. But purely for argument's sake we may concede the contrary. The decision must have been, in any conception, based on the provisions of the treaty with Mexico. The court said so. But the treaty with Spain, instead of providing for incorporating the ceded territory into the United States, as did the treaty with Mexico, expressly declares that the status of the ceded territory is to be determined by Congress. This difference in the treaties removes *Cross v. Harrison* as a factor in the judgment of the case at bar, supposing its interpretation, in the opinion we are reviewing, be correct.

3. The opinion of the court says: "On March 1, 1845, Congress adopted a joint resolution [215] consenting to the annexation \*of Texas upon certain conditions (5 Stat. at L. 797), but it was not until December 29, 1845, that it was formally admitted as a state. 9 Stat. at L. 108. In this interval, and on July 29, 1845, the Secretary of the Treasury issued a circular letter directing the collectors to collect duties upon all imports from Texas into the United States until Congress had further acted. Of course, there could be no question that Texas remained a foreign state until December 29, when she was formally admitted. The circular, therefore, is of no pertinence to the question here involved." We think otherwise. Even after her admission as a state it was deemed necessary to extend the laws of the United States to her. 9 Stat. at L. 1, chap. 1. She was an example, as Florida was, as to what Congress believed to be necessary, and Oregon and Alaska are like examples. The simple rule of the automatic action of the custom and revenue laws 182 U. S.

seemingly did not occur to anybody; not even as to incorporated territory nor to a new state formed from foreign territory. Nor, as we have seen, did such theory seem to be sustainable when Chief Justice Taney announced in *Fleming v. Page* a contrary conclusion.

4. But independent of precedent the court says it is "irresistibly impelled to the same conclusion." The argument is mainly based upon the treaty-making power invested in the President and Senate. A treaty made by that power is said to be the supreme law of the land,—as efficacious as an act of Congress; and, if subsequent and inconsistent with an act of Congress, repeals it. This must be granted, and also that "one of the ordinary incidents of a treaty is the cession of territory," and that "the territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress." But to tell us of the sources of the treaty-making power and to define the extent of that power helps us very little to the solution of the present problem.

The question occurs, What has the treaty-making power done? Is the treaty with Spain inconsistent with the Dingley act, and was it intended to work the repeal of that act? That act when passed was undoubtedly intended to apply to products from Porto Rico, and, we suppose, it will not be contended, in determining whether the treaty has rendered the act inoperative, the \*terms [216] of the treaty are not to be looked at? Assuredly the treaty cannot have an automatic force contrary to its terms. That is, it cannot be contended that the automatic force of the treaty is greater than the force of the treaty itself.

This court said, speaking by Mr. Justice Brown, in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383:

"In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."

The statement being accepted, may not a fiscal system be as important as other matters of administration? May not a change of taxation, new burdens of taxation suddenly imposed, be worthy of consideration?

The opinion of the case at bar has not discussed the treaty. It takes it for granted that the cession of Porto Rico was absolute, and the conclusion that it is not a foreign country, within the meaning of the revenue laws, is deduced from that. But necessarily that depends upon the treaty, and interpretation is called for. The power of Con-



gress over ceded territory is asserted in the opinion in somewhat absolute terms,—it “involves the right to govern and dispose of it.” This being so, it would seem to be certain that the treaty-making power would not forestall Congress, or accept with the cession of territory the destruction of the fiscal and industrial policies of the country. We should hesitate to so pronounce for reasons which must occur to everyone, except upon the compulsion of the clearest expression.

The opinion of the court further says: “Territory thus acquired (by treaty) can remain a foreign country under the tariff laws only upon one of two theories: Either that the word ‘foreign’ applies to such countries as were foreign at the time the statute [217] \*was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the states.” Both theories are rejected as untenable. The first because, “while a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope.” But what constitutes the scope of a statute,—its letter inevitably, or may its spirit be regarded as interpreting and applying its letter? In other words, shall the purpose of its enactment be executed or defeated? There can be but one answer to these questions, nor can confidence in the answer be lessened by the analogies used by the court.

The law against selling liquors to minors, it is said, contemplates all minors,—those existing and those which may come into being afterwards. Very true, but the purpose of the law is that. The same with territories (to use another illustration of the opinion) being bound as states when they come into the Union. But these illustrations assume that the territory referred to was incorporated by the treaty into the United States, an ever-recurring and misleading fallacy, in our judgment.

Let us, however, look at the argument under the wrong assumption of incorporation. The provisions of the Constitution for the admission of new states contemplate the consequences of statehood,—contemplate territories ceasing to be bound as such and becoming bound as states. In other words, those provisions regard the future, and have their purpose fulfilled, not defeated, by territories becoming states. But a tariff law does not contemplate additions to or subtractions from itself. It may be said to be occasional. It regards certain conditions, and may be dependent upon them, whether it be enacted for revenue only or for protection and revenue. Its entire plan may be impaired or be destroyed by change in any part. The revenues of the government may be lessened, even taken away by change; the industrial policy of the country may be destroyed by change. We are repelled by the argument which leads to such consequences, whether regarding our own country or the foreign country made “do-

mestic.” If “domestic” as to what comes from it, it is “domestic” as to what goes to it, and its customs laws, as well \*as our cus- [218] toms laws, may be cast into confusion, and its business and affairs deranged before there is possibility of action.

As we have already said, to set the word “foreign” in antithesis to the word “domestic” proves nothing. Their opposition does not express the controversy. The controversy is narrower. It is whether a particular tariff law applies. That, indeed, may be the consequence of the principle that all laws apply, or that customs laws apply by reason of the provision of the Constitution which requires duties, imposts, and excises to be uniform throughout the United States, and the treaty-making power cannot prevent the application of that provision. That principle is asserted by counsel, and is very simple, but, applied as counsel apply it, is fraught with grave consequences. It takes this great country out of the world and shuts it up within itself. It binds and cripples the power to make war and peace. It may take away the fruits of victory, and, if we may contemplate the possibility of disaster, it may take away the means of mitigating that. All those great and necessary powers are, as a consequence of the argument, limited by the necessity to make some impost or excise “uniform throughout the United States.”

The treaty-making power is as much a constitutional power as the legislative or judicial powers. It is a supreme attribute of sovereignty, but often less determined in its exercise than others,—more dependent on contingency, and may be less optional. It may precede war or follow war,—command or be commanded by war. The kind or direction of its exercise cannot always be predicted or marked. There can be no verbal limitations upon it, and, wisely, none were attempted. Whatever restraints should be put upon it might have to yield to the greater restraints of life or death,—not only material prosperity, but national existence. These, of course, are extreme contingencies, but they are not impossible, and are necessary to be regarded when limitations are urged which take no account of them. We do not mean to say that there are no limitations. They are certainly not those which counsel urge. Besides, the contention of counsel is answered by the *Canter Case*. The difference between military occupation of a territory and its cession at the treaty of peace was noted. “If it be ceded by the treaty,” \*the court said, “the [219] acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.” What is the significance of this? It would seem like useless language; its purpose often defeated if the Constitution and laws of the conqueror, and, to drop from the abstract and supposing this country the conqueror, if our Constitution and laws, immediately apply on cession of territory. The terms which



may be granted or received would be, to a certain and important extent, predetermined. Neither we nor the conquered nation would have any choice in the new situation, could make no accommodation to exigency, would stand bound in a helpless fatality. Whatever might be the interests, temporary or permanent, whatever might be the condition or fitness of the ceded territory, the effect on it or on us, the territory would become a part of the United States with all that implies. It is only true to say that counsel shrink somewhat from the consequences of their contention, or if "shrink" be too strong an expression, deny that it can be carried to the nationalization of uncivilized tribes. Whether that limitation can be logically justified we are not called upon to say. There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary, or which could be applied or enforced by the judiciary. Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial. Nor can those difficulties be put out of contemplation, under the assumption that the principles which we may declare will have no other consequence than to affect duties upon a cargo of sugar. We need not, however, dwell on this part of the discussion. From our construction of the powers of the government and of the treaty with Spain the danger of the nationalization of savage tribes cannot arise.

[220] These views answer, in our judgment, the chief arguments of the opinion, but to make a complete reply and to justify a different conclusion we should consider and interpret the treaty \*with Spain. We will, however, not do so now. It has been done in the concurring opinion in *Downes v. Bidwell*, and it is not necessary to anticipate the statements and reasoning of that opinion.

We said at the outset that it could be demonstrated that Porto Rico occupied a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely, and because of that relation its products were subject to the duties imposed by the Dingley act. And, concluding, we say we believe that, in this opinion and the one referred to, we have made that demonstration; made it from the Constitution itself, the immediate and continued practice under the Constitution, judicial authority, and the treaty with Spain. And that demonstration does more than declare the legality of the duties which were levied upon the sugars of the plaintiff in error. It vindicates the government from national and international weakness. It exhibits the Constitution as a charter of great and vital authorities, with limitations indeed, but with such limitations as serve and assist government, not destroy it; which, though fully enforced, yet enable the United States to have—what it was intended

to have—"an equal station among the Powers of the earth," and to do all "Acts and Things which Independent States may of right do,"—and confidently do, able to secure the fullest fruits of their performance. All powers of government, placed in harmony under the Constitution; the rights and liberties of every citizen secured, put to no hazard of loss or impairment; the power of the nation also secured in its great station, enabled to move with strength and dignity and effect among the other nations of the earth to such purpose as it may undertake or to such destiny as it may be called.

The judgment of the Circuit Court should be affirmed.

\*JOHN H. GOETZE, *Appt.*,

[221]

v.

UNITED STATES. (340)

GEORGE W. CROSSMAN *et al.*, *Appts.*,

v.

UNITED STATES. (515)

(See S. C. Reporter's ed. 221, 222.)

*Duties—jurisdiction of board of general appraisers.*

Jurisdiction of the board of general appraisers under the customs administrative act of June 10, 1890 (26 Stat. at L. 131, chap. 407), authorizing an appeal to the board from a decision of a collector "as to the rate and amount of the duties chargeable upon imported merchandise," if paid under protest, does not extend to an appeal from a decision as to duties on goods imported from Porto Rico and the Hawaiian islands, when the sole question is whether those places were foreign countries within the meaning of the tariff laws.

[Nos. 340 and 515.]

No. 340 Argued December 17, 18, 19, 20, 1900. Decided May 27, 1901.

No. 515 Argued January 14, 15, 1901. Decided May 27, 1901.

APPEALS from decisions of the Circuit Court of the United States for the Southern District of New York on petitions for the review of decisions of the board of general appraisers as to duties on merchandise imported in one case from Porto Rico and in the other from Honolulu, in the Hawaiian islands. *Reversed.*

See same case below, 103 Fed. 72.

Statement by Mr. Justice Brown:

These were petitions for a review of two decisions of the board of general appraisers, holding subject to duty certain merchandise imported, in one case from Porto Rico, and in the other from Honolulu, in the Hawaiian islands. The action of the board of general appraisers in each case was affirmed.

**Messrs. Everit Brown and Edward C. Perkins** argued the cause, and, with **Mr. Albert Comstock**, filed a brief for appellant in No. 340:

The claim of unlimited power in new territory is opposed to our entire theory of constitutional government.

*Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73; *Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 663, 22 L. ed. 461.

The prohibitory clauses of the Federal Constitution apply in the government of the territory of the United States.

*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Black v. Jackson*, 177 U. S. 363, 44 L. ed. 807, 20 Sup. Ct. Rep. 648; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691.

A treaty may be a contract in the international sense, but it is a mere law in the constitutional sense.

*Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415.

And nothing is better settled than that a treaty is subject to modification and repeal by the Congress.

*Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Head Money Cases*, 112 U. S. 580, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Cherokee Tobacco*, 11 Wall. 616, *sub nom. 207 Half Pound Papers Smoking Tobacco v. United States*, 20 L. ed. 227; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168.

Congress is supreme in the territories as to political, but not as to civil, rights.

Civil rights are secured negatively, by the general prohibitions of the Constitution, to all persons whatsoever; political rights are conferred positively, by express provisions of the Constitution, upon a special class of persons only.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

The power of Congress over the territories of the United States, though "general and plenary," is not unlimited.

*Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 44, 34 L. ed. 491, 10 Sup. Ct. Rep. 792; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

The cases in which it has been held that certain provisions of the judiciary article of the Constitution do not apply to the establishment of courts of justice in territories by

Congress lend no support to the theory that the Constitution is not operative in the territories.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

The decision in *Re Ross*, 140 U. S. 464, *sub nom. Ross v. McIntyre*, 35 L. ed. 580, 11 Sup. Ct. Rep. 897, even had that case been decided without regard to the delegation of power by Japan, would only be in point if it were shown that constitutional government in new territory is absurd, mischievous, and repugnant to the general spirit of the Constitution.

*Dartmouth College v. Woodward*, 4 Wheat. 644, 4 L. ed. 661; *M'Culloch v. Maryland*, 4 Wheat. 415, 4 L. ed. 603; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

*Ex parte Milligan*, 4 Wall. 120, 18 L. ed. 295.

That the framers of the Constitution contemplated and provided for the acquisition of territory with a view to its permanent retention as a dependency, colony, or province, has been denied by this court on more than one occasion.

*Shively v. Bowlby*, 152 U. S. 49, 38 L. ed. 349, 14 Sup. Ct. Rep. 548; *McLean, J. diss. op. in Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; (*Curtis, J.*) 19 How. 613, 615, 15 L. ed. 787; (*Taney, Ch. J.*) 19 How. 446-449, 15 L. ed. 718, 719.

The municipal or local law of a conquered or annexed country which governs the relations of the inhabitants to each other continues in force until superseded by the new sovereign, not as the continuing mandate of the old sovereign, but as the presumptive mandate of the new.

*Blankard v. Galdy*, 4 Mod. 222.

The constitutional restrictions do not relate to local or municipal laws, but to the relations of the government to the governed. The laws governing these relations must depend upon the constitutional powers and limitations of the new government, not on those of the old.

*Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; *Halleck, Internat. Law*, chap. 33, §§ 4, 13, 14, 17, 19, 21, 24; *Pollard v. Hagan*, 3 How. 225, 11 L. ed. 571; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

The treaty of Paris is not open to the construction that it provides for the governing of Porto Rico without regard to the constitutional limitations and as a country foreign to the United States. If it were possible to place that construction upon the treaty, the provision would be void as contrary to the Constitution, but this would not in any way



prevent or affect the accomplishment or the usual results of annexation.

Any unconstitutional provisions in the treaty are void.

*Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73.

The power to make treaties, like the power to regulate commerce, or any other express power, can be exercised only with regard to the general prohibitory clauses of the Constitution.

*Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Doe ex dem. Clark v. Braden*, 16 How. 657, 14 L. ed. 1099; *New Orleans v. United States*, 10 Pet. 736, 9 L. ed. 602; see also *Pollard v. Hagan*, 3 How. 225, 11 L. ed. 571.

The relinquishment of sovereignty by the former possessor is certainly not indispensable, as the free act of an owner of real estate is to the transfer of the title. Annexation is accomplished when the conqueror secures firm possession and declares his will to treat such possession as permanent.

*Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

The words "throughout the United States," in the Constitutional provision that all duties, imposts, and excises shall be uniform, designate the whole of "the American empire."

*Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

The uniformity required by this clause of the Constitution is a geographical uniformity.

*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The principle of limiting the power to tax in the territories has been recognized in the instance of direct taxation.

*Loughborough v. Blake*, 5 Wheat. 320, 5 L. ed. 99.

When the treaty of Paris took effect, Porto Rico ceased to be "a foreign country" within the meaning of those words as used in the tariff act.

It is a well-recognized principle of tariff law that duties are imposed only by clear and express provisions of law, and that in case of doubt the presumption is against the government.

*The Liverpool Hero*, 2 Gall. 184, Fed. Cas. No. 8,405; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Adams v. Bancroft*, 3 Sumn. 384, Fed. Cas. No. 44; *Powers v. Barney*, 5 Blatchf. 202, Fed. Cas. No. 11,361; *United States v. Ullman*, 4 Ben. 547, Fed. Cas. No. 16,593; *Philadelphia & R. R. Co. v. Kenney*, 9 Phila. 403, Fed. Cas. No. 11,088; *United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *Hartranft v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the  
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treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

It cannot be said that goods brought from one to another part of the same country are "imported," according to the signification of that term in American jurisprudence. In view of the well-settled meaning of that word, the addition of, "from foreign countries," borrowed from earlier tariff acts, is, indeed, tautological.

*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; see also *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

The opinion of Mr. Gallatin, that the United States tariff did not apply to Louisiana until after the act of February 24, 1804, which extended the general customs laws to Louisiana and established a custom house at New Orleans, took effect, and anything to the same effect in *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, are directly opposed to the law as laid down by this court in *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

It is the law of this court as laid down in that case, not only that territory ceded by a treaty of peace "becomes a part of the nation to which it is annexed," and that the Constitution of the United States is in force in the government of such country, but that the tariff law is one of those general laws which in their nature apply throughout the entire national dominion, and which, of their own force, supersede the former laws immediately upon annexation. In other words, that territory, when annexed, ceases to be "a foreign country within the meaning of the tariff act."

During the period between the ratification of the treaty of cession of Alaska and the passage of an act of Congress extending the revenue laws to Alaska and erecting a collection district, goods from Alaska were, under a decision by the Secretary of the Treasury, admitted free of duty.

Synopsis Treasury Decisions 1868, No. 74, p. 20.

*Mr. John B. Henderson* filed an additional argument for appellant.

*Attorney General Griggs* argued the cause and filed a brief for appellee:

The United States as a sovereign nation possesses the same power of acquiring territory possessed by other nations. It may constitutionally acquire territory (1) by conquest, (2) by treaty, (3) by annexation, and (4) by discovery.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 42, 34 L. ed. 490, 10 Sup. Ct. Rep. 792; *United States v. Huckabee*, 16 Wall. 414, 21 L. ed. 457; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Legal Tender Cases*, 12 Wall. 554, 20 L. ed. 313.

This sovereign national power was asserted in the Declaration of Independence: As

free and independent states, they (United States of America) have the full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

On the transfer of territory ceded by a treaty the relations of the inhabitants with each other undergo no change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and the general conduct of individuals remains in force until altered by the newly created power of the state.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 541, 7 L. ed. 254; *United States v. Gratiot*, 14 Pet. 526, 10 L. ed. 573; Story, Const. § 1324.

The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.

*Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 42, 34 L. ed. 490, 10 Sup. Ct. Rep. 792; *McAlister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

Congress in the exercise of its power in the organization and government of the territories combines the powers of both the Federal and the state authorities.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

International law declares that the new sovereign may deal with the inhabitants of conquered or ceded territory, and give them such laws as it sees fit. They receive privileges and political benefits at the will of the new government, and not by virtue of the automatic operation of the laws of the new sovereign.

*Johnson v. M'Intosh*, 8 Wheat. 543, 5 L. ed. 681; 3 Vattel, chap. 13, § 200; *Calvin's Case*, 7 Coke, 17; *Campbell v. Hall*, 1 Cowp. 209; 2 Halleck, Internat. Law, 475; Hall, Internat. Law, 593.

The theory upon which the various governments for portions of the territory of the

United States have been organized has been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress.

*Clinlon v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659.

The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

*First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

The people of the United States as sovereign owners of the national territories have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

The United States, having rightfully acquired the territories and being the only government which can impose laws upon them, have entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition.

*Shively v. Bowlby*, 152 U. S. 48, 38 L. ed. 349, 14 Sup. Ct. Rep. 548.

The distinction between the Federal and the state jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments, and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and the state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and Federal jurisdiction.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119.

This power of Congress to organize territorial governments and make laws for their inhabitants arises, not so much from the clause in the Constitution in regard to disposing of and making rules and regulations



concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government and can be found nowhere else.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *United States v. Kagama*, 118 U. S. 379, 30 L. ed. 229, 6 Sup. Ct. Rep. 1109.

The territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution or subject to its complex distribution of the powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. The United States, having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and state.

*Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *Endleman v. United States*, 30 C. C. A. 186, 57 U. S. App. 1, 86 Fed. 457.

The conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers, and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use, or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

*New Orleans v. New York Mail & S. S. Co.* 20 Wall. 393, 22 L. ed. 357.

The power of Congress over the public territory is clearly exclusive and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.

2 Story, Const. ¶ 1328.

Whatever doubt Jefferson had as to the constitutional authority for the Louisiana treaty related, not to acquiring territory, but to the right, either of the treaty-making power, or of Congress, to annex it to or incorporate it into the Union.

8 Jefferson's Writings, pp. 241, 245, 247, 254, 269, 313, 315; 1 Gallatin's Writings, p. 115.

Madison had the same opinion which Jefferson held, that we could lawfully acquire, but could not incorporate or confer citizenship, by means of a treaty.

2 State Papers, 540.

The debates that arose in the Senate and House of Representatives upon the bill authorizing the creation of stock to pay the purchase money for Louisiana, and the bill to provide a temporary government for Louisiana, 182 U. S. U. S., Book 45.

Louisiana, are likewise confirmatory and conclusive that whatever doubts may have existed among public men at that day as to constitutional authority related, not to the acquisition of territory, but to the right either of the treaty-making power or of Congress to attach it to or make it a part of the territory of the United States. Both Federalists and Republicans agreed on this point.

13 Annals of Congress, pp. 431, 434, 450, 457, 462, 469.

Notwithstanding the doubts expressed by Jefferson, and Madison as his Secretary of State, together with many other prominent statesmen of their day, as to the power of the President and Senate by treaty provisions to confer upon the inhabitants of ceded territory the rights and immunities of citizens of the United States, the validity of the exercise of this power by means of treaties may now be regarded as affirmed by judicial decision.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Fleming v. Page*, 9 How. 614, 13 L. ed. 280; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 42, 34 L. ed. 490, 10 Sup. Ct. Rep. 792; *Geoffroy v. Riggs*, 133 U. S. 266, 33 L. ed. 644, 10 Sup. Ct. Rep. 295.

The conceded power to acquire territory by treaty or by conquest includes the right to prescribe what terms the United States will agree to in fixing the future status of its inhabitants.

The term "people," in the declaration of Independence and in the Federal Constitution, was synonymous with "citizens," and did not include the Indians or the class of persons who had been imported as slaves, or their descendants, whether they had become free or not.

*Scott v. Sandford*, 19 How. 404, 15 L. ed. 700.

And not being citizens they could claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States, and had no rights or privileges but such as those who held the power and the government might choose to grant them, and they might justly and lawfully be reduced to slavery for the benefit of the white race.

*Ibid.*

The political status of native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession. A long line of special treaties with such tribes, and numerous acts of legislation by Congress on the subject of Indians and Indian rights, show that these people have always been regarded as quasi-foreign. And the decisions of this court are to the same effect.

*Cherokee Nation v. Georgia*, 5 Pet. 17, 8 L. ed. 31; *United States v. Rogers*, 4 How. 572, 11 L. ed. 1107; *Johnson v. M'Intosh*, 8 Wheat. 574, 5 L. ed. 688; *Cherokee Tobacco*, 11 Wall. 616, sub nom. 207 Half Pound Papers of Smoking Tobacco v. *United States*, 20 L. ed. 227; *Elk v. Wilkins*, 112 U. S. 1

28 L. ed. 645, 5 Sup. Ct. Rep. 41; *United States v. Osborne*, 6 Sawy. 406.

If, therefore, it be asserted that the "inhabitants" of territory ceded by treaty become, *ipso facto* and without reference to the stipulations of the compact, citizens of the United States, by what principle were "free persons of color" in Louisiana and Florida considered as without the class of citizens? They were not excepted by the treaty; nevertheless they were not regarded as entitled to the political privileges guaranteed by that instrument.

And by what constitutional distinction were the Indians debarred the privileges and immunities of citizenship under the Constitution, if those privileges traveled automatically to the "new province," and attached by their own adhesion to their "inhabitants?"

Nothing can be clearer than that the universally accepted view then was and always has been that only they are citizens who are made such by the voluntary action of the United States, expressed either in the treaty of annexation, by acts of Congress, or by process of naturalization.

Of course, persons born in Spanish territory and under Spanish jurisdiction, though it be afterwards acquired by the United States, are not "born in the United States," for these words relate to the time of birth.

*Elk v. Wilkins*, 112 U. S. 101, 28 L. ed. 645, 5 Sup. Ct. Rep. 41.

It must be birth within the allegiance.

*United States v. Wong Kim Ark*, 169 U. S. 655, 42 L. ed. 893, 18 Sup. Ct. Rep. 456.

It is at the option of the inhabitants whether or not they will become subjects of the new sovereign (assuming that no expatriation is demanded), but it is at the option of the sovereign whether they shall become citizens or not.

2 Halleck, *Internat. Law*, 3d ed. § 7, p. 475.

The conqueror who shall obtain permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.

*United States v. De Repentigny*, 5 Wall. 260, 18 L. ed. 643.

One of the effects of a conquest is to invest the conquering state with sovereignty over all subjects of the wholly conquered state, and over such subjects of a partially conquered state as are identified with the territory at the time when the conquest is definitely effected, so that they become subjects of the state and are naturalized for external purposes without necessarily acquiring the full status of subjects or citizens for internal purposes.

Hall, *Internat. Law*, 4th ed. 1895. p. 593.

Administrative construction, congressional action, and judicial precedent, all affirm that under our revenue laws every port in a ceded country is to be regarded as a foreign one until such laws are expressly extended by Congress to the new possessions.

Rhode Island and North Carolina, 1 Stat. at L. pp. 99, 126; Louisiana, 8 Jefferson's Writings, p. 275; 1 Writings of Gallatin, pp. 1070

127, 167; 1 Reports on Finances, pp. 265, 335, U. S. Treasury; Act February 24, 1804 (2 Stat. at L. 251); Book G January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of Treasury; Florida, Act March 3, 1821, § 2 (3 Stat. at L. p. 639); 7 Benton's Abridgment, p. 295, note; 2 Annals of Congress, 1st Sess. 17th Congress, p. 2411; Texas, Act March 1, 1845 (5 Stat. at L. 797); Book T, October 10, 1843, to February 4, 1848, Circulars, Office Secretary of Treasury; Act December 29, 1845 (9 Stat. at L. p. 1); Oregon, Act August 14, 1848 (9 Stat. at L. 323); Missouri, Act June 4, 1812 (2 Stat. at L. 743); Wisconsin, Act April 20, 1836 (5 Stat. at L. 10); Minnesota, Act March 3, 1849 (9 Stat. at L. 403); New Mexico, Act September 9, 1850 (9 Stat. at L. chap. 49, p. 446); Utah, 9 Stat. at L. p. 458, chap. 51, § 17; Colorado, 12 Stat. at L. p. 176, chap. 59, § 16; Dakota, 12 Stat. at L. p. 244, chap. 86, § 16; Idaho, 12 Stat. at L. p. 813, chap. 117, § 13; Montana, 13 Stat. at L. p. 91, chap. 95, § 13; Wyoming, 15 Stat. at L. p. 183, chap. 235, § 16; District of Columbia, 16 Stat. at L. p. 426, chap. 62, § 34; Alaska, Act July 27, 1868; U. S. Rev. Stat. § 1891; Johnson, J. in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 517, 7 L. ed. 244; *Fleming v. Page*, 9 How. 603, 13 L. ed. 276; *Pollard v. Kibbe*, 14 Pet. 353, 10 L. ed. 490.

Notwithstanding the fact that a portion of the reasoning of the court in *Cross v. Harrison* is opposed to the doctrine of *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 517, 7 L. ed. 244, and *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, the decision as a decision is sound, and rightly rests upon the war power continued over a ceded conquest until Congress has legislated for it.

Halleck, *Internat. Law*, p. 835.

The clause of the Constitution which declares that duties, imposts, and excises shall be uniform throughout the United States does not apply to or govern these cases, because the term "United States," as there used, means only the territory comprised within the several states of the Union, and was intended only for the benefit or protection of outside territory belonging to the nation. In the latter sense, duties on imports from these islands are uniform throughout the United States, because they are uniformly imposed at every port in the United States, so that there is no preference given to the ports of one state over those of another, nor is any inequality between the several states created.

The judicial power of the United States as defined by the Constitution does not extend to territory. Territorial courts are established under the clause which authorizes Congress to make all needful rules and regulations respecting the territory belonging to the United States.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Clinton v. Englebrecht*, 13 Wall. 447, 20 L. ed. 662.

A citizen of the District of Columbia cannot maintain an action as a citizen of a  
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state, within the meaning of the Constitution, against a citizen of Virginia.

*Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332.

A citizen of the Mississippi territory cannot sue a citizen of a state.

*New Orleans v. Winter*, 1 Wheat. 9, 4 L. ed. 44.

The members of the American confederacy only are the states contemplated in the Constitution; and the District of Columbia is not a state within the meaning of that instrument.

*Hooe v. Jamieson*, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596.

The object intended to be provided for by the rule of uniformity imposed upon the power to levy duties, imposts, and excises was the prevention of possible discrimination against one or more of the several states composing the United States.

*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; 2 Messages and Papers of the Presidents, p. 164.

The Constitution does not require that either direct taxes or duties, imposts, or excises shall be laid throughout the whole territory belonging to the United States uniformly with the states.

*Loughborough v. Blake*, 5 Wheat. 323, 5 L. ed. 99; *Cherokee Tobacco*, 11 Wall. 616, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 227.

The Constitution does not extend of its own force over acquired territory.

"History cannot class higher than as the vagary of a diseased imagination this imputed self-acting and self-extension of the Constitution. The Constitution does nothing of itself,—not even in the states, for which it was made. Every part of it requires a law to put it into operation. No part of it can reach a territory unless imparted to it by act of Congress."

2 Benton, Thirty Years in the Senate, pp. 713, 714. See vol. 20 Appendix to Congressional Globe, pp. 255 *et seq.*

None of the decisions relative to the right of trial by jury in the territories establishes the contention that such right extends to the territories *ex proprio vigore*.

*Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

The constitutional provision respecting the tenure of judicial offices did not apply to territorial judges.

*McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

The state may establish one system of law in one portion of its territory, and another system in another, provided it does not encroach upon the proper jurisdiction of the United States, or abridge the privileges and immunities of citizens of the United States.

*Missouri v. Lewis*, 101 U. S. 22, *sub nom.* *Bowman v. Lewis*, 25 L. ed. 989.

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The words "due process of law," in the 14th Amendment of the Constitution of the United States, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder.

*Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

A trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship, which the states are forbidden by the 14th Amendment to abridge.

*Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

The first ten amendments to the Federal Constitution contain no restrictions on the powers of the states, but were intended to operate solely on the Federal government.

*Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Cook v. United States*, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268; *Re Ross*, 140 U. S. 453, *sub nom.* *Ross v. McIntyre*, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

A practical construction of the Constitution, nearly contemporaneous with its adoption, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of that instrument.

*Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Prigg v. Pennsylvania*, 16 Pet. 621, 10 L. ed. 1091; *Cooley v. Philadelphia Port Wardens*, 12 How. 315, 13 L. ed. 1003; *Scott v. Sandford*, 19 How. 616, 15 L. ed. 788; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Field v. Clark*, 143 U. S. 691, 36 L. ed. 309, 12 Sup. Ct. Rep. 495.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require.

*Martin v. Hunter*, 1 Wheat. 326, 4 L. ed. 102.

Chief Justice Marshall, in *Cohen v. Vir-*  
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*ginia*, 6 Wheat. 264, 5 L. ed. 257, declared that our Constitution was framed for ages to come and designed to approach immortality as nearly as human institutions can approach it.

In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represents the growth of generations of inhabitants a jurisprudence with which they have had no previous acquaintance or sympathy.

*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

In so far as any fugitive expressions in former opinions of this court may seem to conflict with the position maintained by the Attorney General on behalf of the United States in these cases, they are to be weighed and valued only in accordance with the wise and just rule of interpretation formulated by Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing upon all other cases is seldom completely investigated."

In the case of *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, the ancient rule which confined the maritime and admiralty jurisdiction of the United States to tidal waters was departed from on the express ground that the great importance of the question, in view of the later growth and expansion of the country, was not appreciated or understood.

Messrs. E. Ham, Alexander Porter Morse, and Charles F. Manderson filed a brief on behalf of industrial interests in the states:

The "uniform" requirement applies, as to imports and exports, only to foreign goods.

*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

Neither Congress nor the executive branch of the government has yet recognized our recent cessions of territory as a part of the United States for fiscal or revenue purposes. Is not the court bound by that?

*Williams v. Suffolk Ins. Co.* 13 Pet. 415, 10 L. ed. 226.

The Constitution, forbidding a preference to be given by any regulation of Congress or revenue to the ports of one state over the

ports of another state, was intended to apply to foreign commerce.

*Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The provision against requiring vessels bound to or from one state to enter, clear, or pay duties in another state prohibits duties on vessels, not on products in vessels, and is not applicable to this case.

*Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *Lord v. Goodall*, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224.

The words "United States," in the "uniform" clause as to imposts,—i. e., duty on foreign articles,—undoubtedly embrace the whole country, states, organized territories, and possessions only ceded. Whenever the words "United States" are used in an international sense, in the sense that public writers use the word "state" or "states," whenever the clause refers to foreign goods, affects foreign nations, and not solely domestic affairs, as the words "United States" are generally used in the Constitution, the words are given a construction that comprises the entire country,—our entire domain; otherwise the terms refer to the states only.

*Geofroy v. Riggs*, 133 U. S. 268, 33 L. ed. 645, 10 Sup. Ct. Rep. 295.

The fact is that the words "states," "United States," and "Union of states," used interchangeably in the Constitution, and as almost invariably used therein, exclude acquired territory that simply belongs to the United States.

*New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44; *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332.

The words "United States," in the declaration made by U. S. Const. art. 3, § 1, that the judicial power of the United States shall extend to all cases, etc., cannot properly comprehend ceded territory, because the judicial power of the United States is not over, nor can it extend to or comprehend, territory until Congress places it there.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *Benner v. Porter*, 9 How. 242, 13 L. ed. 122.

It is only when used in treaties or employed by writers on public law, in connection with matters affecting foreign nations, such as duties on foreign products, that the words "state," or "United States," or "States of the Union," have a wider signification. They may then well embrace our whole domain.

*Geofroy v. Riggs*, 133 U. S. 268, 33 L. ed. 645, 10 Sup. Ct. Rep. 295; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44; *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332; *Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

No prohibition exists in the Constitution against the exercise of the power to tax, complained of. It is an inference only, drawn from the spirit of the Constitution or clauses that were intended, in return for a surrender of the taxing power, to secure equality of burden among and to protect states, pre-



vent friction, and secure revenue to the Federal government, and to prevent one state taxing the domestic products of another, which even they may do, if the tax also runs to the products of the state that taxes.

*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

A presumption will never be indulged that Congress intended to exercise or usurp any unconstitutional authority, unless that conclusion is forced on the court by language altogether unambiguous.

*United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004.

The power of Congress to tax imports from the (Spanish) ceded possessions must be shown to be nonexistent beyond all doubt, and the burden is on the contentents.

*Per Strong, J. in Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162.

Until the territory is ceded by the treaty of peace, it is considered that the holding of such territory is a mere military occupation. When the acquisition is complete by cession, the laws which were in force while the territory was a part of another nation—those excepted which are political in their character, as, for instance, those attaching to the obligations of allegiance and protection—remain in force until Congress acts. After complete acquisition and until Congress acts to change them, the former local laws apply, and the President administers them through his agents.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Mitchel v. United States*, 9 Pet. 733, 9 L. ed. 291.

This is the general principle, and yet in New Mexico the code promulgated by General Kearney as military conqueror and occupant remained in force long after the cession of that territory. And in California it was the *de facto* government.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 689; *Loitensdorfer v. Webb*, 20 How. 177, 15 L. ed. 891.

The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory. Could this position be contested, the Constitution of the United States declares that Congress shall have power to make all needful rules and regulations respecting the territory of the United States.

*Sere v. Pitot*, 6 Cranch, 332, 3 L. ed. 240; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. As a government it was invested with all the attributes of sovereignty.

*Legal Tender Cases*, 12 Wall. 554, 20 L. ed. 313.

It is only when admitted as a state that territory becomes a part of the "Union of States."

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

The Constitution was made for the states, 182 U. S.

not the territories. It confers power to govern the territories, but in exercising this the United States is a sovereign dealing with dependent territory according as in its wisdom shall seem politic, wise and just, having regard to its own interests as well as those of the territories.

*Cooley*, Const. p. 36.

We know of no civilized government which does not accord some measure of protection even under the civil law. If it do not in any given case of cession, and the treaty is silent, and no provisional government has been promulgated, then, pending action by Congress, we do not see but that the existing laws, whatever they may be, remain in force.

*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

When Congress commences to legislate, it will be bound by all the prohibitions and all the limitations in the Constitution.

*Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

The clauses in the Constitution itself for the protection of persons and property had reference mainly to the action of state governments, and were limitations on their power, the exceptions being those where the experience of English and American history had forcibly demonstrated that a tendency to abuse existed.

*Cooley*, Const. Lim. 6th ed. pp. 311-359.

So that nearly, if not quite all, the provisions were mere reaffirmations of rights or privileges already existing, guaranteed by the common law.

*Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618.

A treaty is the law of the land. It is equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.

*Poster v. Neilson*, 2 Pet. 254, 7 L. ed. 415.

Arguments drawn from public policy have large influence where the course of legislation leaves no doubt as to what that policy is.

*License Tax Cases*, 5 Wall. 469, 18 L. ed. 500.

*Mr. W. Wickham Smith* argued the cause, and, with *Mr. Charles Curie*, filed a brief for appellants in No. 515:

After annexation the Hawaiian islands were a part of the United States, within the meaning of the phrase "throughout the United States," in the provision of the Constitution requiring uniformity in taxation.

There are five places in the Constitution

in which the words "the United States" are used with a preceding preposition, such as "in" or "throughout," to designate place, or in a geographical sense.

U. S. Const. art. 1, § 8, subds. 1, 4; art. 2, § 1, subd. 3; 13th Amend.; 14th Amend.

In each of these five places, with one exception, the words "in" or "throughout" the United States are intended to include the territories as well as the states. The exception is the provision for the day of choosing presidential electors.

The words "throughout the United States," in the provision for uniform naturalization and bankrupt laws, have been uniformly applied to the territories as well as the states.

U. S. Rev. Stat. § 2165; Bankrupt Act of August 18, 1841, §§ 1, 16 (5 Stat. at L. 440); Bankrupt Act of 1867 (Rev. Stat. §§ 4977, 4978); Bankrupt Act of 1898, §§ 1, 2 (30 Stat. at L. 544).

In the 14th Amendment the words "in the United States," following the words "all persons born or naturalized," relate to the states and territories and District of Columbia.

*Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

It would be a strange view of language to hold that the words "throughout the United States," in article 1, § 8, were narrower or more limited in their scope than the words "in the United States," in the 14th Amendment.

The words "or any place subject to their jurisdiction" were not inserted in the 13th Amendment to cover the territories of the United States, and to indicate any recognition that the words "within the United States" did not include the territories.

See Congressional Globe, 38th Congress, 1st Sess., pt. 2.

The doctrine that the limitations of the Constitution on the powers of Congress do not become operative in territories of the United States until introduced into them by act of Congress is one utterly repugnant to the whole spirit of the Constitution and the theory of our government, and fraught with mischief and danger.

A treaty is nothing but a law, and Congress has a right by statute to do things which are inconsistent with treaties. Indeed, it has repeatedly done so, and this court has held that the only person who could complain of such act on its part was the government with which the treaty had been made.

*Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456.

Even if the Hawaiian islands could be considered, after annexation, as having been a foreign country, the provision of the joint resolution continuing in force the theretofore existing customs relations with the United States would have been unconstitutional, as violating the provision of subd. 5, § 9, art. 1, of the Constitution, that "no tax or duty shall be laid on articles exported from any state."

*Brown v. Maryland*, 12 Wheat. 419, 6 L.

ed. 678; *Almy v. California*, 24 How. 169, 16 L. ed. 644.

*Solicitor General Richards* argued the cause and filed a brief for appellee. For his contentions see his brief as reported in *De Lima v. Bidwell*, ante, 1041.

\*Mr. Justice **Brown** delivered the opinion [221] of the court:

As the sole question presented by the record in these cases was whether Porto Rico and the Hawaiian islands were foreign countries within the meaning of the tariff law, we must hold, \*for the reasons stated in *De Lima v. Bidwell*, just decided, 182 U. S. 1, ante, 1041, 21 Sup. Ct. Rep. 743, that the board of general appraisers had no jurisdiction of the cases.

*The judgments of the Circuit Court are therefore reversed*, and the cases remanded to that court, with instructions to reverse the action of the board of general appraisers.

HENRY W. DOOLEY *et al.*, Plffs. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 222-243.)

*Duties—importations into Porto Rico from the United States—authority of President and military commander.*

1. An action to recover back duties illegally exacted and paid under protest upon imports into Porto Rico from New York is within the jurisdiction of the circuit court as a court of claims, whether the exactions were tortious or not, since the importer can waive the tort and sue upon an implied contract of the United States to refund the money, and the case is founded upon an act of Congress within the meaning of the Tucker act (24 Stat. at L. 505, chap. 359), namely a revenue law.
2. The exaction of duties on importations into Porto Rico from the United States before the cession of the island by treaty was properly made, under the war power, by General Miles's order of July 26, 1898, which merely extends the existing regulations, and by the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander in Chief.
3. Porto Rico and the United States were foreign countries with respect to each other, within the meaning of the revenue laws, while the island was in the military occupation of the United States before its cession to the United States by treaty.
4. Goods imported into Porto Rico from the United States after the cession of that island to the United States by the treaty of peace with Spain are not subject to duties imposed by order of the military commander and by the President of the United States as Commander in Chief, though the right to administer the government of the island continued in the military commander, since his power to levy duties extended only to importations from foreign countries, and by the treaty of cession the island ceased to be foreign country.

NOTE.—On martial law—see note to *Luther v. Borden*, 12 L. ed. U. S. 581.



try, and the entry of goods from the ports of the United States was free until Congress should constitutionally legislate upon the subject.

[No. 501.]

*Argued January 8, 9, 10, 11, 1901. Decided May 27, 1901.*

AN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer in an action to recover back duties paid under protest in Porto Rico. *Reversed.*

Statement by Mr. Justice **Brown**:

[222] \*This was an action begun in the circuit court, as a court of claims, by the firm of Dooley, Smith, & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of \$5,374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900, viz.:

1. From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rican duties.

2. From August 19, 1898, until February 1, 1899, under the customs tariff for Porto Rico, proclaimed by order of the President.

[223] \*3. From February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the President.

It thus appears that the duties were collected partly before and partly after the ratification of the treaty, but in every instance prior to the taking effect of the Foraker act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

A demurrer was interposed upon the ground of the want of jurisdiction, and the insufficiency of the complaint. The circuit court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error.

**Mr. Henry M. Ward** argued the cause, and, with *Messrs. John G. Carlisle* and *William Edmond Curtis*, filed a brief for plaintiffs in error:

At all times since the ratification of the treaty, Porto Rico has been a part of the United States.

*Cross v. Harrison*, 16 How. 197, 14 L. ed. 902.

As a consequence of the treaty the entire sovereignty over Porto Rico has become vested in the United States, but the executive and legislative departments of the Federal government have only such power in relation to Porto Rico as is granted to them by the Constitution.

*Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565.

Every express grant of power to any branch of the government, however absolute  
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in terms, is limited, either by express prohibitions and limitations, or by the implied limitations arising out of the grant or limitation of other powers. To illustrate: The power is granted to the President to make treaties, provided that two thirds of the Senate concur, and this power is, on its face, absolute, yet it has been repeatedly held that no treaty can be made which violates any of the provisions of the Constitution, and that the general limitations apply with as much force to the treaty-making power as to any other power expressly granted.

*New Orleans v. United States*, 10 Pet. 735, 9 L. ed. 601; *Cherokee Tobacco Case*, 11 Wall. 616, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 227.

So, Congress has the exclusive power to regulate interstate commerce, but in exercising this power it is limited by the provision that private property shall not be taken for public use without just compensation.

*United States v. Joint Traffic Asso.* 171 U. S. 571, 43 L. ed. 288, 19 Sup. Ct. Rep. 25.

By U. S. Const. art. 1, § 8, ¶ 17, exclusive power is given to Congress to legislate for the District of Columbia, but it has been held that, in spite of the exclusive grant, Congress cannot deprive the inhabitants of the District of the right to a trial by jury in common-law or criminal cases, as secured by the 6th and 7th Amendments, and that private property in the District cannot be taken for public use without just compensation.

*Callen v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 874, 19 Sup. Ct. Rep. 580.

The President is Commander in Chief of the military forces, but in waging war he cannot authorize the taking of private property for public use without just compensation.

*Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75.

Under U. S. Const. art. 4, § 4, the United States is required to guarantee to every state a republican form of government. This power is subject to the general limitations on all powers.

*Texas v. White*, 7 Wall. 700, 19 L. ed. 227.

The President had not the power under the Constitution to make or enforce the order of January 20, 1899, in so far as it imposed duties upon articles of merchandise brought into Porto Rico from other parts of the United States.

The President has no power to exercise any of the functions of Congress.

*Jecker v. Montgomery*, 13 How. 498, 14 L. ed. 240; *United States v. Weed*, 5 Wall. 69, 18 L. ed. 533.

The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode

of proceeding to carry into effect what Congress has enacted.

*Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

It was held in *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281, that courts-martial have no jurisdiction over civilians in a state which is in a condition of peace and where the civil courts are in session, and it has been repeatedly stated in many decisions that military power is at an end as soon as the conquered territory has become a part of the United States.

The power to govern the territory of the United States, like every other power granted to the Federal government, is limited by the grant and limitation of other powers and by the right secured to the individual.

If Congress had organized Porto Rico as a territory, and had given it a territorial government with all the power over the island of Porto Rico with respect to local matters which Congress itself possesses, such local legislature would not have had the power to impose any tax or burden upon commerce between any one of the states and the island of Porto Rico.

*Talbott v. Silver Bow County*, 139 U. S. 438, 35 L. ed. 210, 11 Sup. Ct. Rep. 594; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Since, then, the local legislature of Porto Rico, however broad its powers, could not enact this tariff, it seems clear that Congress in imposing this tariff against goods brought from a state into Porto Rico, and in like manner against goods brought from Porto Rico into a state, is not acting under the power to make rules and regulations for a territory, or under any power of governing a territory, arising out of the power to make war and to acquire territory by conquest or treaty.

The argument advanced by the government, that the Constitution does not extend over the territories until extended by act of Congress, is conclusively refuted by the evident proposition that, if the Constitution is extended over territory only as a law through act of Congress or by treaty, then any subsequent act of Congress inconsistent with such extension must, *pro tanto*, supersede its provisions, and leads inevitably to the deduction that constitutional rights are now enjoyed in the territories of Arizona, New Mexico, and the District of Columbia only by the grace and favor of Congress, which can violate such rights at any time. This deduction has been condemned by the decisions of this court.

*Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

In the opinion of the members of the first Congress, the provisions and limitations of the Constitution were applicable to the northwest territory, and Congress could not legislate for this territory except in the manner prescribed by the Constitution.

Act August 17, 1789 (1 Stat. at L. 50, chap. 8).

Contemporaneous practical construction of the Constitution has always been held to be of the greatest weight, and we submit that the construction by the enactment is almost conclusive upon the point that the Constitution includes every legislative act relating to the territories.

The duties are not uniform throughout the United States, as required by the terms of the 8th section of the 1st article of the Constitution.

The first internal revenue taxes were enforced and collected uniformly throughout both the states and the territories.

Act March 3, 1791 (1 Stat. at L. § 4, pp. 199, 200); Act May 8, 1792 (1 Stat. at L. 267); Act June 5, 1794 (1 Stat. at L. 378); Act July 11, 1798 (1 Stat. at L. 591); Act August 2, 1813 (3 Stat. at L. 82, chap. 56).

We contend that it is settled, both by authority and by principle, that the limitation on the power is coextensive with its exercise; that Congress derives its power to lay duties and excises for national purposes in the territories, as in every part of our domain, from this express grant; and that, as the power extends to all places subject to the legislative power of Congress, it is in all places subject to the limitation.

*Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

No claim can be maintained that the tax is levied upon property within the limits of Porto Rico. The tax is not laid upon property in Porto Rico, but it is laid before the goods have become mingled with the general mass of property on the island.

*Rhodes v. Iowa*, 170 U. S. 415, 42 L. ed. 1092, 18 Sup. Ct. Rep. 664; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 889, 1062.

The duties in question are not imposts or customs duties, but are of the nature of internal revenue duties or excises. "Imposts," or "customs duties," by the definition of these terms as stated many times by this court, can be imposed only upon goods imported from foreign countries. It may well be doubted whether Congress has any power to tax commerce between the states and a territory; but, if it has, then any tax on such commerce must be of the nature of an excise.

*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

The position that Congress, in the exercise of its legislative function for the territories, is bound by the restrictive clauses of the Bill of Rights, cannot be successfully attacked. Indeed, it can make no difference whether that body proceeds under the express grant of article 4, or under its power implied in the capacity to acquire and hold additional soil; in either case it is equally hedged round and trammelled by the safeguards of individual rights that are contained in the first eight amendments. No American citizen in whose veins flows any drop of Saxon blood, and who inherits the results of the glorious struggle which his English forefathers maintained with power



and prerogative, can deny or question this doctrine.

Pomeroy, Const. L. § 708.

Mr. John G. Carlisle also argued the cause for plaintiffs in error:

As between the governments of Spain and the United States, the treaty of peace took effect from its date.

*United States v. Reynes*, 9 How. 127, 13 L. ed. 74; *Davis v. Concordia Police Jury*, 9 How. 280, 13 L. ed. 138; *Haver v. Yaker*, 9 Wall. 32, sub nom. *Jecker v. Magee*, 19 L. ed. 571.

So far as we have been able to ascertain, no attempt was ever before made by either a President or Congress to impose duties upon the products of the states or territories imported into a conquered or ceded district or country, or even into a district or territory temporarily held in subjection by our authorities.

In the *Tampico Case* the district was treated as a foreign country temporarily held by our forces, and duties were collected at our home ports under the then existing general tariff law; while in the California case duties were collected only on foreign goods, a part of the time under a tariff adopted by the military government, and after the ratification under our general tariff law of 1846, which this court said, in *Cross v. Harrison*, 16 How. 197, 14 L. ed. 902, took effect there as soon as notice of the ratification was received.

The President can at no time and in no place assume the power of legislation over national subjects, such as the regulation of the external commerce of the states and the imposition of taxes and duties upon the products of the states lawfully carried out of the states for sale. And even if he possesses such power during a war and while temporarily occupying the enemy's country, it ceases the moment the country is acquired by the United States, whether by conquest or cession.

When this period arrives the conquered or ceded district becomes at once subject to the jurisdiction of Congress, in which the Constitution has vested the whole legislative power of the government, although that body may not at once assume its constitutional authority over it.

The question whether the Constitution should be declared to be the supreme law of the whole land, or only the supreme law of the respective states and their inhabitants or citizens, was presented in the Federal convention of 1787, and was finally disposed of by the adoption of the clause as it now stands in the Constitution, which declares it to be the supreme law of the land.

1 Elliot, Debates, pp. 46, 71, 72, 100, 120, 151.

While international law is a part of the municipal law of this country, in all cases to which it is applicable, it is not a part of the fundamental or organic law of the land, and therefore it does not create or confer any governmental powers.

If Congress possesses the exclusive power to govern the territories, it can, of course, 182 U. S.

regulate the commerce between them; but by what authority, except the authority derived from that part of the Constitution referred to, can it regulate and control the commerce between a territory and a state?

The exclusive power of Congress to regulate commerce extends, under the Constitution, all over the United States, and includes commerce between the states and territories, because the territories are within the United States and parts of the United States, and because the subject to which the power relates is of a national character and is a unit, the proper control of which requires the enactment of uniform and harmonious laws and regulations.

*Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Beginning with the act of 1789, passed immediately after the organization of the government, and following the legislation upon the subject down to the present date, there cannot be found a single tariff act that has not been applied in all its provisions to all the territories and all the states.

The word "imports," as used in that clause of the Constitution which confers the taxing power upon Congress, means only articles brought into this country from a foreign country; and the word "exports," as used in the clause prohibiting the states from taxing exports, means only articles sent from this country to a foreign country.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 624, 29 L. ed. 258, 5 Sup. Ct. Rep. 1091.

Now, if the same construction should be given to the clause prohibiting the general government from laying such a tax as was given to it in the case of the states, as long as Porto Rico remained a foreign country, or a part of a foreign country, however long or short this court may find that period to have been, a tax or duty laid upon the products of one of the states because they were exported to that island was, undoubtedly, an export tax or duty in violation of this express provision of the Constitution.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

But this court has never given to the words "articles exported," used in the clause which prohibits the imposition of a tax or duty on articles exported from any state, the same meaning that was given to the word "exports" as it stands in the prohibition upon the states. On the contrary, the opinion of the court delivered by Mr. Justice Miller in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, shows very clearly that he did not think the general clause prohibiting all taxes or duties upon exports from any state applied only to articles carried to a foreign country, but that it must be construed as applying to every export from a state, whether it goes to a foreign country or not.

Mr. Henry M. Ward also filed a separate brief for plaintiffs in error on the question of jurisdiction:

The claims in suit are based upon rights

secured to the plaintiffs by the Constitution. The duties were paid to the military authorities in the one case, and to the customs authorities in the other, in order that plaintiffs might obtain possession of their property. Plaintiffs' title to such property was not disputed by the government or any of its officers, but the duties were exacted in each case under the authority of the United States, and the moneys collected were received and are now held by the United States. These actions are therefore in the nature of actions for money had and received, and come within the decisions in *Medbury v. United States*, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244.

The jurisdiction of the court below may also be sustained under the decision in *Ingram v. United States*, 32 Ct. Cl. 147.

The court below entertained jurisdiction of the subject-matter, and the procedure followed is substantially that adopted in the recent case of *Sherman v. United States*, 178 U. S. 150, 44 L. ed. 1014, 20 Sup. Ct. Rep. 779, in which jurisdiction was entertained both by the trial court and by this court on writ of error.

*Solicitor General Richards* argued the cause and filed a brief for defendant in error:

If this case involves wholly or in part the collection of revenue, it is not within the jurisdiction of a United States circuit court under the act of March 3, 1887, giving that court in certain cases concurrent jurisdiction with the court of claims.

*Nichols v. United States*, 7 Wall. 129, 19 L. ed. 128.

The essence of the claim in this case is that the goods of the claimant were not imported articles, and therefore not subject to the payment of the duties assessed. But if this is so, the act of the government officers in seizing and holding the goods was unquestionably tortious.

*Re Fassett*, 142 U. S. 479, 35 L. ed. 1086, 12 Sup. Ct. Rep. 295.

The claimant could not waive the tort and sue to recover the duty paid as upon an implied contract.

*Hill v. United States*, 149 U. S. 598, 37 L. ed. 864, 13 Sup. Ct. Rep. 1011.

However just it may be that a person whose property or money has been tortiously obtained by the government should have redress therefor, it is apparent that no jurisdiction has been conferred upon any court to grant it.

*Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan Fire-arms Mfg. Co.* 156 U. S. 566, 39 L. ed. 534, 15 Sup. Ct. Rep. 420.

For his other contentions see his brief as reported in *De Lima v. Bidwell*, ante, 1041.

*Attorney General Griggs* also argued the cause for defendant in error. For his con-

tentions see his brief as reported in *Goetze v. United States*, ante, 1065.

\*Mr. Justice **Brown** delivered the opinion[223] of the court:

1. The jurisdiction of the court in this case is attacked by the government upon the ground that the circuit court, as a court of claims, cannot take cognizance of actions for the recovery of duties illegally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker act (24 Stat. at L. 505, chap. 359), the court of claims was vested with jurisdiction over, "first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable;" \*and by § 2 the district and circuit[224] courts were given concurrent jurisdiction to a certain amount.

The 1st section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

In support of the first proposition we are cited to the case of *Nichols v. United States*, 7 Wall. 122, 19 L. ed. 125, in which it was broadly stated that "cases arising under the revenue laws are not within the jurisdiction of the court of claims." The action in that case was brought to recover an excess of duties paid upon certain liquors which had leaked out during the voyage, and, being thus lost, were never imported in fact into the United States. Plaintiffs paid the duties, as exacted, but made no protest, and subsequently brought suit in the court of claims for the overpayment. The act in force at that time gave the court of claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The court held, first, that the duties could not be recovered because they were not paid under protest, and, second, that Congress did not intend to confer upon the court of claims jurisdiction of cases arising under the revenue laws. in-



asmuch as, by the act of February 26, 1845 (5 Stat. at L. 727, chap. 22), Congress had given a right of action against the collector in favor of persons "who have paid, or shall hereafter pay, money, as and for duties, under protest . . . in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable [225] in part or in whole by law," provided that protests were duly made in writing. It was held that this remedy was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give to the taxpayer and importer a different and further remedy.

Subsequent statutes, however, have so far modified that special remedy that it can no longer be made available, and the broad statement in the *Nichols Case*, that revenue cases are not within the cognizance of the court of claims, if still true, must be accepted with material qualifications. By the customs administrative act of 1890, as we have just held in *De Lima v. Bidwell*, 182 U. S. 1, ante, 1041, 21 Sup. Ct. Rep. 743, an appeal is given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," to a board of general appraisers, whose decision shall be final and conclusive "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification," unless application be made for a review to the circuit court of the United States. This remedy is doubtless exclusive as applied to customs cases; but, as we then held, it has no application to actions against the collector for duties exacted upon goods which were not imported at all. Such cases, although arising under the revenue laws, are not within the purview of the customs administrative act; as for such cases there is still a common-law right of action against the collector, and we think also by application to the court of claims. There would seem to be no doubt about plaintiffs' remedy against the collector at San Juan.

In the *Nichols Case* it was held that, as there was a remedy by action against the collector, expressly provided by statute, that remedy was exclusive. In *De Lima v. Bidwell* we held that, although no other remedy was given expressly by statute than that provided by the customs administrative act, there was still a common-law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the court of claims.

[226] \*But conceding that the *Nichols Case* does not stand in the way of a suit in the court of claims, the government takes the position that a suit in the United States to recover back duties illegally exacted by a collector of customs is really an action "sounding in tort," though not an action "for damages, liquidated or unliquidated," within the 182 U. S.

fourth class of cases enumerated in the Tucker act.

There are a number of authorities in this court upon that subject which require examination. The question is whether any claim sounding in tort can be prosecuted in the court of claims, notwithstanding the words "not sounding in tort," in the Tucker act, are apparently limited to claims for damages, liquidated or unliquidated. The question was first considered in *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010, under the statute above cited, giving the court of claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The suit was brought to recover for the use and occupation of certain lands and buildings of which possession had been forcibly taken by agents of the government, against the will of Langford, who claimed title to the lands. It was held that the act of the United States in taking and holding possession was an unequivocal tort, and a distinction was drawn between such a case and one where the government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which class there arises an implied obligation to pay the owner its just value. "It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property." It was held that the limitation of the act to cases of contract, express or implied, "was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

\*The case was rested largely upon that of [227] *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453, in which an army contractor who had agreed to furnish certain oats at a fixed price had, after the delivery of part of the amount, been released from the obligation to deliver the balance. He was, however, carried before the military authority, and, influenced by threats, agreed to deliver, and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference between the contract price and the market price of the oats at the time of delivery. It was said that "if such pressure was brought to bear upon him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable," but that it was not within the court of claims act.

The act of March 3, 1887 (the Tucker act), was first considered by this court in *United States v. Jones*, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669, in which it was held not



to confer upon the court of claims jurisdiction in equity to compel the issue and entry of a patent for public land, following *United States v. Alire*, 6 Wall. 573, 18 L. ed. 947, and *Bonner v. United States*, 9 Wall. 156, 19 L. ed. 666. In delivering the opinion, Mr. Justice Bradley compared the original act with the Tucker act, and held that there was no such difference in language as to justify an equitable jurisdiction to compel the issue of a patent.

In *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011, it was held that a claim for damages for the use and occupation of land under tide water, for the erection and maintenance of a lighthouse, without the consent of the owner, but not showing that the United States had acknowledged any right of property in him as against them, was a case sounding in tort, of which the circuit court had no jurisdiction under the Tucker act. It was said that "the United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract." "An action in the nature [228] of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser." No distinction was noticed between the phraseology of the original act and the Tucker act, though it seems to have been assumed that the case was one for the recovery of "damages" sounding in tort.

In *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85, it was held that the court of claims had no jurisdiction of an action upon a claim against the government for the wrongful appropriation of a patent by the United States, against the protest of the patentee. It was said to be an action for damages sounding in tort, and therefore not maintainable. "Not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction, and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of the court of claims that it had no jurisdiction over an action to recover for the tort."

In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the court

of claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker act, has been repeatedly sustained.

Thus, in *United States v. Kaufman*, 96 U. S. 567, 24 L. ed. 792, a brewer who had been illegally assessed for a special tax upon his business \*was held entitled to bring suit in [229] the court of claims to recover back the amount, upon the ground that no special remedy had been provided for the enforcement of the payment, and consequently the general laws which govern the court of claims may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that a liability created by statute without a remedy may be enforced by a common-law action. The *Nichols Case* was distinguished upon the ground that the statute there had provided a special remedy.

So, too, in *United States v. Real Estate Sav. Bank*, 104 U. S. 728, 26 L. ed. 908, the court of claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

In *Campbell v. United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759, it was held that a party claiming to be entitled to a drawback of duties upon manufactured articles exported might, when payment thereof has been refused, maintain a suit in the court of claims, because the facts found raised an implied contract that the United States would refund to the importer the amount he had paid to the government. There was here no question of tort.

In *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, it was held, following the observation of Mr. Justice Miller in *Langford v. United States*, that where property to which the United States asserts no title was taken by their officers or agents, pursuant to an act of Congress, as private property for public use, there was an implied obligation to compensate the owner, which might be enforced by suit in the court of claims.

So, too, in *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717, it was held that a suit might be maintained in the court of claims to recover for the use of a patented invention, if the right of the patentee were acknowledged. To the same effect are *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104, and *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

In *Medbury v. United States*, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503, it was held the court of claims had jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant which grant was, subsequent to the payment, forfeited by act of Congress for nonconstruction of the road.



[230] \*In *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, the same right was treated as existing in favor of a party who sued for a commission upon the amount of certain adhesive stamps which he had at one time purchased for his own use from the Bureau of Internal Revenue. See also *United States v. Lawson*, 101 U. S. 164, 25 L. ed. 860; *Mosby v. United States*, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327.

2. In their legal aspect, the duties exacted in this case were of three classes: (1) The duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander in Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. While it is true the treaty of peace was signed December 10, 1898, it did not take effect upon individual rights until there was an exchange of ratifications. *Haver v. Yak-er*, 9 Wall. 32, *sub nom. Jecker v. Magee*, 19 L. ed. 571. Upon the occupation of the country by the military forces of the United States the authority of the Spanish government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, General Miles was fully justified by the laws of war. The doctrine upon this subject is thus summed up by Halleck in his work on International Law (vol. 2, page 444): "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war, and flows directly from the right to conquer. We therefore do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession, during its \*military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world and confirmed by the writings of publicists and decisions of courts,—in fine, from the law of nations. . . .

[231] The municipal laws of a conquered territory or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. . . . He, nevertheless, has all the powers of a *de* 182 U. S.

*facto* government, and can at his pleasure either change the existing laws or make new ones."

In *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 393, 22 L. ed. 354, it was said, with respect to the powers of the military government over the city of New Orleans after its conquest, that it had "the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject." See also *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. ed. 701; *Fleming v. Page*, 9 How. 603, 13 L. ed. 276; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

But it is useless to multiply citations upon this point, since the authority to exact similar duties was fully considered and affirmed by this court in *Cross v. Harrison*, 16 How. 182, 14 L. ed. 896. This case involved the validity of duties exacted by the military commander of California upon imports from foreign countries, from the date of the treaty of peace, February 3, 1848, to November \*13, [232] 1849, when the collector of customs appointed by the President entered upon the duties of his office. Prior to the treaty of peace, and from August, 1847, duties had been exacted by the military authorities, the validity of which does not seem to have been questioned. Page 189, L. ed. 899: "That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States." The duties were held to have been legally exacted. Speaking of the duties exacted before the treaty of peace, Mr. Justice Wayne observed (p. 190, L. ed. 900): "No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations." It was further held that the right to collect these



duties continued from the date of the treaty up to the time when official notice of its ratification and exchange were received in California. Owing to the fact that no telegraphic communication existed at that time, the news of the ratification of this treaty did not reach California until August 7, 1848, during which time the war tariff was continued. The question does not arise in this case, as the ratifications of the treaty appear to have been known as soon as they were exchanged.

The court further held in *Cross v. Harrison* that the right of the military commander to exact the duties prescribed by the tariff laws of the United States continued until a collector of customs had been appointed. Said the court: "The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory [233] was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence, of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. . . . We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that, until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

Upon this point that case differs from the one under consideration only in the particular that the duties were levied in *Cross v. Harrison* upon goods imported from foreign countries into California, while in the present case they were imported from New York, a port of the conquering country. This, however, is quite immaterial. The United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandise imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into that island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws, is established by the case of *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, in which we held that the capture and occupation of a Mexican port during our war with that country did not make it a part of the United States, and that it still remained a foreign country within the meaning of the revenue laws. The right to exact duties upon goods imported into Porto Rico from New York arises from

the fact that New York was still a foreign country with respect to Porto Rico, and from the correlative right to exact at New York duties upon merchandise imported from that island.

3. Different considerations apply with respect to duties levied \*after the ratification [234] of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have just held in *De Lima v. Bidwell*, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress. *Cross v. Harrison*, 16 How. 182, 14 L. ed. 896. At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance. By that act Porto Rico ceased to be a foreign country, and the right to collect duties upon imports from that island ceased. We think the correlative right to exact duties upon importations from New York to Porto Rico also ceased. The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance, it is clear that, while a military commander during the Civil War was in the occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions,—in other words, they would not extend beyond the necessities of the case. Thus, in the case of *The Admittance* (*Jecker v. Montgomery*, 13 How. 498, 14 L. ed. 240) it was held that neither the President nor the military commander could establish a court of prize competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war "were nothing more than the agents of the military power, to assist \*it in preserving order in the [235] conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize," although



Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. *The Grapeshot*, 9 Wall. 129, 133, *sub nom. The Grapeshot v. Wallerstein*, 19 L. ed. 651, 653.

So, too, in *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75, it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading, and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is *Mostyn v. Fabrigas*, 1 Cowp. 180.

In *Raymond v. Thomas*, 91 U. S. 712, 23 L. ed. 434, a special order, by the officer in command of the forces in the state of South Carolina, annulling a decree rendered by a court of chancery in that state, was held to be void. In delivering the opinion Mr. Justice Swayne observed: "Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."

Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that, until Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

An unlimited power on the part of the Commander in Chief to exact duties upon imports from the states might have placed [236] \*Porto Rico in a most embarrassing situation. The ratification of the treaty and the cession of the island to us severed her connection with Spain, of which the island was no longer a colony, and with respect to which she had become a foreign country. The wall of the Spanish tariff was raised against her exports, the wall of the military tariff against her imports, from the mother country. She received no compensation from her new relations with the United States. If her exports, upon arriving there, were still subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subjected to duties prescribed by the Commander in Chief, she would be placed in a position of practical isolation, which could not fail to be disastrous to the business and finances of an island. It had no manufactures or markets of its own, and was dependent upon the markets of other countries for the sale of her productions of coffee, sugar, and tobacco. In our opinion the authority of the President as Commander in Chief to exact duties upon imports from the 182 U. S.

United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.

*The judgment of the Circuit Court is therefore reversed*, and the case remanded to that court for further proceedings in consonance with this opinion.

Mr. Justice White, with whom concur Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice McKenna, dissenting:

The question involved in this case is the validity of certain impost duties laid on goods coming from the United States into Porto Rico under the tariff imposed by the military commander and under tariffs proclaimed by the President as Commander in Chief. The duties collected prior to the ratification of the treaty of peace are now decided to have been valid; those collected after the ratification of the treaty are decided to have been unlawfully imposed, upon the doctrine announced in the \*case of *De Lima* [237] *v. Bidwell*, just previously decided, 182 U. S. 1, ante, 1041, 21 Sup. Ct. Rep. 743. I concur in so far as it is held that the duties collected prior to the ratification were validly collected, but dissent in so far as it is decided that the duties collected after the ratification were illegal. I might content myself with referring to the dissent in the *De Lima Case* as expressing the grounds which prevent me from concurring in this case; but the importance of the subject and the grave consequences which I think are to be entailed by the decision now announced lead me to refer to some additional considerations.

As a prelude to doing so, however, let me briefly *résumé* the propositions which seem to me to have been hitherto established.

1. There is a *non sequitur* involved in stating that the question is whether Porto Rico was a foreign country *within the meaning of the tariff laws*, and then discussing, not the question thus stated, but a different subject; that is, whether the territory ceded by the treaty with Spain came under the sovereignty of the United States by the effect of the cession.

2. And the confusion which arises from stating one question and then analyzing and expressing opinions on another and different one is additionally demonstrated when it is considered that most of the authorities now relied upon in relation to the extension of the sovereignty of the United States over territory were cited to the court in *Fleming v. Page*, to establish that the dominancy of the sovereignty of the United States over a territory was the proper test by which to determine whether, under all circumstances, the revenue laws of the United States were applicable, and the court decided adversely to such contention. *Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

3. As the treaty with Spain provided "that the civil rights and political status of the native inhabitants should be determined by Congress," in reason this provision should



not be controlled by conclusions deduced from treaties made by the United States in the past with other countries, which did not contain such a provision, but expressly stipulated to the contrary.

[238] 4. In view of the terms of the treaty with Spain, to hold that the status of the ceded territory as previously existing was *ipso facto* changed, within the meaning of the tariff laws of the \*United States, without action by Congress, is to deprive that body of the rights which the stipulations of the treaty sedulously sought to preserve.

5. Even ignoring the terms of the treaty, the conclusion that the status of the ceded territory, within the meaning of the tariff laws, was changed by the treaty before Congress could act on the subject, can only be upheld by disregarding the opinion of the court expressed by Mr. Chief Justice Taney in *Fleming v. Page*, and treating the important declarations on this subject by him in that case as mere *dicta*.

6. The result, also, cannot be supported without a misconception of the case of *Cross v. Harrison*, since that decision enforced the payment of a tariff duty levied, after the ratification of the treaty with Mexico, at a different rate from that imposed by the existing tariff laws of the United States, and since, moreover, that case can only be harmoniously interpreted by recalling the fact that several months after the notification of the ratification of the treaty with Mexico was received in California the President ordered the tariff laws of the United States to be enforced in California, and this authority may well have been treated as not only a direction for the future, but as a ratification of the act of the military officials in enforcing the tariff laws of the United States after they had learned of the ratification of the treaty.

7. In no single case from the foundation of the government except, if it can be called an exception, in the brief period prior to the President's order enforcing the tariff laws in California, as above stated, have the revenue laws of the United States been enforced in acquired territory without the action of the President or the consent of Congress, express or implied.

8. The rule of the immediate bringing, by the self-operating force of a treaty, ceded territory inside of the line of the tariff laws of the United States, denies the existence of powers which the Constitution expressly bestows, overthrows the authority conferred on Congress by the Constitution, and is impossible of execution.

[239] Having thus imperfectly summarized the propositions which are more lucidly stated in the dissent in the *De Lima Case*, I\* come to express the additional thoughts which have been previously adverted to.

Before the outbreak of the war with Spain it cannot be disputed that Porto Rico was embraced within the words "foreign country," as used in the tariff laws. Why was that island so embraced without specific reference to it in such laws? is the question which naturally arises. To answer this question it

is essential to determine what is the import of the words "foreign country," not internationally, but within the meaning of the tariff laws. It is settled that the power of Congress to lay an impost duty does not give the right to levy such a duty on merchandise coming from one part of the United States to the other. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382. It follows, therefore, that when, in the exercise of its power to lay impost duties, Congress specifies such duties are to be collected on merchandise from foreign countries, those words but generically embody the declaration of Congress that it is exerting its taxing power conformably to the Constitution; that is, it is causing the taxes which are levied to be applicable to the entire area to which they may be extended under the Constitution. The command, then, in tariff laws, that impost duties when laid shall be collected on all merchandise coming from "foreign countries," is but a provision that they are to be levied on merchandise arriving from countries which are not a part of the United States, *within the meaning of the tariff laws*, and which are hence subject to such duties. It must follow that, as long as a locality is in a position where it is subject to the power of Congress to levy an impost tariff duty on merchandise coming from that country into the United States, such country must be a foreign country *within the meaning of the tariff laws*. Now this court has just decided in *Downes v. Bidwell*, 182 U. S. 244, *post*, 1088, 21 Sup. Ct. Rep. 770, that, despite the treaty of cession, Porto Rico remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States. If, however, it remained in that position, how then can it be now declared that it ceased to be in that relation because it was no longer foreign country within the meaning of the tariff laws? But, it is said, although when the treaty was ratified the country \*at once [240] ceased to be foreign within the meaning of the tariff laws it yet subsequently became foreign for the purpose of the tariff laws when the act of Congress imposing a duty on goods from Porto Rico took effect. To what, in reason, does this proposition come? In my opinion only to this: Congress, under the Constitution, may not impose a tariff duty on goods brought from a country which has ceased to be foreign, but, although a country has so ceased to be foreign within the meaning of the tariff laws, nevertheless Congress may thereafter cause it to become foreign within such intendment by levying an impost upon its products coming into the United States. This is but to say an act of Congress can have the effect of changing the status of a territory from not foreign within the meaning of the tariff laws to foreign within such meaning, although a law attempting to so do would be plainly in violation of the Constitution, if the principle announced in this case be true, that the treaty from the moment of its ratification by its own force caused the ceded territory to be



no longer foreign within the meaning of the tariff laws.

The only escape my mind can point out from this deduction is to say that territory which has become domestic, and therefore ceases to be foreign within the meaning of the tariff law, can yet be constitutionally treated by Congress as if it had not ceased to be foreign and had not become domestic. But this would expressly overrule *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, and cannot, therefore, be the rule of decision now announced, since that case is referred to and cited approvingly in the opinion of my brethren who dissent in the *Downes Case*, and who do not dissent from the opinion of the court now announced.

Passing these considerations, it is impossible for me to conceive that Porto Rico ceased to be subject to the tariff laws, for the reasons fully stated by me in my concurring opinion in *Downes v. Bidwell*, which need not be reiterated. But, for the purposes of this case and *arguendo* only, let me now admit that the treaty incorporated Porto Rico into the United States despite the provisions which were contained in that instrument. Does it follow that such territory at once ceased to be subject to the tariff laws before Congress had the time to act? I am constrained to think not.

The power to originate revenue laws is lodged by the Constitution in the House of Representatives. When a tariff bill is drawn the revenue to arise from it must depend upon the sum of the articles which are to be imported and which are to pay the duty provided in the law. Let me illustrate it: Suppose a tariff law is so adjusted that the greater portion of the revenue which it seeks to provide is drawn from a few articles of general consumption. The duties to be paid on these articles, when imported, will therefore largely furnish the revenues essential to carry on the government. Suppose a treaty of cession which embraces territory producing in large quantities the articles upon which the existing tariff laws mainly rely for revenue to sustain the government. If, instantly, on the ratification of the treaty, before Congress can remodel or change the laws so as to provide for the support of the government, the articles stated coming into the United States from the country in question would be within the tariff line, and thereby entitled to free entry into the United States, what would become of the power of the House of Representatives and of the Congress on the subject of revenue as provided in the Constitution? It may be said in answer to this suggestion that Congress could make the change, and whilst of course a brief interval of disaster would ensue, during which there would be no revenue, the country must suffer the consequences during such interval. But does this follow? Suppose the political state of the country should be such that there was a difference of opinion as to the policy to be embodied in a tariff law, analogous to that which existed when California was acquired from Mexico, where, in consequence of division on the sub-

ject of the slavery question between the different branches of Congress, it was impossible to enact legislation conferring a territorial government upon California, what would be the situation then? Look at it practically from another point of view. Certainly, before revenue laws can be made operative in a district or country it is essential that the situation be taken into account, for the purpose of establishing ports of entry, collection districts, and the necessary "machinery" to enforce them. Of course, it is patent that such investigations cannot be made prior to acquisition. But, as the laws immediately extend, without action of Congress, as the result of acquisition, it must follow that they extend, although none of the means and instrumentalities for their successful enforcement can possibly be devised until the acquisition is completed. This must be, unless it be held that there is power in the government of the United States to enter a foreign country, examine its situation, and enact legislation for it before it has passed under the sovereignty of the United States. From the point of view of the United States, then, it seems to me that the doctrine of the immediate placing of the tariff laws outside the line of newly acquired territory, however extreme may be the opinion entertained of the doctrine of immediate incorporation, is inadmissible and in conflict with the Constitution.

Let me look at and illustrate it from the point of view of the ceded territory. In doing so let me take for granted the accuracy of suggestions which have been advanced in argument. It is said that the public revenues of the island of Porto Rico, except only such as were raised by a burdensome and complicated excise tax on incomes and business vocations, had always been chiefly obtained by duties on imports and exports; that our internal revenue laws, if applied in the island, would prove oppressive and ruinous to many people and interests; that one of the staple productions of the island—coffee—had always been protected by a tariff duty, whereas under our tariff laws coffee was admitted into the United States free of duty; that there was no system of direct taxation of property in operation when the island was ceded, there was no time to establish one, and such a system, moreover, would have entailed upon the people burdens incapable of being borne. I cannot conceive that under the provisions of the Constitution conferring upon Congress the power to raise revenue, consequences such as would flow from immediately putting in force in Porto Rico the revenue laws of the United States could constitutionally be brought about without affording to the Congress the opportunity to adjust the revenue laws of the United States to meet the new situation.

\*All these suggestions, however, it is argued, but refer to expediency, and are entitled to no weight as against the theory that, under the Constitution, the tariff laws of the United States took effect of their own force immediately upon the cession. But this is

fallacious. For, if it be demonstrated that a particular result cannot be accomplished without destroying the revenue power conferred upon Congress by the Constitution, and without annihilating the conceded authority of the government in other respects, such demonstration shows the unsoundness of the argument which magnifies the results flowing from the exercise by the treaty-making power of its authority to acquire, to the detriment and destruction of that balanced and limited government which the Constitution called into being.

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(See S. C. Reporter's ed. 243, 244.)

The decision in this case follows that in *Dooley v. United States*, *ante*, 1074.

[No. 509.]

Argued January 8, 9, 10, 11, 1901. Decided May 27, 1901.

**A** PPEAL from a judgment of the Court of Claims sustaining a demurrer to a petition to recover duties paid under protest in Porto Rico. *Reversed*.

Statement by Mr. Justice **Brown**:

This was a petition to the court of claims by a British subject, to recover duties exacted by the collector of the port of San Juan, and paid under protest, upon goods, wares, and merchandise of the growth, produce, or manufacture of the United States, between August 12, 1898, and December 5, 1899.

The same demurrer was filed and the same judgment was entered as in the preceding case.

**Mr. Alphonso Hart** argued the cause, and, with *Messrs. John C. Chaney, John G. Carlisle, and Charles C. Leeds*, filed a brief for appellant:

States, territories, and districts are all alike parts of the great American Empire, throughout which uniformity in the imposition of imposts, duties, and excises is to be observed.

Marshall, Ch. J., in *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

California became a part of the United States the moment the treaty of peace between the United States and Mexico, of February 3, 1848, was signed; and merchants bringing goods into California could be compelled to pay duty, even though no port of entry was established or collector appointed.

*Cross v. Harrison*, 16 How. 164, 14 L. ed. 889. This case has been cited with approval as follows: *The Amy Warwick*, 2 Sprague, 134, Fed. Cas. No. 341; *Hamilton v. Dillin*, 21 Wall. 87, 22 L. ed. 530; *New*

*Orleans v. New York Mail S. S. Co.* 20 Wall. 394, 22 L. ed. 358; *Coleman v. Tennessee*, 97 U. S. 536, 24 L. ed. 1129; *Dow v. Johnson*, 100 U. S. 183, 25 L. ed. 641.

Upon the acquisition of territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory.

*Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of the government, state and national.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *Reynolds v. United States*, 98 U. S. 162, 25 L. ed. 249; *Capital Traction Co. v. Hof*, 174 U. S. 5, 43 L. ed. 874, 19 Sup. Ct. Rep. 580; *The City of Panama*, 101 U. S. 453, *sub nom. The City of Panama v. Phelps*, 25 L. ed. 1061; *Cohen v. Virginia*, 6 Wheat. 424, 5 L. ed. 296; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *First Nat. Bank v. Yankton County*, 101 U. S. 131, 25 L. ed. 1046; *Talbott v. Silver Bow County*, 139 U. S. 441, 35 L. ed. 210, 11 Sup. Ct. Rep. 594; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

The Constitution, by its own force, carries the right of trial by jury to every person over whom the authority of the government extends.

*Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

The securities for personal liberty which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere; and citizens of the territories, as well as citizens of the states, may claim the benefit of their protection.

*Cooley*, Const. L. pp. 37, 38.

The conduct of those in charge of public affairs has been, as a rule, based upon the idea that the Constitution, of its own force, reaches over all lands subject to national jurisdiction.

Treaty of Paris, September 3, 1783; Washington's Messages to Congress, September 16, 1789, January 8, 1790.

The President has no legislative authority, and his acts fixing a tariff for Porto Rico are void.

*Curtis*, Executive Power (1862); 4 Webster's Works, p. 186; Chase, Ch. J., in *Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *Ex parte Valandingham* (Rickey & Carroll, p. 226) Leavitt, J.; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.



*Messrs. John O. Chaney and Alphonso Hart* filed a further brief for appellant in reply:

The facts set up in the petition in appellant's case show that appellant paid the duties demanded of him by the army officers in Porto Rico under protest, and relied upon the government to restore the same to him should it after all be found that the duties were unlawfully exacted. The court of claims therefore had jurisdiction.

*Mosby v. United States*, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327.

It is also hereby suggested that the court of claims has jurisdiction of this action, on the ground that it arises under a regulation of the executive department.

Act February 24, 1855 (10 Stat. at L. 612); *Harvey v. United States*, 3 Ct. Cl. 38.

The question of whether an article is imported merchandise and subject to the imposition of duties cannot be raised before the board of appraisers, or upon any appeal from their decision; and to institute proceedings under the customs administrative act amounts to a concession that the article is imported merchandise and subject to imposition of duties.

*Re Fassett*, 142 U. S. 479, 35 L. ed. 1086, 12 Sup. Ct. Rep. 295.

The cases based upon *Nichols v. United States*, 7 Wall. 122, 19 L. ed. 125, in which the jurisdiction of this court is denied on claims arising under the revenue laws where Congress has provided "a system" for their adjustment, do not apply to the claim at bar, which is based, not upon any revenue law, but upon an alleged unconstitutional exercise of power by the President and the military authorities.

No other method having been provided by Congress for the hearing and determination of this class of claims, it follows that this claim is within the general jurisdiction of this court.

*Smithmeyer v. United States*, 147 U. S. 342, 37 L. ed. 196, 13 Sup. Ct. Rep. 321; *Campbell v. United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; *Broulathour v. United States*, 7 Ct. Cl. 555; *De Bow v. United States*, 11 Ct. Cl. 672; *Boughton v. United States*, 13 Ct. Cl. 284; *Kettler v. United States*, 21 Ct. Cl. 175; *Simons v. United States*, 19 Ct. Cl. 603; *Foster v. United States*, 32 Ct. Cl. 170.

The petitioner's claim "is founded upon the Constitution of the United States," and is clearly within the jurisdiction conferred upon this court by the Tucker act (24 Stat. at L. 505). "That the court of claims shall have jurisdiction to hear and determine all claims founded upon the Constitution of the United States is as comprehensive and untrammelled a grant of judicial authority as the legislative power could well make."

*Stovall v. United States*, 26 Ct. Cl. 226.

It is well settled that an action against the United States to recover money illegally taken from the owner by an officer or agent of the United States acting under the orders of his superior officer or the regulations of an executive department, or money paid to

the government's agent in order to enable the owner to take possession of his property, is in the nature of an action for money had and received, based upon an implied contract within the meaning of the Tucker act.

*Ingram v. United States*, 32 Ct. Cl. 147; *Johnston v. United States*, 17 Ct. Cl. 157; *Simons v. United States*, 19 Ct. Cl. 601; *New York Consol. Card Co. v. United States*, 20 Ct. Cl. 174; *Kettler v. United States*, 21 Ct. Cl. 175; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; *Campbell v. United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759.

The petitioner's case is that of money which has been wrongfully paid and may be recovered back.

*La Peyre v. United States*, 8 Ct. Cl. 165, 17 Wall. 191, 21 L. ed. 606; *Lawson v. United States*, 14 Ct. Cl. 332, 101 U. S. 164, 25 L. ed. 860.

If the commissioners made an illegal assessment of taxes under 12 Stat. at L. 292, 422, the person who paid more than his proportion may recover, under U. S. Rev. Stat. § 3689.

*Seabrook v. United States*, 21 Ct. Cl. 39; see also *Simons v. United States*, 19 Ct. Cl. 601.

Money illegally exacted by a government officer under circumstances which make payment necessary to avoid the discontinuance of the business in which the payer is engaged may be recovered.

*Swift & C. & B. Co. v. United States*, 111 U. S. 23, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, 105 U. S. 691, 26 L. ed. 1108.

The court has jurisdiction of claims arising under the revenue laws, based upon an implied promise to repay money collected, though there may be another mode of recovery.

*Schlesinger v. United States*, 1 Ct. Cl. 16; *Boehm v. United States*, 20 Ct. Cl. 241.

Proceeds of property illegally seized by the United States may be recovered.

*Thayer v. United States*, 20 Ct. Cl. 139.

If petitioner had not protested against this payment of duties and taxes, the Attorney General would have insisted, doubtless, that the same was a voluntary payment which could not be recovered back. Now that the petitioner has protested, he declares that this protest makes the action a tort, but this is not so. Where money is illegally exacted the law creates an obligation to refund it.

*Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299; *Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 28 L. ed. 899, 5 Sup. Ct. Rep. 352.

The question for determination is whether the tariff duties collected were such as claimant was bound to pay under the laws of the United States and the President's orders. If they were not, then the claimant, having paid the same under protest, may recover them.

*Mosby v. United States*, 133 U. S. 273, 33 L. ed. 626, 10 Sup. Ct. Rep. 327.

Aliens who are citizens or subjects of any

government which accords to citizens of the United States the right to prosecute claims against such government in its courts shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

U. S. Rev. Stat. 1869, § 1068; *United States v. O'Keefe*, 11 Wall. 178, 20 L. ed. 131; *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; *Hill v. United States*, 8 Ct. Cl. 470; *Fichera v. United States*, 9 Ct. Cl. 334.

Mr. John G. Carlisle also argued the cause for appellant. For his contentions see his argument as reported in *Dooley v. United States*, ante, 1074.

Solicitor General Richards argued the cause and filed a brief for appellee:

If this case involves wholly or in part the collection of revenues, it is not within the jurisdiction of the court of claims.

*Nichols v. United States*, 7 Wall. 129, 19 L. ed. 128.

For his other contentions as to jurisdiction, see *Dooley v. United States*, ante, 1074, and for his contentions on the merits see his brief as reported in *De Lima v. Bidwell*, ante, 1041.

Attorney General Griggs also argued the cause. For his contentions see his brief as reported in *Goetze v. United States*, ante, 1065.

[244] \*Mr. Justice Brown delivered the opinion of the court:

This case is controlled by the case of *Dooley v. United States* (No. 501), just decided, 182 U. S. 222, ante, 1074, 21 Sup. Ct. Rep. 762. So far as the duties were exacted upon goods imported prior to the ratification of the treaty of April 11, 1899, they were properly exacted. So far as they were imposed upon importations after that date and prior to December 5, 1899, plaintiff is entitled to recover them back.

The judgment of the Court of Claims is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

SAMUEL DOWNES, Doing Business under the Firm Name of S. B. Downes & Company. Plff. in Err.,

v.

GEORGE R. BIDWELL.

(See S. C. Reporter's ed. 244-391.)

*Duties—importation from Porto Rico—territory appurtenant to United States—meaning of "United States" in revenue laws—ceded territory not incorporated into United States—conditions in treaty of cession—power of United States to ac-*

*quire and hold territory without incorporating it—places subject to the jurisdiction of the United States—intent of Congress as to incorporating new territory—application of United States Constitution to new territory—presumption that Congress will obey Constitution—extension of civil government of United States to conquered territory.*

1. Jurisdiction of an action to recover back duties exacted under the Foraker act of April 12, 1900, and paid under protest, upon goods brought from Porto Rico, is given to a circuit court of the United States by U. S. Rev. Stat. § 629, subd. 4, vesting it with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," when construed with § 643, providing for the removal from state courts of suits against a revenue officer "on account of any act done under color of his office, or of any such revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law."
2. The island of Porto Rico by the treaty of cession became territory appurtenant to the United States, but not a part of the United States, within the revenue clauses of the Constitution, such as art. 1, § 8, requiring duties, imposts, and excises to be uniform "throughout the United States."
3. The imposition of duties upon imports from Porto Rico by the act of Congress known as the Foraker act, approved April 12, 1900 (31 Stat. at L. 77, chap. 191), temporarily providing a civil government and revenues for that island, was a constitutional exercise of the power of Congress.
4. The United States, within the meaning of the clause of the Constitution (art. 1, § 8) requiring duties to be uniform "throughout the United States," as in the other phrase respecting commerce "among the several states," must be understood to mean the states whose people united to form the Constitution and such as have since been admitted to the Union upon an equality with them. [Per Mr. Justice Brown.]
5. An alien people cannot be incorporated into the United States by the treaty-making power by a mere cession, without the express or implied approval of Congress. [Per Justices White, Shiras, and McKenna.]
6. Conditions which preclude incorporation into the United States, without consent of Congress, of territory acquired by treaty, may be inserted in the treaty of cession by the treaty-making power, and will have the force of the law of the land if the treaty be not repudiated by Congress. [Per Justices White, Shiras, and McKenna.]
7. The government of the United States has the power to acquire and hold territory without immediately incorporating it into the United States. [Per Justices White, Shiras, and McKenna.]
8. Places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words,

NOTE.—As to the power of Congress over the territories—see note to *First Nat. Bank v. Yankton County*, 25 L. ed. U. S. 1046.

On the construction and operation of treaties—see note to *United States v. Amlstad*, 10 L. ed. U. S. 826.

On treaty guaranties to aliens—see note to

*Gandolfo v. Hartman* (C. C. S. D. Cal.) 16 L. R. A. 277.

On the effect of conquest over the laws of a conquered territory—see note to *Delassus v. United States*, 9 L. ed. U. S. 71.



are recognized by the provision of U. S. Const. 13th Amend., prohibiting slavery within the United States "or any place subject to their jurisdiction." [Per Justices White, Shiras, and McKenna.]

9. Incorporation into the United States of territory acquired by treaty of cession, in which there are conditions against the incorporation of the territory until Congress provides therefor, will not take place until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family. [Per Justices White, Shiras, and McKenna.]
10. The treaty with Spain by which Porto Rico and other territory was ceded to the United States, and by article 9 of which it is declared that the civil rights and political status of the native inhabitants therein "shall be determined by the Congress," shows an express purpose, not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. [Per Justices White, Shiras, and McKenna.]
11. The intention of Congress that Porto Rico is not to be incorporated into the United States, for the present at least, is shown by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), for temporarily providing revenue and a civil government for that island and for other purposes. [Per Justices White, Shiras, and McKenna.]
12. Provisions of the Constitution of the United States which are applicable are in force in Porto Rico, whether the island be incorporated into the United States or not. [Per Justices White, Shiras, and McKenna.]
13. Porto Rico, though not a foreign country in an international sense, since it was subject to the sovereignty of and was owned by the United States after the treaty of cession, continued to be foreign to the United States in a domestic sense, because it had not been incorporated into the United States, but was merely appurtenant thereto as a possession. [Per Justices White, Shiras, McKenna, and Gray.]
14. It must be presumed that the legislative department of the government, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore will terminate the occupation by the United States of territory which has been temporarily acquired, and which is demonstrated to be unfit to be incorporated into the United States, if it would be a violation of duty under the Constitution to hold it permanently. [Per Justices White, Shiras, and McKenna.]
15. The civil government of the United States cannot extend immediately and of its own force over territory acquired by war, even when possession is confirmed by treaty, but such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief, until civil government is put in operation by the action of the appropriate political department, at such time and in such degree as that department may determine. [Per Mr. Justice Gray.]
16. The regulation of the revenue of conquered territory, even after the treaty of cession, remains with the executive and military authority, in the absence of congressional legislation. [Per Mr. Justice Gray.]
17. A temporary government which is not sub-

ject to all the restrictions of the Constitution may be established for conquered territory by Congress, if it is not ready to construct a complete government for such territory. [Per Mr. Justice Gray.]

[No. 507.]

*Argued January 8, 9, 10, 11, 1901. Decided May 27, 1901.*

**I**N ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to a complaint in an action to recover back duties paid under protest upon importations from Porto Rico under the Foraker act. *Affirmed.*

Statement by Mr. Justice **Brown**:

\*This was an action begun in the circuit [247] court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of \$659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the island of Porto Rico, known as the Foraker act. The district attorney demurred to the complaint for the want of jurisdiction in the court, and for insufficiency of its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiff sued out this writ of error.

**Mr. Frederic R. Condert, Jr.**, argued the cause, and, with **Mr. Paul Fuller**, filed a brief for plaintiff in error:

An alien is one born out of the jurisdiction and owing obedience to a strange prince or country.

Rapelyea, Law Dict. citing Coke, Litt. 128 C, and Bracton, 427.

And "foreign" is that which is out of a certain state or country and of its jurisdiction. Foreign laws are the laws of another country than our own.

*Veazie v. Moor*, 14 How. 572, 14 L. ed. 546.

A country is foreign which is not subject to our laws and not within our limits.

*Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Elk v. Wilkins*, 112 U. S. 122, 28 L. ed. 653, 5 Sup. Ct. Rep. 41.

The boundaries of the United States were enlarged by the treaty-making power, which was competent to operate that metamorphosis.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

The theory that the ports of Porto Rico remain foreign ports as to revenue laws until Congress has established custom houses, framed collection districts, and declared the ports domestic, is based upon a *dictum* in *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, and is at variance with the course of the administration and with the decision of this

court in *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, where the collection of duties on foreign goods landed in California after the ratification of the treaty and before any action of Congress was upheld on the ground that California had become a part of the United States.

If treaties may become operative by their own force and without the aid of congressional legislation (*Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Chinese Exclusion Case*, 130 U. S. 600, 32 L. ed. 1073, 9 Sup. Ct. Rep. 623), how can it be that the Constitution has not equal virtue, and that its imperative mandates must remain impassive and unobserved until Congress chooses to take action?

The treaty of Paris has made Porto Rico "foreign" to every nation except our own.

The condition of territory subject exclusively to Federal control, which has not yet acquired that peculiar sovereignty of its own known to our Constitution as statehood, has been aptly described by Chief Justice Marshall as "a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained."

*Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

The territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects.

*Shively v. Bowlby*, 152 U. S. 49, 38 L. ed. 349, 14 Sup. Ct. Rep. 548.

The only source of this right or power of Congress to govern new territories not yet organized into statehood flows from the Constitution; and we must look to that same charter for the limitations controlling the exercise of the right and power so given.

Pom. Const. L. § 492; 2 Curtis's Life of Webster, 366; 2 Webster's Works, 300; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 49, 10 Sup. Ct. Rep. 792; *McAllister v. United States*, 141 U. S. 188, 35 L. ed. 697, 11 Sup. Ct. Rep. 949; *United States v. Kagama*, 118 U. S. 380, 30 L. ed. 230, 6 Sup. Ct. Rep. 1109; *Callan v. Wilson*, 127 U. S. 550, 32 L. ed. 226, 8 Sup. Ct. Rep. 1301; *Thompson v. Utah*, 170 U. S. 346, 42 L. ed. 1065, 18 Sup. Ct. Rep. 620.

The purpose of the clause of the Federal Constitution, requiring taxes, duties, imposts, and excises to be uniform throughout the United States, was manifestly to deprive the governmental authorities of that power of oppression which could be exercised through inequality in taxation. Inequality was an injustice against which every part of the nation was to be protected.

*Crandall v. Nevada*, 6 Wall. 49, 18 L. ed. 749.

If it were thought necessary that Congress be hedged around with restrictions while it is legislating for the inhabitants of

the states, who may be partially protected by their local governments, how much more necessary that the same body should be restrained while legislating for the inhabitants of those districts and territories over which it has an exclusive control and undivided sway.

Pom. Const. L. § 492.

Moreover, it seems evident that the term "United States," in the clause in question, was meant in a geographical sense, as embracing the entire domain of the nation.

*Knowlton v. Moore*, 178 U. S. 76, 44 L. ed. 983, 20 Sup. Ct. Rep. 747.

The territories are part of the United States in a geographical sense.

*Elk v. Wilkins*, 112 U. S. 99, 28 L. ed. 645, 5 Sup. Ct. Rep. 41; *Cherokee Nation v. Georgia*, 5 Pet. 15, 8 L. ed. 30; *Cherokee Tobacco*, 11 Wall. 619, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 228; *Scott v. Sandford*, 19 How. 513, 15 L. ed. 745.

A native of one of the territories before its admission as a state is a natural-born citizen of the United States.

*Elk v. Wilkins*, 112 U. S. 99, 28 L. ed. 645, 5 Sup. Ct. Rep. 41.

If it be urged that the restriction of the governmental agents to their limited powers will create an intolerable political situation, the court has nothing to do with this question of expediency.

*Chinese Exclusion Case*, 130 U. S. 603, 32 L. ed. 1074, 9 Sup. Ct. Rep. 623.

Alaska is not yet a territory; Congress has only vouchsafed to erect it into a district; yet the tariff laws were applied to it as early as 1868, constitutional restrictions have been applied to it, and the serfdom recognized among its native tribes has been declared illegal.

*Re Sah Quah*, 31 Fed. 327.

Even in England the rule was long since laid down that the Crown or Parliament could not make laws for the colonies "contrary to the fundamental principles of English law," and that from any such injustice the privy council would hear appeals.

Sir William Anson, *The Crown*, 274; *Campbell v. Hall*, 20 How. St. Tr. 304; *Re Colenso*, 3 Moore P. C. C. N. S. 115.

Messrs. Frederic R. Coudert, Jr., and Paul Fuller also filed a supplemental brief as to local taxation and jurisdiction:

Whenever Congress acts upon a matter of interstate commerce, it must be under a system applicable equally and uniformly throughout the whole country. This universal and uniform application of the taxing system is obligatory upon Congress whenever it acts as a congress of the nation.

*Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Whenever Congress acts as a local legislature of a state it can impose a tax within that district and on the inhabitants, but not elsewhere. If such a regulation reaches beyond the district it is no longer a local regulation nor within the jurisdiction of Congress acting as a local legislature.

*Brown v. Maryland*, 12 Wheat. 419, 6 L.



ed. 678; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

But there can be no question that the burden imposed by the Foraker act is not a local excise, but absolutely an imposition of duties such as the Constitution requires to be uniform throughout the United States.

Mr. Paul Fuller filed a separate brief in reply for plaintiff in error:

As the jurisdiction and sovereignty of a state legislature is confined to the limits of a state, so Congress as the legislature of the District of Columbia is confined in the exercise of its powers to that district, and cannot lay a tax on the merchants of New York for the benefit of the district.

*Gibbons v. District of Columbia*, 116 U. S. 407, 29 L. ed. 681, 6 Sup. Ct. Rep. 427.

Congress when administering the local needs of a territory is governed and restrained by the Constitution of the United States.

U. S. Const. art. 5; *First Nat. Bank v. Yankton County*, 101 U. S. 133, 25 L. ed. 1047.

Unjust and unequal taxation, and discrimination in the distribution of the burden of taxation among the citizens of the territory, would be a violation of that prohibition in the Constitution intended for the protection of all who come under the rule of any of its agencies of government, to wit, the provision of article 5 of the amendments, that no one shall be deprived of property without due process of law.

*Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Sharpless v. Philadelphia*, 21 Pa. 162, 59 Am. Dec. 759; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; Cooley, Const. Lim. pp. 354, 495, 513.

A territory enjoys the constitutional immunities by virtue of the Constitution, and not by grace of an act of Congress re-enacting constitutional provisions.

*Springville v. Thomas*, 166 U. S. 708, 41 L. ed. 1173, 17 Sup. Ct. Rep. 717.

There are civil and personal rights over which not even the treaty of cession can give Congress authority in the territory which it cedes.

*Cherokee Tobacco*, 11 Wall. 620, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 229.

Solicitor General Richards argued the cause and filed a brief for defendant in error:

It is submitted that, as there is less than \$2,000 involved in this case, the circuit court had no jurisdiction.

*Holt v. Indiana Mfg. Co.* 176 U. S. 72, 44 L. ed. 376, 20 Sup. Ct. Rep. 272.

For his other contentions see his brief as reported in *De Lima v. Bidwell*, *ante*, 1041.

Attorney General Griggs also argued the cause for the defendant in error. For his contentions see his brief as reported in *Goetze v. United States*, *ante*, 1065.

[247] \*Mr. Justice Brown announced the conclusion and judgment of the court:

This case involves the question whether  
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merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the 3d section of that act, which requires the payment of "15 \*per[248] centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries."

1. The exception to the jurisdiction of the court is not well taken. By Rev. Stat. § 629, subd. 4, the circuit courts are vested with jurisdiction "of all suits at law or in equity arising under any act providing for revenue from imports or tonnage," irrespective of the amount involved. This section should be construed in connection with § 643, which provides for the removal from state courts to circuit courts of the United States of suits against revenue officers "on account of any act done under color of his office, or of any such [revenue] law, or on account of any right, title, or authority claimed by such officer or other person under any such law." Both these sections are taken from the act of March 2, 1833 (4 Stat. at L. 632, chap. 57) commonly known as the force bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in *De Lima v. Bidwell*, 182 U. S. 1, *ante*, 1041, 21 Sup. Ct. Rep. 743, actions against the collector to recover back duties assessed upon nonimportable property are not "customs cases" in the sense of the administrative act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of § 629, since they are for acts done by a collector under color of his office. This subdivision of § 629 was not repealed by the jurisdictional act of 1875, or the subsequent act of August 13, 1888, since these acts were "not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects. *United States v. Mooney*, 116 U. S. 104, 107, 29 L. ed. 550, 552, 6 Sup. Ct. Rep. 304, 306. See also *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. ed. 540; *Philadelphia v. The Collector*, 5 Wall. 720, *sub nom.* *Philadelphia v. Diehl*, 18 L. ed. 614; *Hornthall v. The Collector*, 9 Wall. 560, *sub nom.* *Hornthall v. Keary*, 19 L. ed. 560. As the case "involves the construction or application of the Constitution," as well as the constitutionality of a law of the United States, the writ of error was properly sued out from this court.

2. In the case of *De Lima v. Bidwell* just decided, 182 U. S. 1, *ante*, 1041, 21 Sup. Ct. Rep. 743, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory \*of the United States, and [249] that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." Art. 1,



§ 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by § 9 "vessels bound to or from one state" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in "certain articles of confederation and perpetual union," the first one of which declared that "the stile of this confederacy shall be the United States of America." Each member of the confederacy was denominated a *state*. Provision was made for the representation of each state by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in article 11, which authorized the admission of Canada, upon its "acceding to this confederation," and of other colonies if such admission were agreed to by nine states. At this time several states made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy, before it was fairly put in operation. Several of the states refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781. Most of these states in the \*mean-  
[250]time having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government north-west of the Ohio river, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat "with a right of debating, but not of voting," and for the ultimate formation of states therefrom, and their admission into the Union on an equal footing with the original states.

The confederacy, owing to well-known historical reasons, having proven a failure, a new Constitution was formed in 1787 by "the people of the United States" "for the United States of America," as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union, except that Congress was empowered "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

At this time all of the states had ceded their unappropriated lands except North Carolina and Georgia. It was thought by Chief Justice Taney in the *Dred Scott Case*, 19 How. 393, 436, 15 L. ed. 691, 713, that the sole object of the territorial clause was "to transfer to the new government the property then held in common by the states, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the states before their league was dissolved;" that the power "to make needful rules and regulations" was not intended to give the powers of sovereignty, or to authorize the establishment of territorial governments,—in short, that these words were used in a proprietary, and not in a political, sense. But, as we observed in *De Lima v. Bidwell*, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question. Indeed, in the *Dred Scott Case* it was admitted to be the inevitable consequence of the right to acquire territory.

It is sufficient to observe in relation to these three fundamental instruments, that it can nowhere be inferred that the \*terri-  
[251]tories were considered a part of the United States. The Constitution was created by the people of the *United States*, as a union of *states*, to be governed solely by representatives of the *states*; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any *state*," and "no preference shall be given by any regulation of commerce or revenue to the ports of one *state* over those of another; nor shall vessels bound to or from one *state* be obliged to enter, clear, or pay duties in another." In short, the Constitution deals with *states*, their people, and their representatives.

The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these states were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the 14th Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized in the *United States*, and subject to the jurisdiction thereof, are citizens of the United States, and of the *state* wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."



The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern states to settle in the fertile valley \*of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the treaty of October 27, 1795, by which the Mississippi river was opened to the commerce of the United States. 8 Stat. at L. 138, 140, art. 4. In October, 1800, by the secret treaty of San Ildefonso, Spain retroceded to France the territory of Louisiana. This treaty created such a ferment in this country that James Monroe was sent as minister extraordinary with discretionary powers to co-operate with Livingston, then minister to France, in the purchase of New Orleans, for which Congress appropriated \$2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at \$15,000,000. It is well known that Mr. Jefferson entertained grave doubts as to his power to make the purchase, or, rather, as to his right to annex the territory and make it part of the United States, and had instructed Mr. Livingston to make no agreement to that effect in the treaty, as he believed it could not be legally done. Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the 3d article of the treaty, which provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." [8 Stat. at L. 202.] This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress. In regard to this, Mr. Jefferson, in a letter to Senator Breckinridge of Kentucky, of August 12, 1803, used the following language: "This treaty must, of course, be laid before both Houses, be-  
[253] cause \*both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an addi-

tional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the Constitution."

To cover the questions raised by this purchase Mr. Jefferson prepared two amendments to the Constitution, the first of which declared that "the province of Louisiana is incorporated with the United States and made part thereof;" and the second of which was couched in a little different language, viz.: "Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations." But by the time Congress assembled, October 17, 1803, either the argument of his friends or the pressing necessity of the situation seems to have dispelled his doubts regarding his power under the Constitution, since in his message to Congress he referred the whole matter to that body, saying that "with the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its incorporation into the Union." Jefferson's Writings, vol. 8, p. 269.

The raising of money to provide for the purchase of this territory, and the act providing a civil government, gave rise to an animated debate in Congress, in which two questions were prominently presented: First, whether the provision for the ultimate incorporation of Louisiana into the Union was constitutional; and, second, whether the 7th article of the treaty admitting the ships of Spain and France for the next twelve years "into the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of \*the United States coming directly from[254] France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise or other or greater tonnage than that paid by the citizens of the United States" [8 Stat. at L. 204], was an unlawful discrimination in favor of those ports and an infringement upon art. 1, § 9, of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." This article of the treaty contained the further stipulation that "during the space of time above mentioned no other nation shall have a right to the same privileges in the ports of the ceded territory; . . . and it is well understood that the object of the above article is to favor the manufactures, commerce, freight, and navigation of France and Spain."

It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by



personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts. *United States v. Union P. R. Co.* 91 U. S. 72, 79, 23 L. ed. 224, 228. Suffice it to say that the administration party took the ground that, under the constitutional power to make treaties, there was ample power to acquire territory, and to hold and govern it under laws to be passed by Congress; and that as Louisiana was incorporated into the Union as a territory, and not as a state, a stipulation for citizenship became necessary; that as a state they would not have needed a stipulation for the safety of their liberty, property, and religion, but as territory this stipulation would govern and restrain the undefined powers of Congress to "make rules and regulations" for territories. The Federalists admitted the power of Congress to acquire and hold territory, but denied its power to incorporate it into the Union under the Constitution as it then stood.

They also attacked the 7th article of the treaty, discriminating in favor of French and Spanish ships, as a distinct violation of the Constitution against preference being [255] given to the "ports of one state over those of another. The administration party, through Mr. Elliott of Vermont, replied to this that "the states, as such, were equal and intended to preserve that equality; and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between particular states. It was not contemplated that this provision would have application to colonial or territorial acquisitions." Said Mr. Nicholson of Maryland, speaking for the administration: "It [Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution. Had it been the island of Cuba which was ceded to us, under a similar condition of admitting French and Spanish vessels for a limited time into Havana, could it possibly have been contended that this would be giving a preference to the ports of one state over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory is it to be viewed in a different light?"

As a sequence to this debate two bills were passed, one October 31, 1803 (2 Stat. at L. 245, chap. 1), authorizing the President to take possession of the territory and to continue the existing government, and the other November 10, 1803 (2 Stat. at L. 245, chap. 2), making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed providing for a temporary government (2 Stat. at L. 283, chap. 38), and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the views of Congress,

first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution (art. 1, § 9) that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of states within the meaning of the Constitution.

\*The same construction was adhered to in [256] the treaty with Spain for the purchase of Florida (8 Stat. at L. 252) the 6th article of which provided that the inhabitants should "be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution;" and the 15th article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine "without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States," and that "during the said term no other nation shall enjoy the same privileges within the ceded territories."

So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By article 4 the United States agree, "for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine islands on the same terms as ships and merchandise of the United States,"—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine islands be ports of the United States.

So, too, by article 13, "Spanish scientific, literary, and artistic works . . . shall be continued to be admitted free of \*duty [257] in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty." This is



also a clear discrimination in favor of Spanish literary productions into particular ports.

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat. § 1891, a general provision was enacted that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

So, too, on March 6, 1820 (3 Stat. at L. 545, chap. 22), in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the territory of Louisiana north of 36° 30' slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691, but it is none the less a distinct annunciation by Congress of power over property in the territories, which it obviously did not possess in the several states.

[258] The researches of counsel have collated a large number of other instances in which Congress has in its enactments recognized the fact that provisions intended for the states did not embrace the territories, unless specially mentioned. These are found in the laws prohibiting the slave trade with "the United States or territories thereof;" or equipping ships "in any port or place within the jurisdiction of the United States;" in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing states, and others of which extended them expressly to the territories, or "within the exterior boundaries of the United States;" and in the acts extending the internal revenue laws to the territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the states. Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them), Congress has been consistent in recognizing the difference between the states and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. 182 U. S.

Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor, upon the other hand, to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated, not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, 290.

The earliest case is that of *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word "state," in that connection, was used simply to denote a distinct political society. "But," said the Chief Justice, "as the act of Congress obviously used the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution, . . . and excludes from the term the signification attached to it by writers on the law of nations." This case was followed in *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825, and quite recently in *Hooe v. Jamieson*, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. The same rule was applied to citizens of territories in *New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44, in which an attempt was made to distinguish



a territory from the District of Columbia. But it was said that "neither of them is a state in the sense in which that term is used in the Constitution." In *Scott v. Jones*, 5 How. 343, 12 L. ed. 181, and in *Miners' Bank v. Iowa ex rel. District Prosecuting Attorney*, 12 How. 1, 13 L. ed. 867, it was held that under the judiciary act, permitting writs of error to the supreme court of a state in cases where the validity of a state statute is drawn in question, an act of a territorial legislature was not within the contemplation of Congress.

*Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98, was an action of trespass or, as appears by the original record, *replevin*, brought in the circuit court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. at L. 216, chap. 60. It was insisted that Congress could act in a double capacity: in one as legislating [260] for the states; in the other as a local legislature for the District of Columbia. In the latter character, it was admitted that the power of levying direct taxes might be exercised, but for District purposes only, as a state legislature might tax for state purposes; but that it could not legislate for the District under art. 1, § 8, giving to Congress the power "to lay and collect taxes, imposts, and excises," which "shall be uniform throughout the United States," inasmuch as the District was no part of the United States. It was held that the grant of this power was a general one without limitation as to place, and consequently extended to all places over which the government extends; and that it extended to the District of Columbia as a constituent part of the United States. The fact that art. 1, § 2, declares that "representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers" furnished a standard by which taxes were apportioned, but not to exempt any part of the country from their operation. "The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers." That art. 1, § 9, ¶ 4, declaring that direct taxes shall be laid in proportion to the census, was applicable to the District of Columbia, "and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to." It was further held that the words of the 9th section did not "in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the states. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them."

There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the states of Maryland and \*Virginia. It had been subject [261] to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a faneiful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

In delivering the opinion, however, the Chief Justice made certain observations which have occasioned some embarrassment in other cases. "The power," said he, "to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout \*the United States." So far as applicable to [262] the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

In line with *Loughborough v. Blake* is the case of *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, in which the provisions of the Constitution relating to trial by jury were held to be in force in the District of Columbia. Upon the other hand, in *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed.



642, 10 Sup. Ct. Rep. 295, the District of Columbia, as a political community, was held to be one of "the states of the Union" within the meaning of that term as used in a consular convention of February 23, 1853, with France. The 7th article of that convention provided that in all the states of the Union whose existing laws permitted it Frenchmen should enjoy the right of holding, disposing of, and inheriting property in the same manner as citizens of the United States; and as to the states of the Union by whose existing laws aliens were not permitted to hold real estate the President engaged to recommend to them the passage of such laws as might be necessary for the purpose of conferring this right. The court was of opinion that if these terms, "states of the Union," were held to exclude the District of Columbia and the territories, our government would be placed in the inconsistent position of stipulating that French citizens should enjoy the right of holding, disposing of, and inheriting property in like manner as citizens of the United States, in states whose laws permitted it, and engaging that the President should recommend the passage of laws conferring that right in states whose laws did not permit aliens to hold real estate, while at the same time refusing to citizens of France holding property in the District of Columbia and in some of the territories, where the power of the United States is in that respect unlimited, a like release from the disabilities of alienage, "thus discriminating against them in favor of citizens of France holding property in states having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states it would hardly

[263] refuse to them in the district embracing its capital, or in any of its own territorial dependencies."

This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. By art. 1, § 10, of the Constitution, "no state shall enter into any treaty, alliance, or confederation, . . . [or] enter into any agreement or compact with another state, or with a foreign power." It would be absurd to hold that the territories, which are much less independent than the states, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states.

It may be added in this connection, that  
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to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of February 21, 1871 (16 Stat. at L. 419, 426, chap. 62, § 34), specifically extended the Constitution and laws of the United States to this District.

The case of *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, originated in a libel filed in the district court for South Carolina, for the possession of 356 bales of cotton which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as bona fide purchaser at a marshal's sale at Key West, by virtue of a decree of a territorial court consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida. The case turned upon the question whether the sale by that court was effectual to divest the interest of the underwriters. The district judge pronounced the proceedings a nullity, and rendered a decree from which both parties appealed to the circuit court. The circuit court reversed the decree of the district court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser.

The opinion of the circuit court was delivered by Mr. Justice Johnson, of the Supreme Court, and is published in full in a note in Peters's Reports. It was argued that the Constitution vested the admiralty jurisdiction exclusively in the general government; that the legislature of Florida had exercised an illegal power in organizing this court, and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and as such its acts were not to be reviewed in a foreign tribunal, such as was the court of South Carolina; "that the district of Florida was no part of the United States, but only an acquisition or dependency, and as such the Constitution *per se* had no binding effect in or over it." "It becomes," said the court, "indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States. . . . And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest) within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attached, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. And on this

subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession. For in the act of Congress of March 30, 1822, § 9, we have an enumeration of the acts of Congress which are to be held in force in the territory; and in the 10th section an enumeration, in the nature of a bill \*of rights, of privileges and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession. . . . These states, this territory, and future states to be admitted into the Union are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits." He further held that the right of acquiring territory was altogether incidental to the treaty-making power; that their government was left to Congress; that the territory of Florida did "not stand in the relation of a state to the United States;" that the acts establishing a territorial government were the Constitution of Florida; that while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West.

From the decree of the circuit court the underwriters appealed to this court, and the question was argued whether the circuit court was correct in drawing a distinction between territories existing at the date of the Constitution and territories subsequently acquired. The main contention of the appellants was that the superior courts of Florida had been vested by Congress with exclusive jurisdiction in all admiralty and maritime cases; that salvage was such a case, and therefore any law of Florida giving jurisdiction in salvage cases to any other court was unconstitutional. On behalf of the purchaser it was argued that the Constitution and laws of the United States were not *per se* in force in Florida, nor the inhabitants citizens of the United States; that the Constitution was established by the people of the United States for the United States; that if the Constitution were in force in Florida it was unnecessary to pass an act extending the laws of the United States to Florida. "What is Florida?" said Mr. Webster. "It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions."

The opinion of Mr. Chief Justice Marshall in this case should be read in connection with art. 3, §§ 1 and 2, of the Constitution, [266] \*vesting "the judicial power of the United States" in "one Supreme Court and in such inferior courts as the Congress may, from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior," etc. He held that the court "should

take into view the relation in which Florida stands to the United States;" that territory ceded by treaty "becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." That Florida, upon the conclusion of the treaty, became a territory of the United States and subject to the power of Congress under the territorial clause of the Constitution. The acts providing a territorial government for Florida were examined in detail. He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of Florida held their office for four years; that "these courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited;" that "they are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government. The act of the territorial legislature creating the court in question was held not to be "inconsistent with the laws and Constitution of the United States," and the decree of the circuit court was affirmed.

As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution. In delivering his opinion in this \*case Mr. Chief Justice Marshall made [267] no reference whatever to the prior case of *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98, in which he had intimated that the territories were part of the United States. But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a state, except under the restrictions of the judicial clause. It is sufficient to say that this case has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it. We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these terri-



tories, or that the judicial clause is exceptional in that particular.

This case was followed in *Benner v. Porter*, 9 How. 235, 13 L. ed. 119, in which it was held that the jurisdiction of these territorial courts ceased upon the admission of Florida into the Union, Mr. Justice Nelson remarking of them (p. 242, L. ed. p. 122), that "they are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and state jurisdiction. . . . (p. 244, L. ed. p. 123). Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a state." To the same effect are *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *Good v. Martin*, 95 U. S. 90, 98, 24 L. ed. 341, 344; and *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

[268] That the power over the territories is vested in Congress "without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 422, 4 L. ed. 579, 605, and in *United States v. Gratiot*, 14 Pet. 526, 10 L. ed. 573. So, too, in *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, 182 U. S.

in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. . . . Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions." See also, to the same effect, [269] *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

In *Webster v. Reid*, 11 How. 437, 13 L. ed. 761, it was held that a law of the territory of Iowa, which prohibited the trial by jury of certain actions at law founded on contract to recover payment for services, was void; but the case is of little value as bearing upon the question of the extension of the Constitution to that territory, inasmuch as the organic law of the territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787 (which provided expressly for jury trials), so far as they were applicable; and the case was put upon this ground. 5 Stat. at L. 235, 239, chap. 96, § 12.

In *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244, a law of the territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. § 808, required that a grand jury impaneled before any circuit or district court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the circuit and district courts. The territorial courts were free to act in obedience to their own laws.

In *Ross's Case*, 140 U. S. 453, *sub nom. Ross v. McIntyre*, 35 L. ed. 581, 11 Sup. Ct. Rep. 897, petitioner had been convicted by the American consular tribunal in Japan, of a murder committed upon an American vessel in the harbor of Yokohama, and sentenced to death. There was no indictment by a grand jury, and no trial by a petit jury. This court affirmed the conviction, holding that the Constitution had no application, since it was ordained and established "for the United States of America," and not for countries outside of their limits. "The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury, when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."

In *Springville v. Thomas*, 166 U. S. 707,



41 L. ed. 1172, 17 Sup. Ct. Rep. 717, it was held that a verdict returned by less than the whole number of jurors was invalid because in contravention of the 7th Amendment to the Constitution and the act of Congress of [270] April 7, \*1874 (18 Stat. at L. 27, chap. 80), which provide "that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." It was also intimated that Congress "could not impart the power to change the constitutional rule," which was obviously true with respect to Utah, since the organic act of that territory (9 Stat. at L. 458, chap. 51, § 17) had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision, once made, could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such, and become of no greater authority than an ordinary act of Congress. In *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory. These rulings were repeated in *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, and applied to felonies committed before the territory became a state, although the state Constitution continued the same provision.

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and glean- ing therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;
2. That territories are not states within the meaning of Rev. Stat. § 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;
3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;
4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;
5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully [271] provide for such trials before consular tribunals, without the intervention of a grand or petit jury;
6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent there- with.

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The case of *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691, remains to be consid- ered. This was an action of trespass *vi et armis* brought in the circuit court for the district of Missouri by Scott, alleging himself to be a citizen of Missouri, against Sand- ford, a citizen of New York. Defendant pleaded to the jurisdiction that Scott was not a citizen of the state of Missouri, be- cause a negro of African descent, whose an- cestors were imported as negro slaves. Plaintiff demurred to this plea and the de- murrer was sustained; whereupon, by stipu- lation of counsel and with leave of the court, defendant pleaded in bar the general issue, and specially that the plaintiff was a slave and the lawful property of defendant, and, as such, he had a right to restrain him. The wife and children of the plaintiff were also involved in the suit.

The facts in brief were that plaintiff had been a slave belonging to Dr. Emerson, a surgeon in the army; that in 1834 Emerson took the plaintiff from the state of Missouri to Rock Island, Illinois, and subsequently to Fort Snelling, Minnesota (then known as Upper Louisiana), and held him there until 1838. Scott married his wife there, of whom the children were subsequently born. In 1838 they returned to Missouri.

Two questions were presented by the rec- ord: First, whether the circuit court had jurisdiction; and, second, if it had jurisdic- tion, was the judgment erroneous or not? With regard to the first question, the court stated that it was its duty "to decide wheth- er the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States," and that the question was whether "a negro whose ancestors were im- ported into this country and sold as slaves became a member of the political community formed and brought into existence by the Constitution of the United States, and as such became entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court [272] of the United States." It was held that he was not, and was not included under the word "citizens" in the Constitution, and therefore could claim "none of the rights and privi- leges which that instrument provides for and secures to citizens of the United States;" that it did not follow, because he had all the rights and privileges of a citizen of a state, he must be a citizen of the United States; that no state could by any law of its own "introduce a new member into the po- litical community created by the Constitu- tion;" that the African race was not intend- ed to be included, and formed no part of the people who framed and adopted the Declara- tion of Independence. The question of the status of negroes in England and the several states was considered at great length by the Chief Justice, and the conclusion reached that Scott was not a citizen of Missouri, and that the circuit court had no jurisdiction of the case.

This was sufficient to dispose of the case  
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without reference to the question of slavery; but, as the plaintiff insisted upon his title to freedom and citizenship by the fact that he and his wife, though born slaves, were taken by their owner and kept four years in Illinois and Minnesota, they thereby became free, and upon their return to Missouri became citizens of that state, the Chief Justice proceeded to discuss the question whether Scott was still a slave. As the court had decided against his citizenship upon the plea in abatement, it was insisted that further decision upon the question of his freedom or slavery was extrajudicial and mere *obiter dicta*. But the Chief Justice held that the correction of one error in the court below did not deprive the appellate court of the power of examining further into the record and correcting any other material error which may have been committed; that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, can be looked into or corrected by this court, even though it had decided a similar question presented in the pleadings.

[273] Proceeding to decide the case upon the merits, he held that the territorial clause of the Constitution was confined to the territory which belonged to the United States at the time the Constitution was adopted, and did not apply to territory subsequently acquired from a foreign government.

In further examining the question as to what provision of the Constitution authorizes the Federal government to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, he made use of the following expressions, upon which great reliance is placed by the plaintiff in this case (p. 446, L. ed. p. 718): "There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; . . . and if a new state is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the state, and the citizens of the state, and the Federal government. But no power is given to acquire a territory to be held and governed permanently in that character."

He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States, and that this doctrine applied to slaves as well as to other property. Hence, it followed that the act of Congress which prohibited a citizen from holding and owning slaves in territories north of 36° 30' (known as the Missouri Compromise) was unconstitutional and void, and the fact that Scott was carried into such territory, referred to what is now known as Minnesota, did not entitle him to his freedom.

ring to what is now known as Minnesota, did not entitle him to his freedom.

He further held that whether he was made free by being taken into the free state of Illinois and being kept there two years depended upon the laws of Missouri, and not those of Illinois, and that by the decisions of the highest court of that state his status as a slave continued, notwithstanding his residence of two years in Illinois.

It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be \*taken at its full value it is decisive in his [274] favor. We are not, however, bound to overlook the fact, that, before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an act of Congress which had been acquiesced in for thirty years was declared unconstitutional. It would appear from the opinion of Mr. Justice Wayne that the real reason for discussing these constitutional questions was that "there had become such a difference of opinion" about them "that the peace and harmony of the country required the settlement of them by judicial decision." p. 455, L. ed. p. 721. The attempt was not successful. It is sufficient to say that the country did not acquiesce in the opinion, and that the Civil War, which shortly thereafter followed, produced such changes in judicial, as well as public, sentiment as to seriously impair the authority of this case.

While there is much in the opinion of the Chief Justice which tends to prove that he thought all the provisions of the Constitution extended of their own force to the territories west of the Mississippi, the question actually decided is readily distinguishable from the one involved in the cause under consideration. The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the states,—a claim quite inconsistent with the position of the court in the *Canter Case*. If the assumption be true that slaves are indistinguishable from other property, the inference from the *Dred Scott Case* is irresistible that Congress had no power to prohibit their introduction into a territory. It would scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two \*are so inseparable from [275] each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the un-



derlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the 14th Amendment. The difficulty with the *Dred Scott Case* was that the court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the Virginian might carry his slaves into the territories, but he could not carry with him the Virginian law which made him a slave.

In his history of the *Dred Scott Case*, Mr. Benton states that the doctrine that the Constitution extended to territories as well as to states first made its appearance in the Senate in the session of 1848-1849, by an attempt to amend a bill giving territorial government to California, New Mexico, and Utah (itself "hitched on" to a general appropriation bill), by adding the words "that the Constitution of the United States and all and singular the several acts of Congress (describing them) be and the same hereby are extended and given full force and efficacy in said territories." Says Mr. Benton: "The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the territories, declaring that instrument to have been made for states, not territories; that Congress governed the territories independently of the Constitution and incompatibly with it; that no part of it went to a territory but what Congress chose to send; that it could not act of itself anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere. Mr. Clay was of the same opinion and added: 'Now, really, I must say the idea that *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it.' Upon the [276] other hand, Mr. Calhoun \*boldly avowed his intent to carry slavery into them under the wing of the Constitution, and denounced as enemies of the south all who opposed it."

The amendment was rejected by the House, and a contest brought on which threatened the loss of the general appropriation bill in which this amendment was incorporated, and the Senate finally receded from its amendment. "Such," said Mr. Benton, "were the portentous circumstances under which this new doctrine first revealed itself in the American Senate, and then as needing legislative sanction requiring an act of Congress to carry the Constitution into the territories and to give it force and efficacy there." Of the *Dred Scott Case* he says: "I conclude this introductory note with recurring to the great fundamental error of the court (father of all the political errors), that of assuming the extension of the Constitution to the territories. I call it assum-

ing, for it seems to be a naked assumption without a reason to support it, or a leg to stand upon, condemned by the Constitution itself and the whole history of its formation and administration. Who were the parties to it? The states alone. Their delegates framed it in the Federal convention; their citizens adopted it in the state conventions. The Northwest Territory was then in existence and it had been for three years; yet it had no voice either in the framing or adopting of the instrument, no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it made by states. Territories are not alluded to in it."

Finally, in summing up the results of the decisions holding the invalidity of the Missouri Compromise and the self-extension of the Constitution to the territories, he declares "that the decisions conflict with the uniform action of all the departments of the Federal government from its foundation to the present time, and cannot be received as rules governing Congress and the people without reversing that action, and admitting the political supremacy of the court, and accepting an altered Constitution from its hands and taking a new and portentous point of departure in the working of the government."

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles \*of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several states. [277]

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the 1st Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the states whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the 13th Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Con-



gress itself, in the act of March 27, 1804 (2 Stat. at L. 298, chap. 56), providing for the proof of public records, applied the provisions of the act, not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several states. This classification, adopted by the Eighth Congress, is carried into the Revised Statutes as follows:

[278] "Sec. 905. The acts of the legislature of any state or territory, \*or of any country subject to the jurisdiction of the United States, shall be authenticated," etc.

"Sec. 906. All records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States," etc.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not of the United States.

In determining the meaning of the words of article 1, section 8, "uniform throughout the United States," we are bound to consider, not only the provisions forbidding preference being given to the ports of one state over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some states and not equally upon others. The opinion of Mr. Justice White in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, contains an elaborate historical review of the proceedings in the convention, which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105, L. ed. p. 995, Sup. Ct. Rep. p. 772) that "although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption," they were originally placed together, and "became separated only in arranging the Constitution for the purpose of style." Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several states," and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union.

[279] Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect \*that the Constitution is applicable to territories acquired by purchase or conquest, only when 182 U. S.

and so far as Congress shall so direct. Notwithstanding its duty to "guarantee to every state in this Union a republican form of government" (art. 4, § 4), by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes \*of life, shall become at once citizens [280] of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc.; and in the case of Porto



Rico and the Philippines, "that the civil rights and political status of the native inhabitants . . . shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Grave apprehensions of danger are felt by many eminent men,—a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These fears, however, find no justification in the action of Congress in the past century, nor in the conduct of the British Parliament towards its outlying possessions since the American Revolution. Indeed, in the only instance in which this court has declared an act of Congress unconstitutional as trespassing upon the rights of territories (the Missouri Compromise), such action was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the 13th Amendment to the Constitution. There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. Even in the Foraker act itself, the constitutionality of which is so vigorously assailed, [281] power \*was given to the legislative assembly of Porto Rico to repeal the very tariff in question in this case, a power it has not seen fit to exercise. The words of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, with respect to the power of Congress to regulate commerce, are pertinent in this connection: "This power," said he, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections,—as that, for example, of declaring war,—the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments."

So too, in *Johnson v. M'Intosh*, 8 Wheat. 543, 583, 5 L. ed. 681, 691, it was said by him:

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinc-

tion between them is gradually lost, and they make one people. Where this incorporation is practicable humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old; and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

"When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or *safely governed as a distinct people*, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot \*neglect [282] them without injury to his fame and hazard to his power."

The following remarks of Mr. Justice White in the case of *Knowlton v. Moore*, 178 U. S. 109, 44 L. ed. 996, 20 Sup. Ct. Rep. 774, in which the court upheld the progressive features of the legacy tax, are also pertinent:

"The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable \*to a free government. Of the latter class [283]



are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing*, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 962; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Large powers must necessarily be intrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised. That these powers may be abused is possible. But the same may be said of its powers under the Constitution as well as outside of it. Human wisdom has never devised a form of government so perfect that it may not be perverted to bad purposes. It is never conclusive to argue against the possession of certain powers from possible abuses of them. It is safe to say that if Congress should venture upon legislation manifestly dictated by selfish interests, it would receive quick rebuke at the hands of the people. Indeed, it is scarcely possible that Congress could do a [284] greater injustice \*to these islands than would be involved in holding that it could not impose upon the states taxes and excises without extending the same taxes to them. Such requirement would bring them at once within our internal revenue system, including stamps, licenses, excises, and all the paraphernalia of that system, and apply it to territories which have had no experience of this kind, and where it would prove an intolerable burden.

This subject was carefully considered by the Senate committee in charge of the Foraker bill, which found, after an examination of the facts, that property in Porto Rico was

already burdened with a private debt amounting probably to \$30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States.

In passing upon the questions involved in this and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the states which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The states had but recently emerged from a war with one of the most powerful nations of Europe, were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghanies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession \*under the treaty of [285] peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the states were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them.

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that



our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other

[286]er hand, we assume \*that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

There is a provision that "new states may be admitted by the Congress into this Union." These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. *Cooley, Const. Lim. §§ 81-85. Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively

demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions \*desirable. If those posses- [287]sions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

*The judgment of the Circuit Court is therefore affirmed.*

Mr. Justice **White**, with whom concurred Mr. Justice **Shiras** and Mr. Justice **McKenna**, uniting in the judgment of affirmance:

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me.

The recovery sought is the amount of duty paid on merchandise which came into the United States from Porto Rico after July 1, 1900. The exaction was made in virtue of the act of Congress approved April 12, 1900, entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes." 21 Stat. at L. 77, chap. 191. The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the \*United States, [288] and therefore the act of Congress which imposed the duty in question is repugnant to article 1, § 8, clause 1, of the Constitution providing that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Subsidiar-



ily, it is contended that the duty collected was also repugnant to the export and preference clauses of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that this latter contention is involved in the previous one, and need not be separately considered.

The arguments at bar embrace many propositions which seem to me to be irrelevant, or, if relevant, to be so contrary to reason and so in conflict with previous decisions of this court as to cause them to require but a passing notice. To eliminate all controversies of this character, and thus to come to the pivotal contentions which the case involves, let me state and concede the soundness of some principles, referring, in doing so, in the margin to the authorities by which they are sustained, and making such comment on some of them as may to me appear necessary.

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Ever then, when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred, or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, while confined to its constitutional \*orbit, the government of the United States is supreme within its lawful sphere.†

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.‡

Third. Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every

†*Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73 *et seq.*; *Martin v. Hunter*, 1 Wheat. 326, 4 L. ed. 102; *New Orleans v. United States*, 10 Pet. 662, 736, 9 L. ed. 573, 602; *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 679, 40 L. ed. 576, 580, 16 Sup. Ct. Rep. 427, and cases cited.

‡*The City of Panama*, 101 U. S. 453, 460, 25 L. ed. 1061, 1064; *Fong Yue Ting v. United States*, 149 U. S. 716, 738, 37 L. ed. 914, 921, 13 Sup. Ct. Rep. 1016.

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action on the subject within its constitutional limits.†

Fourth. Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

Fifth. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such \*territory of representative government if it is considered just to do so, and to change such local governments at discretion.‡

The plenitude of the power of Congress as just stated is conceded by both sides to this controversy. It has been manifest from the earliest days, and so many examples are afforded of it that to refer to them seems superfluous. However, there is an instance which exemplifies the exercise of the power substantially in all its forms, in such an apt way that reference is made to it. The instance referred to is the District of Columbia, which has had from the beginning different forms of government conferred upon it by Congress, some largely representative, others only partially so, until, at the present time, the people of the District live under a local government totally devoid of local representation, in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative in effect, acting as the local legislature.

In some adjudged cases the power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory. In others it has been rested upon the clause of § 3, article 4, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other

†*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *United States v. Joint Traffic Asso.* 171 U. S. 571, 43 L. ed. 288, 19 Sup. Ct. Rep. 25.

‡*United States v. Kagama*, 118 U. S. 375, 378, 30 L. ed. 228, 229, 6 Sup. Ct. Rep. 1109; *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548.

property of the United States.† But this divergence, if not conflict of opinion, does not imply that the authority of Congress to govern the territories is outside of the Constitution, since in either case the right is founded on the Constitution, although referred to different provisions of that instrument.

[291] While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for \*any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transgressed.‡ But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.

Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr. Chief Justice Taney in *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691, appears to me to be unwarranted. Whatever may be the view entertained of the correctness of the opinion of the court in that case, in so far as it interpreted a particular provision of the Constitution concerning slavery, and decided that as so construed it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative. That doctrine was concurred in by the dissenting

judges, as the following excerpts demonstrate. Thus Mr. Justice McLean, in the course of his dissenting opinion, said (19 How. 542, 15 L. ed. 757):

"In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

\*Mr. Justice Curtis, also in the dissent expressed by him, said (p. 614, L. ed. p. 787):

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?"

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

Eighth. As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "to lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States.†

To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere *dicta* seems to me to be entirely inadmissible. And, besides, if such view was justified, \*the principle would still find support in the decision in *Woodruff v. Parham*, and that decision, in this regard, was affirmed by this court in *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091 and *Fairbank v.*

†*Sere v. Pilot*, 6 Cranch, 332, 336, 3 L. ed. 240, 241; *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. ed. 579, 605; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 242, 255; *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. ed. 573, 578; *Scott v. Sandford*, 19 How. 448, 15 L. ed. 718; *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. ed. 659, 662; *Hamilton v. Dillie*, 21 Wall. 73, 93, 22 L. ed. 528, 532; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 132, 25 L. ed. 1046, 1047; *The City of Panama v. Phelps*, 25 L. ed. 1061, 1062; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; *United States v. Kaganaa*, 118 U. S. 375, 380, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 42, 34 L. ed. 478, 490, 10 Sup. Ct. Rep. 792; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 169, 36 L. ed. 103, 112, 12 Sup. Ct. Rep. 375.

‡*Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 44, 34 L. ed. 478, 491, 10 Sup. Ct. Rep. 792.

†*Loughborough v. Blake*, 5 Wheat. 317, 322, 5 L. ed. 98, 99; *Woodruff v. Parham*, 8 Wall. 123, 133, 19 L. ed. 352, 385; *Brown v. Houston*, 114 U. S. 622, 628, 29 L. ed. 257, 259, 5 Sup. Ct. Rep. 1091; *Fairbank v. United States*, 181 U. S. 282, 862, 21 Sup. Ct. Rep. 648.



*United States*, 181 U. S. 283, *ante*, § 862, 21 Sup. Ct. Rep. 648.

From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico.

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this court which are cited in the margin.† Some of these decisions hold on the one hand that, growing out of the presumably ephemeral nature of a territorial government, the provisions of the Constitution relating to the life tenure of judges is inapplicable to courts created by Congress, even in territories which are incorporated into the United States, and some, on the other hand, decide that the provisions as to common-law juries found in the Constitution are applicable under like conditions; that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution. And the application of the provision of the Constitution relating to juries has been also considered in a different aspect, the case being noted in the margin.‡

The question involved was the constitutionality of the statutes of the United States [294] conferring power on ministers and consuls \*to try American citizens for crimes committed in certain foreign countries. Rev. Stat. 4083-4086. The court held the provisions in question not to be repugnant to the Constitution, and that a conviction for a felony without a previous indictment by a grand jury, or the summoning of a petty jury, was valid.

It was decided that the provisions of the Constitution relating to grand and petty juries were inapplicable to consular courts exercising their jurisdiction in certain countries foreign to the United States. But this did not import that the government of the United States in creating and conferring jurisdiction on consuls and ministers acted

outside of the Constitution, since it was expressly held that the power to call such courts into being and to confer upon them the right to try, in the foreign countries in question, American citizens, was deducible from the treaty-making power as conferred by the Constitution. The court said (p. 463, L. ed. p. 585, Sup. Ct. Rep. p. 900):

"The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

In other words, the case concerned, not the question of a power outside the Constitution, but simply whether certain provisions of the Constitution were applicable to the authority exercised under the circumstances which the case presented.

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character \*cannot [295] be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions—those which regulate a granted power and those which withdraw all authority on a particular subject—has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country. No one had more broadly asserted this principle than Mr. Webster. Indeed, the support which that proposition receives from expressions of that illustrious man have been mainly relied upon to sustain it, and yet there can be no doubt that, even while insisting upon such principle, it was conceded by Mr. Webster that those positive prohibitions of the Constitution which withhold all power on a particular subject were always applicable. His views of the principal proposition and his concession as to the existence of the qualification are clearly shown by a debate which took place in the Senate on February 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States over California and New Mexico. Mr. Webster, in support of his conception that the Constitution did not, generally speaking, control Congress in legislating for the territories or operate in

†*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *Webster v. Reld*, 11 How. 437, 460, 13 L. ed. 761, 770; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Black v. Jackson*, 177 U. S. 363, 44 L. ed. 807, 20 Sup. Ct. Rep. 648.

‡*Re Ross*, 140 U. S. 453, 461, 462, 463, *sub nom. Ross v. McIntyre*, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.  
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such districts, said as follows (20 Cong. Globe, App. p. 272):

"Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a matter as that. The Constitution, what is it—we extend the Constitution of the United States by law to a territory? What is the Constitution of the United States? Is not its very first principle that all within its in-

[296]fluence and comprehension shall \*be represented in the legislature which it establishes, with not only the right of debate and the right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice President? And can we by law extend these rights, or any of them, to a territory of the United States? Everybody will see that it is altogether impracticable."

Thereupon, the following colloquy ensued between Mr. Underwood and Mr. Webster (Ibid. 281-282):

"Mr. Underwood: 'The learned Senator from Massachusetts says, and says most appropriately and forcibly, that the principles of the Constitution are obligatory upon us even while legislating for the territories. That is true, I admit, in its fullest force, but if it is obligatory upon us while legislating for the territories, is it possible that it will not be equally obligatory upon the officers who are appointed to administer the laws in these territories?'

"Mr. Webster: 'I never said it was not obligatory upon them. What I said was, that in making laws for these territories it was the high duty of Congress to regard those great principles in the Constitution intended for the security of personal liberty and for the security of property.'

"Mr. Underwood: ' . . . Suppose we provide by our legislation that nobody shall be appointed to an office there who professes the Catholic religion. What do we do by an act of this sort?'

"Mr. Webster: 'We violate the Constitution, which says that no religious test shall be required as qualification for office.'

And this was the state of opinion generally prevailing in the Free Soil and Republican parties, since the resistance of those parties to the extension of slavery into the territories, while in a broad sense predicated on the proposition that the Constitution was not generally controlling in the territories, was sustained by express reliance upon the 5th Amendment to the Constitution forbidding Congress from depriving any person of life, liberty, or property without due process of law. Every platform adopted by those parties down to and including 1860, while propounding the general doctrine, also in ef-

fect declared \*the rule just stated. I append [297] in the margin an excerpt from the platform of the Free Soil party adopted in 1842.†

The conceptions embodied in these resolutions were in almost identical language reiterated in the platform of the Liberty party in 1843, in that of the Free Soil party in 1852, and in the platform of the Republican party in 1856. Stanwood, Hist. of Presidency, pp. 218, 253, 254, and 271. In effect, the same thought was repeated in the declaration of principles made by the Republican party convention in 1860, when Mr. Lincoln was nominated, as will be seen from an excerpt therefrom set out in the margin.‡

The doctrine that those absolute withdrawals of power which \*the Constitution has [298] made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court in *Chicago, R. I. & P. R. Co. v. McGlinn* (1885) 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005, where, speaking through Mr. Justice Field, the court said (p. 546, L. ed. p. 271, Sup. Ct. Rep. p. 1006):

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another the municipal laws of the country—

†Extract from the Free Soil Party Platform of 1842 (Stanwood, Hist. of Presidency, p. 240):

"Resolved, That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the Federal government which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.

"Resolved, That, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them.

"Resolved, That it is the duty of the Federal government to relieve itself from all responsibility for the existence or continuance of slavery wherever the government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.

"Resolved, That the true, and in the judgment of this convention the only safe, means of preventing the extension of slavery into territory now free, is to prohibit its existence in all such territory by an act of Congress."

‡Excerpt from Declarations Made in the Platform of the Republican Party in 1860 (Stanwood, Hist. of Presidency, p. 293):

"8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any territory of the United States."



that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255; Halleck, *International Law*, chap. 34, § 14."

[299] There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can \*also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation,—for, whether the tax was local or national, it could have been

imposed although Porto Rico had no representative local government and was not represented in Congress,—but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily and until Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without \*complete incorpora-[300] tion following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since if there were any which were intended to prevent incorporation they were repugnant to the Constitution and void. The result of the argument is that the government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. These conflicting contentions are asserted to be sanctioned by many adjudications of this court and by various acts of the executive and legislative branches of the government; both sides, in many instances, referring to the same decisions and to the like acts, but deducing contrary conclusions from them. From this it comes to pass that it will be impossible to weigh the authorities relied upon without ascertaining the subject-matter to which they refer, in order to determine their proper influence. For this reason, in the orderly discussion of the controversy, I propose to consider the subject from the Constitution itself, as a matter of first impression, from that instrument as illustrated by the history of the government, and as construed by the previous decisions of this court. By this process, if accurately carried out, it will follow that the true solution of the question will be ascertained, both deductively and inductively, and the result, besides, will be adequately proved.

It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the



acquiring power in the absence of stipulations upon the subject. These general principles of the law of nations are thus stated by Halleck in his treatise on International Law, page 126:

[301] "A state may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; \*or by discovery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence. Wheaton, International Law, pt. 2, chap. 4, §§ 1, 4, 5; 1 Phillimore, International Law, §§ 221-277; Grotius, de Jur. Bel. ac. Pac., lib. 2, chap. 4; Vattel, Droit des Gens, liv. 2, chaps. 7 and 11; Rutherford, Inst. b. 1, chap. 3, b. 2, chap. 9; Puffendorf, de Jur. Nat. et. Gent., lib. 4, chaps. 4-6; Moser, Versuch, etc., b. 5, chap. 9; Martens, Precis du Droit des Gens, §§ 35 *et seq.*; Schmaltz, Droit des Gens, liv. 4, chap. 1; Kluber, Droit des Gens, §§ 125, 126; Heffter, Droit International, § 76; Ortolan, Domaine International, §§ 53 *et seq.*; Bowyer, Universal Public Law, chap. 28; Bello, Derecho Internacional, pt. 1, chap. 4; Riquelme, Derecho, Pub. Int., lib. 1, title 1, chap. 2; Burlamaqui, Droit de la Nat. et des Gens, tome 4, pt. 3, chap. 5."

Speaking of a change of sovereignty, Halleck says (pp. 76, 814):

"Chap. 3, § 23. The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power, and become incorporated into the conquering state as a province or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease.

"Chap. 33, § 3. If the hostile nation be subdued and the entire state conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the state, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges, and immunities of his own subjects, he does for them all that is due

[302] from \*a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.' Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the

war or as a punishment for the injustice he has suffered from them . . . Vattel, Droit des Gens, liv. 3, ch. 13, § 201; 2 Curtius, History, etc., liv. 7, cap. 8; Grotius, de Jur. Bel. ac. Pac. lib. 3, caps. 8, 15; Puffendorf, de Jur. Nat. et Gent. lib. 8, cap. 6, § 24; Real, Science du Gouvernement, tome 5, ch. 2, § 5; Heffter, Droit International, § 124; Abegg, Untersuchungen, etc., p. 86."

In *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, the general doctrine was thus summarized in the opinion delivered by Mr. Chief Justice Marshall (p. 542, L. ed. p. 255):

"If it [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

"As free and independent states, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

That under the Confederation it was considered that the government of the United States had authority to acquire territory like any other sovereignty is clearly established by the 11th of the Articles of Confederation.

The decisions of this court leave no room for question that, under the Constitution, the government of the United States, \*in vir- [303] tue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation.

In *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, the court, by Mr. Chief Justice Marshall, said (p. 542, L. ed. p. 255):

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."

In *United States v. Huckabee* (1872) 16 Wall. 414, 21 L. ed. 457, the court speaking through Mr. Justice Clifford, said (p. 434, L. ed. p. 464):

"Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and



the title vests absolutely in the conqueror. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *30 Hogsheads of Sugar v. Boyle*, 9 Cranch, 195, 3 L. ed. 702; *Shanks v. Dupont*, 3 Pet. 246, 7 L. ed. 668; *United States v. Rice*, 4 Wheat. 254, 4 L. ed. 564; *The Amy Warwick*, 2 Sprague, 143, Fed. Cas. No. 342; *Johnson v. McIntosh*, 8 Wheat. 588, 5 L. ed. 692. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy nation or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property. Halleck, *International Law*, 839; *Elphinstone v. Bedecchund*, 1 Knapp, P. C. C. 329; Vattel, 365; 3 Phillimore, *International Law*, 505."

In *Church of Jesus Christ of L. D. S. v. United States* (1889) 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792, Mr. Justice Bradley, announcing the opinion of the court declared (p. 42, L. ed. p. 491, Sup. Ct. Rep. p. 802):

"The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the [304] power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories."

Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory, in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various states subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. Thus, in part at least, "the title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States." *Shively v. Bowlby*, 152 U. S. 50, 38 L. ed. 349, 14 Sup. Ct. Rep. 566. The province of Louisiana was ceded by France in 1803; the Floridas were transferred by Spain in 1819; Texas was admitted 182 U. S.

into the Union by compact with Congress in 1845; California and New Mexico were acquired by the treaty with Mexico of 1848, and other western territory from Mexico by the treaty of 1853; numerous islands have been brought within the dominion of the United States under the authority of the act of August 18, 1856, chap. 164, usually designated as the Guano islands act, re-enacted in Revised Statutes, §§ 5570-5578; Alaska was ceded by Russia in 1867; Medway island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and \$50,000 was expended in efforts to make it a naval station; on the renewal of a treaty with Hawaii November 9, 1887, Pearl harbor was leased for a permanent naval station; by joint resolution of Congress the Hawaiian islands came under \*the sovereignty of the United States in 1898; [305] and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian islands were given the status of an incorporated territory; on May 21, 1890, there was proclaimed by the President an agreement, concluded and signed with Germany and Great Britain, for the joint administration of the Samoan islands (26 Stat. at L. 1497); and on February 16, 1900 (31 Stat. at L. —) there was proclaimed a convention between the United States, Germany, and Great Britain, by which Germany and Great Britain renounced in favor of the United States all their rights and claims over and in respect to the island of Tutuilla and all other islands of the Samoan group east of longitude 171° west of Greenwich. And finally the treaty with Spain which terminated the recent war was ratified.

It is worthy of remark that, beginning in the administration of President Jefferson, the acquisition of foreign territory above referred to were largely made while that political party was in power which announced as its fundamental tenet the duty of strictly construing the Constitution, and it is true to say that all shades of political opinion have admitted the power to acquire and lent their aid to its accomplishment. And the power has been asserted in instances where it has not been exercised. Thus, during the administration of President Pierce, in 1854, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian islands, was not executed. The 2d article of the proposed treaty provided as follows (Ex. Doc. Senate, 55th Congress, 2d sess., Report No. 681, Calendar No. 747, p. 91):

#### Article 2.

The Kingdom of the Hawaiian Islands shall be incorporated into the American Union as a state, enjoying the same degree of sovereignty as other states, and admitted as such as soon as it can be done in consistency with the principles and requirements of the Federal Constitution, to all the rights, privileges, and immunities of a state as aforesaid, on a perfect equality with the other states of the Union.

It is insisted, however, conceding the right



[306]of the government \*of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire, and immediately to deny its beneficial existence.

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire. Let me illustrate the accuracy of this statement. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. ed. 681, 694; *Martin v. Waddell*, 16 Pet. 367, 409, 10 L. ed. 997, 1012; *Jones v. United States*, 137 U. S. 202, 212, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80; *Shively v. Bowlby*, 152 U. S. 1, 50, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them, not only to local, but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?

The practice of the government has been otherwise. As early as 1856 Congress enacted the Guano islands act, heretofore referred to, which by § 1 provided that when [307]any \*citizen of the United States shall "discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States." 11 Stat. at L. 119, chap. 164; Rev. Stat. § 5570. Under the act referred to, it was stated in argument, that the government now holds and protects American citizens in the occupation of some seventy islands. The statute came

under consideration in *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80, where the question was whether or not the act was valid, and it was decided that the act was a lawful exercise of power, and that islands thus acquired were "appurtenant" to the United States. The court, in the course of the opinion, speaking through Mr. Justice Gray, said (p. 212, L. ed. p. 695, Sup. Ct. Rep. p. 83):

"By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, chap. 18; Wheaton, International Law, 8th ed. §§ 161, 165, 176, note 104; Halleck, International Law, chap. 6, §§ 7, 15; 1 Phillimore, International Law, 3d ed. §§ 227, 229, 230, 232, 242; 1 Calvo, Droit International, 4th ed. §§ 266, 277, 300; *Whiton v. Albany City Ins. Co.* 109 Mass. 24, 31.

And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and in its prosecution the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was \*to necessarily incorporate an alien [308] and hostile people into the United States? Take another illustration. Suppose at the termination of a war the hostile government had been overthrown, and the entire territory or a portion thereof was occupied by the United States, and there was no government to treat with or none willing to cede by treaty, and thus it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States. If holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?

Yet again. Suppose the United States, in consequence of outrages perpetrated upon its citizens, was obliged to move its armies or send its fleets to obtain redress, and it came to pass that an expensive war resulted and culminated in the occupation of a portion of the territory of the enemy, and that the retention of such territory—an event illustrated by examples in history—could alone enable the United States to recover the pe-



cuniary loss it had suffered. And suppose, further, that to do so would require occupation for an indefinite period, dependent upon whether or not payment was made of the required indemnity. It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and hence the whole burden would be entailed upon the people of the United States. This would be a necessary consequence, because if the United States did not hold the territory as security for the needed indemnity it could not collect such indemnity, and, on the other hand, if incorporation must follow from holding the territory the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country. In this, as in the case of discovery, the traditions and practices of the government demonstrate the unsoundness of the contention. Congress on May

[309] 13, 1846, declared that "war existed with Mexico. In the summer of that year New Mexico and California were subdued by the American arms, and the military occupation which followed continued until after the treaty of peace was ratified, in May, 1848. Tampico, a Mexican port, was occupied by our forces on November 15, 1846, and possession was not surrendered until after the ratification. In the spring of 1847 President Polk, through the Secretary of the Treasury, prepared a tariff of duties on imports and tonnage which was put in force in the conquered country. 1 Senate Documents, First Session, 30th Congress, pp. 562, 569. By this tariff, *duties were laid as well on merchandise, exported from the United States as from other countries, except as to supplies for our army, and on May 10, 1847, an exemption from tonnage duties was accorded to "all vessels chartered by the United States to convey supplies of any and all descriptions to our army and navy, and actually laden with supplies."* Ibid. 583. An interesting debate respecting the constitutionality of this action of the President is contained in 18 Cong. Globe, First Session, 30th Congress, at pp. 478, 479, 484-489, 495, 498, etc.

In *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, it was held that the revenue officials properly treated Tampico as a port of a foreign country during the occupation by the military forces of the United States, and that duties on imports into the United States from Tampico were lawfully levied under the general tariff act of 1846. Thus, although Tampico was in the possession of the United States, and the court expressly held that in an international sense the port was a part of the territory of the United States, yet it was decided that in the sense of the revenue laws Tampico was a foreign country. The special tariff act promulgated by President Polk was in force in New Mexico and California until after notice was received of the ratification of the treaty of peace. In *Cross v. Harrison*, 16 How. 164, 182 U. S.

14 L. ed. 889, certain collections of impost duties on goods brought from foreign countries into California prior to the time when official notification had been received in California that the treaty of cession had been ratified, as well as impost duties levied after the receipt of such notice, were called in question. The duties collected prior to the receipt of notice were laid at the rate fixed by the tariff promulgated by the President; \*those laid after the notification conformed [310] to the general tariff laws of the United States. The court decided that all the duties collected were valid. The court undoubtedly in the course of its opinion said that immediately upon the ratification of the treaty California became a part of the United States and subject to its revenue laws. However, the opinion pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States, upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides, the decision was expressly placed upon the conditions of the treaty, and it was stated, in so many words, that a different rule would have been applied had the stipulations in the treaty been of a different character.

But, it is argued, all the instances previously referred to may be conceded, for they but illustrate the rule *inter arma silent leges*. Hence, they do not apply to acts done after the cessation of hostilities when a treaty of peace has been concluded. This not only begs the question, but also embodies a fallacy. A case has been supposed in which it was impossible to make a treaty because of the unwillingness or disappearance of the hostile government, and therefore the occupation necessarily continued, although actual war had ceased. The fallacy lies in admitting the right to exercise the power, if only it is exerted by the military arm of the government, but denying it wherever the civil power comes in to regulate and make the conditions more in accord with the spirit of our free institutions. Why it can be thought, although under the Constitution the military arm of the government is in effect the creature of Congress, that such arm may exercise a power without violating the Constitution, and yet Congress—the creator—may not regulate, I fail to comprehend.

This further argument, however, is advanced. Granting that Congress may regulate without incorporating, where the military arm has taken possession of foreign territory, and where there has been or can be no treaty, this does not concern the decision of this case, since there is here involved no regulation, but an actual cession to the United States of territory by treaty. The general rule of the law of nations, by which the acquiring \*government fixes the status of [311] acquired territory, it is urged, does not apply to the government of the United States, because it is incompatible with the Constitution that that government should hold territory under a cession and administer it as a dependency without its becoming incorpor-

ated. This claim, I have previously said, rests on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existence. The certainty of this is illustrated by the examples already made use of in the supposed cases of discovery and conquest.

If the authority by treaty is limited as is suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United States. Let me, however, eliminate the case of war, and consider the treaty-making power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an interoceanic canal, where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?

While no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and [312] excludes the acquisition of "any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial, considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations.

Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to

contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution—it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may "not insert con- [313] ditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted,—vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent



its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue,—bills for which, by the Constitution, must originate in the House of Representatives,—and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would [314] have been brought about. \*The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

All the confusion and dangers above indicated, however, it is argued, are more imaginary than real, since, although it be conceded that the treaty-making power has the right by cession to incorporate without the consent of Congress, that body may correct the evil by availing itself of the provision of the Constitution giving to Congress the right to dispose of the territory and other property of the United States. This assumes that there has been absolute incorporation by the treaty-making power on the one hand, and yet asserts that Congress may deal with the territory as if it had not been incorporated into the United States. In other words, the argument adopts conflicting theories of the Constitution, and applies them both at the same time. I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories. In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property is altogether erroneous.

Observe, again, the inconsistency of this argument. It considers, on the one hand, that so vital is the question of incorporation that no alien territory may be acquired by a cession without absolutely endowing the [315] territory with incorporation and \*the inhabitants with resulting citizenship, because, under our system of government, the assumption that a territory and its inhabitants may be held by any other title than one incor-  
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porating is impossible to be thought of. And yet, to avoid the evil consequences which must follow from accepting this proposition, the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment like any other property. That is to say, to protect a newly acquired people in their presumed rights, it is essential to degrade the whole body of American citizenship.

The reasoning which has sometimes been indulged in by those who asserted that the Constitution was not at all operative in the territories is that, as they were acquired by purchase, the right to buy included the right to sell. This has been met by the proposition that if the country purchased and its inhabitants became incorporated into the United States, it came under the shelter of the Constitution, and no power existed to sell American citizens. In conformity to the principles which I have admitted it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country.

Undoubtedly, the thought that under the Constitution power to dispose of people and territory, and thus to annihilate the rights of American citizens, was contrary to the conceptions of the Constitution entertained by Washington and Jefferson. In the written suggestions of Mr. Jefferson, when Secretary of State, reported to President Washington in March, 1792, on the subject of proposed negotiations between the United States and Spain, which were intended to be communicated by way of instruction \*to the com- [316] missioners of the United States appointed to manage such negotiations, it was observed, in discussing the possibility as to compensation being demanded by Spain "for the ascertainment of our right" to navigate the lower part of the Mississippi, as follows:

"We have nothing else" (than a relinquishment of certain claims on Spain) "to give in exchange. For as to territory, we have neither the right nor the disposition to alienate an inch of what belongs to any member of our Union. Such a proposition therefore is totally inadmissible, and not to be treated for a moment." Ford's Writings of Jefferson, vol. 5, p. 476.

The rough draft of these observations was submitted to Mr. Hamilton, then Secretary of the Treasury, for suggestions, previously to sending it to the President, some time be-  
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fore March 5, and Hamilton made the following (among other) notes upon it:

"Page 25. Is it true that the United States have no right to *alienate an inch* of the territory in question, except in the case of necessity intimated in another place? Or will it be useful to avow the denial of such a right? It is apprehended that the doctrine which restricts the alienation of territory to cases of *extreme necessity* is applicable rather to *peopled* territory than to waste and uninhabited districts. Positions restraining the right of the United States to accommodate to exigencies which may arise ought ever to be advanced with great caution." Ford's Writings of Jefferson, vol. 5, p. 443.

Respecting this note, Mr. Jefferson commented as follows:

"The power to alienate the *unpeopled* territories of any state is not among the enumerated powers given by the Constitution to the general government, and if we may go out of that instrument and *accommodate to exigencies which may arise* by alienating the *unpeopled* territory of a state, we may accommodate ourselves a little more by alienating that which is *peopled*, and still a little more by selling the *people* themselves. A shade or two more in the degree of exigency is all that will be requisite, and of that degree we shall ourselves be the judges. However, may it not be hoped that these questions are forever laid to rest by the 12th Amendment once made a part of the Constitution, declaring expressly that 'the powers [817] not delegated to the \*United States by the Constitution are reserved to the states respectively?' And if the general government has no power to alienate the territory of a state, it is too irresistible an argument to deny ourselves the use of it on the present occasion." *Ibid.*

The opinions of Mr. Jefferson, however, met the approval of President Washington. On March 18, 1792, in inclosing to the commissioners to Spain their commission, he said, among other things:

"You will herewith receive your commission; as also observations on these several subjects reported to the President and approved by him, which will therefore serve as instructions for you. These expressing minutely the sense of our government, and what they wish to have done, it is unnecessary for me to do more here than desire you to pursue these objects unremittingly," etc. Ford's Writings of Jefferson, vol. 5, p. 456.

When the subject matter to which the negotiations related is considered, it becomes evident that the word "state" as above used related merely to territory which was either claimed by some of the states, as Mississippi territory was by Georgia, or to the Northwest Territory, embraced within the ordinance of 1787, or the territory south of the Ohio (Tennessee), which had also been endowed with all the rights and privileges conferred by that ordinance, and all which territory had originally been ceded by states to the United States under express stipulations that such ceded territory should be ul-

timately formed into states of the Union. And this meaning of the word "state" is absolutely in accord with what I shall hereafter have occasion to demonstrate was the conception entertained by Mr. Jefferson of what constituted the United States.

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.

But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose of an incorporated American territory and citizens by the mere exertion of the power to sell \*be conceded, *arguendo*, it would [318] not relieve the dilemma. It is ever true that, where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow, then, that any conditions annexed to a disposition which looked to the protection of the people of the United States, or to enable them to safeguard the disposal of territory, would be void; and thus it would be that either the United States must hold on absolutely, or must dispose of unconditionally.

A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial, and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary.

The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty



with Spain, which has not contained stipulations to the effect that the United States [319] through Congress \*would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi territory, now the states of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treaty-making power now insisted upon would presuppose that every one of these conditions thus sedulously provided for were superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been mooted. To appreciate this it is essential to bear in mind what the words "United States" signified at the time of the adoption of the Constitution. When by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular states. The entire territory was part of the United States, and all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. When, as has already been said, the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard should be respected. The ordinance of 1787, providing for the government [320] of the Northwest Territory, fulfilled \*this promise on behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that it contained a bill of rights, a promise of ultimate statehood, and it provided (*italics mine*) that "the said territory and the states which may be formed therein *shall ever remain a part of this Confederacy of the United States of America*, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, conformably thereto." It submitted the inhabitants to a liability 182 U. S.

for a tax to pay their proportional part of the public debt and the expenses of the government, to be assessed by the rule of apportionment which governed the states of the Confederation. It forbade slavery within the territory, and contained a stipulation that the provisions of the ordinance should ever remain unalterable unless by common consent.

Thus it was at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of states, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government.

The opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution (Taney, Ch. J., in *Scott v. Sandford*, 19 How. 438, 15 L. ed. 713), while, on the other hand, it has been said that the ordinance of 1787 was "the most solemn of all engagements," and became a part of the Constitution of the United States by reason of the 6th article, which provided that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation." Per Baldwin, J., concurring opinion in *Pollard v. Kibbe*, 14 Pet. 417, 10 L. ed. 521, and per Catron, J., in dissenting opinion in *Strader v. Graham*, 10 How. 98, 13 L. ed. 343. What- [321] ever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under the Constitution the provision of the Northwest Territory ordinance making such territory forever a part of the Confederation was not binding on the government of the United States when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the Continental soldiers, it is impossible for me to believe that it was ever considered that the result of the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their suffering and valor had secured the liberty of their united country. Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the general government the territory south of the Ohio river, intending thereby to expatriate those dauntless mountaineers of North Carolina who had shed lustre upon the Revolutionary arms by the victory of King's mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory.

Beyond question, in one of the early laws



enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform the ordinance to the new Constitution. 1 Stat. at L. 50, chap. 8.

In view of this it cannot, it seems to me, be doubted that the United States continued to be composed of states and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution. Subsequently, the territory now embraced in the state of Tennessee was ceded to the United States by the state of North Carolina. In order to insure the rights of the native inhabitants, it was expressly stipulated that the inhabitants of the ceded territory should enjoy all the rights, privileges, benefits, and advantages set forth in the ordinance "of the late Congress for the government of the western [322] territory of the United \*States." A condition was, however, inserted in the cession, that no regulation should be made by Congress tending to emancipate slaves. By act of April 2, 1790 (1 Stat. at L. 106, chap. 6) this cession was accepted. And at the same session, on May 26, 1790, an act was passed for the government of this territory, under the designation of "the territory of the United States south of the Ohio river." 1 Stat. at L. 123, chap. 14. This act, except as to the prohibition which was found in the Northwest Territory ordinance as to slavery, in express terms declared that the inhabitants of the territory should enjoy all the rights conferred by that ordinance.

A government for the Mississippi territory was organized on April 7, 1798. 1 Stat. at L. 549, chap. 28. The land embraced was claimed by the state of Georgia, and her rights were saved by the act. The 6th section thereof provided as follows:

"Sec. 6. *And be it further enacted*, That from and after the establishment of the said government, the people of the aforesaid territory shall be entitled to and enjoy, all and singular, the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned territory."

Thus clearly defined by boundaries, by common citizenship, by like guaranties, stood the United States when the plan of acquiring by purchase from France the province of Louisiana was conceived by President Jefferson. Naturally, the suggestion which arose was the power on the part of the government of the United States, under the Constitution, to incorporate into the United States—a Union then composed, as I have stated, of states and territories—a foreign province inhabited by an alien people, and thus make them partakers in the American commonwealth. Mr. Jefferson, not doubting the power of the United States to acquire,

consulted Attorney General Lincoln as to the right by treaty to stipulate for incorporation. By that officer Mr. Jefferson was, in effect, advised that the power to incorporate, that is, to share the privileges and immunities \*of the people of the United States with [323] a foreign population, required the consent of the people of the United States, and it was suggested, therefore, that if a treaty of cession were made containing such agreements it should be put in the form of a change of boundaries, instead of a cession, so as thereby to bring the territory within the United States. The letter of Mr. Lincoln was sent by President Jefferson to Mr. Gallatin, the Secretary of the Treasury. Mr. Gallatin did not agree as to the propriety of the expedient suggested by Mr. Lincoln. In a letter to President Jefferson, in effect so stating, he said:

"But does any constitutional objection really exist? To me it would appear (1) that the United States as a nation have an inherent right to acquire territory; (2) that whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; (3) that whenever the territory has been acquired Congress have the power either of admitting into the Union as a new state, or of annexing to a state, with the consent of that state, or of making regulations for the government of such territory." Gallatin's Writings, vol. 1, p. 11, etc.

To this letter President Jefferson replied in January, 1803, clearly showing that he thought there was no question whatever of the right of the United States to acquire, but that he did not believe incorporation could be stipulated for and carried into effect without the consent of the people of the United States. He said (*italics mine*):

"You are right, in my opinion, as to Mr. L.'s proposition: *There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands* will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution." Gallatin's Writings, vol. 1, p. 115.

And the views of Mr. Madison, then Secretary of State, exactly conformed to those of President Jefferson, for, on March 2, 1803, in a letter to the commissioners who were negotiating the treaty, he said:

"To incorporate the inhabitants of the hereby ceded territory \*with the citizens of [324] the United States, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay." 2 State Papers, 540.

Let us pause for a moment to accentuate the irreconcilable conflict which exists between the interpretation given to the Constitution at the time of the Louisiana treaty by Jefferson and Madison, and the import of that instrument as now insisted upon. You



are to negotiate, said Madison to the commissioners, to obtain a cession of the territory, but you must not under any circumstances agree *"to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made."* Under the theory now urged, Mr. Madison should have said: You are to negotiate for the cession of the territory of Louisiana to the United States, and if deemed by you expedient in accomplishing this purpose, you may provide for the immediate incorporation of the inhabitants of the acquired territory into the United States. This you can freely do because the Constitution of the United States has conferred upon the treaty-making power the absolute right to bring all the alien people residing in acquired territory into the United States, and thus divide with them the rights which peculiarly belong to the citizens of the United States. Indeed, it is immaterial whether you make such agreements, since by the effect of the Constitution, without reference to any agreements which you may make for that purpose, all the alien territory and its inhabitants will instantly become incorporated into the United States if the territory is acquired.

Without going into details, it suffices to say that a compliance with the instructions given them would have prevented the negotiators on behalf of the United States from inserting in the treaty any provision looking even to the ultimate incorporation of the acquired territory into the United States. In view of the emergency and exigencies of the negotiations, however, the commissioners were constrained to make such a stipulation, and the treaty provided as follows:

[325] "Art. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted \*as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." 8 Stat. at L. 202.

Weighing the provisions just quoted, it is evident they refute the theory of incorporation arising at once from the mere force of a treaty, even although such result be directly contrary to any provisions which a treaty may contain. Mark the language. It expresses a promise: *"The inhabitants of the ceded territory shall be incorporated in the Union of the United States. . . ."* Observe how guardedly the fulfilment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only *"as soon as possible according to the principles of the Federal Constitution."* If the view now urged be true, this wise circumspection was unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise.

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It is said, however, that the treaty for the purchase of Louisiana took for granted that the territory ceded would be immediately incorporated into the United States, and hence the guaranties contained in the treaty related, not to such incorporation, but was a pledge that the ceded territory was to be made a part of the Union as a state. The minutest analysis, however, of the clauses of the treaty, fails to disclose any reference to a promise of statehood, and hence it can only be that the pledges made referred to incorporation into the United States. This will further appear when the opinions of Jefferson and Madison and their acts on the subject are reviewed. The argument proceeds upon the theory that the words of the treaty, *"shall be incorporated into the Union of the United States,"* could only have referred to a promise of statehood, since the then existing and incorporated territories were not a part of the Union of the United States, as that Union consisted only of the states. But this has been shown to be unfounded, \*since the "Union of the United [326] States" was composed of states and territories, both having been embraced within the boundaries fixed by the treaty of peace between Great Britain and the United States which terminated the Revolutionary War, the latter, the territories, embracing districts of country which were ceded by the states to the United States under the express pledge that they should forever remain a part thereof. That this conception of the Union composing the United States was the understanding of Jefferson and Madison, and indeed of all those who participated in the events which preceded and led up to the Louisiana treaty, results from what I have already said, and will be additionally demonstrated by statements to be hereafter made. Again, the inconsistency of the argument is evident. Thus, while the premise upon which it proceeds is that foreign territory, when acquired, becomes at once a part of the United States, despite conditions in the treaty expressly excluding such consequence, it yet endeavors to escape the refutation of such theory which arises from the history of the government by the contention that the territories which were a part of the United States were not component constituents of the Union which composed the United States. I do not understand how foreign territory which has been acquired by treaty can be asserted to have been absolutely incorporated into the United States as a part thereof despite conditions to the contrary inserted in the treaty, and yet the assertion be made that the territories which, as I have said, were in the United States originally as a part of the states, and which were ceded by them upon express condition that they should forever so remain a part of the United States, were not a part of the Union composing the United States. The argument, indeed, reduces itself to this, that for the purpose of incorporating foreign territory into the United States domestic territory must be disincorporated. In other words, that the Union must be, at least in



theory, dismembered for the purpose of maintaining the doctrine of the immediate incorporation of alien territory.

That Mr. Jefferson deemed the provision of the treaty relating to incorporation to be repugnant to the Constitution is unquestioned. While he conceded, as has been seen, [327] the right \*to acquire, he doubted the power to incorporate the territory into the United States without the consent of the people by a constitutional amendment. In July, 1803, he proposed two drafts of a proposed amendment, which he thought ought to be submitted to the people of the United States to enable them to ratify the terms of the treaty. The first of these, which is dated July, 1803, is printed in the margin.†

The second and revised amendment was as follows:

"Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations. Save only that, as to the portion thereof lying north of the latitude of the mouth of Arcana river, no new state shall be established nor any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for those purposes.

"Florida also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon become citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations." Ford's Writings of Jefferson, vol. 8, p. 241.

It is strenuously insisted that Mr. Jefferson's conviction on the subject of the repugnancy of the treaty to the Constitution was [328] \*based alone upon the fact that he thought the treaty exceeded the limits of the Constitution, because he deemed that it provided for the admission, according to the Constitution, of the acquired territory as a new state or states into the Union, and hence, for the purpose of conferring this power, he drafted the amendment. The contention is refuted by two considerations: The first, because

†First draft of Mr. Jefferson's proposed amendment to the Constitution: "The province of Louisiana is incorporated with the United States and made part thereof. The rights of occupancy in the soil and of self-government are confirmed to Indian inhabitants as they now exist." It then proceeded with other provisions relative to Indian rights and possession and exchange of lands, and forbidding Congress to dispose of the lands otherwise than as therein provided without further amendment to the Constitution. This draft closes thus: "Except as to that portion thereof which lies south of the latitude of 31°, which, whenever they deem expedient, they may enact into a territorial government, either separate or as making part with one on the eastern side of the river, vesting the inhabitants thereof with all rights possessed by other territorial citizens of the United States." Writings of Jefferson, edited by Ford, vol. 8, p. 241.

the two forms of amendment which Mr. Jefferson prepared did not purport to confer any power upon Congress to admit new states; and, second, they absolutely forbade Congress from admitting a new state out of a described part of the territory without a further amendment to the Constitution. It cannot be conceived that Mr. Jefferson would have drafted an amendment to cure a defect which he thought existed, and yet say nothing in the amendment on the subject of such defect. And, moreover, it cannot be conceived that he drafted an amendment to confer a power he supposed to be wanting under the Constitution, and thus ratify the treaty, and yet in the very amendment withhold in express terms, as to a part of the ceded territory, the authority which it was the purpose of the amendment to confer.

I excerpt in the margin† two letters from Mr. Jefferson, one \*written under date of [329] July 7, 1803, to William Dunbar, and the other dated September 7, 1803, to Wilson Cary Nicholas, which show clearly the difficulties which were in the mind of Mr. Jefferson, and which remove all doubt concerning the meaning of the amendment which he wrote and the adoption of which he deemed

†Letter to William Dunbar of July 7, 1803: "Before you receive this you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they make the best arrangements practicable for its good government. It is most necessary because they will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province into the Union and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority." Jefferson's Writings, vol. 8, p. 254.

Letter to Wilson Cary Nicholas of September 7, 1803:

"I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new states into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new states which should be formed out of the territory for which and under whose authority alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless." Writings of Jefferson, vol. 8, p. 247.



necessary so that any supposed want of power concerning the treaty would be provided for.

These letters show that Mr. Jefferson bore in mind the fact that the Constitution in express terms delegated to Congress the power to admit new states, and therefore no further authority on this subject was required. But he thought this power in Congress was confined to the area embraced within the limits of the United States, as existing at the adoption of the Constitution. To fulfil the stipulations of the treaty so as to cause the ceded territory to become a part of the United States, Mr. Jefferson deemed an amendment to the Constitution to be essential. For this reason the amendment which he formulated declared that the territory ceded was to be "*a part of the United States, and its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations.*" What these words meant is not open to doubt when it is observed that they were but the paraphrase of the following words, which were contained in the first proposed amendment which Mr. Jefferson wrote: "Vesting the inhabitants thereof with all rights possessed by *other territorial citizens of the United States,*"—which clearly show that it was the want of power to incorporate the ceded country into the United States as a territory which was in Mr. Jefferson's mind, and to accomplish

[330] which result \*he thought an amendment to the Constitution was required. This provision of the amendment applied to all of the territory ceded, and therefore brought it all into the United States, and hence placed it in a position where the power of Congress to admit new states would have attached to it. As Mr. Jefferson deemed that every requirement of the treaty would be fulfilled by incorporation, and that it would be unwise to form a new state out of the upper part of the new territory, after thus providing for the complete execution of the treaty by incorporation of all the territory into the United States, he inserted a provision *forbidding Congress from admitting a new state out of a part of the territory.*

With the debates which took place on the subject of the treaty I need not particularly concern myself. Some shared Mr. Jefferson's doubts as to the right of the treaty-making power to incorporate the territory into the United States without an amendment of the Constitution; others deemed that the provision of the treaty was but a promise that Congress would ultimately incorporate as a territory, and, until by the action of Congress this latter result was brought about, full power of legislation to govern as deemed best was vested in Congress. This latter view prevailed. Mr. Jefferson's proposed amendment to the Constitution, therefore, was never adopted by Congress, and hence was never submitted to the people.

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An act was approved on October 31, 1803 (2 Stat. at L. 245, chap. 1), "to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof." The provisions of this act were absolutely incompatible with the conception that the territory had been incorporated into the United States by virtue of the cession. On November 10, 1803 (2 Stat. at L. 245, chap. 2), an act was passed providing for the issue of stock to raise the funds to pay for the territory. On February 24, 1804 (2 Stat. at L. 251, chap. 13), an act was approved which expressly extended certain revenue and other laws over the ceded country. On March 26, 1804 (2 Stat. at L. 283, chap. 38), an act was passed dividing the "province of Louisiana" into Orleans territory on the south and the district of Louisiana to \*the north. This act extended over [331] the territory of Orleans a large number of the general laws of the United States, and provided a form of government. For the purposes of government the district of Louisiana was attached to the territory of Indiana, which had been carved out of the Northwest Territory. Although the area described as Orleans territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with.

In a letter written to Mr. Madison on July 14, 1804, Mr. Jefferson, speaking of the treaty of cession, said (Ford's Writings of Jefferson, vol. 8, p. 313):

"The inclosed reclamations of Girod & Chote against the claims of Bapstrop to a monopoly of the Indian commerce supposed to be under the protection of the 3d article of the Louisiana convention, as well as some other claims to abusive grants, will probably force us to meet that question. The article has been worded with remarkable caution on the part of our negotiators. It is that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitution, to the enjoyment of all the rights of citizens, and, in the meantime, *en attendant*, shall be maintained in their liberty, property, and religion. That is, that they shall continue under the protection of the treaty until the principles of our Constitution can be extended to them, when the protection of the treaty is to cease, and that of our own principles to take its place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. Accordingly, Congress has begun by extending about twenty particular laws by their titles, to Louisiana. Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights, therefore, are now taken from under the treaty and placed un-



der the principles of our laws. I imagine it will be necessary to express an opinion to Governor Claiborne on this subject, after you shall have made up one."

[332] \*In another letter to Mr. Madison, under date of August 15, 1804, Mr. Jefferson said (*Ibid.* p. 315):

"I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress."

At the following session of Congress, on March 2, 1805 (2 Stat. at L. 322, chap. 23), an act was approved, which, among other purposes, doubtless was intended to fulfil the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the 1st section, provided that the inhabitants of the territory of Orleans "*shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance*" (that is, the ordinance of 1787) "*and now enjoyed by the people of the Mississippi territory.*" As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat. at L. 550, chap. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the territory of Orleans was incorporated into the United States to fulfil the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that, even after the action of Congress above stated, this condition of the treaty continued to be enforced, thus demonstrating that even after the incorporation of the territory the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.

The upper part of the province of Louisiana, designated by the act of March 26, 1804 (2 Stat. at L. 283, chap. 38), as the district of Louisiana, and by the act of March 3, 1805 (2 Stat. at L. 331, chap. 31), as the territory of Louisiana, was created the ter-  
[333] ritory of Missouri \*on June 4, 1812. 2 Stat. at L. 743, chap. 95. By this latter act, though the ordinance of 1787 was not in express terms extended over the territory,—probably owing to the slavery agitation,—the inhabitants of the territory were accorded substantially all the rights of the inhabitants of the Northwest Territory. Citizenship was in effect recognized in the 9th section, while the 14th section contained an elaborate declaration of the rights secured to the people of the territory.

Pausing to analyze the practical construction which resulted from the acquisition of the vast domain covered by the Louisiana purchase, it indubitably results, first, that it was conceded by every shade of opinion that the government of the United States had the undoubted right to acquire, hold, and govern the territory as a possession, and that incorporation into the United States could under no circumstances arise solely from a treaty of cession, even although it contained provisions for the accomplishment of such result; second, it was strenuously denied by many eminent men that, in acquiring territory, citizenship could be conferred upon the inhabitants within the acquired territory; in other words, that the territory could be incorporated into the United States without an amendment to the Constitution; and, third, that the opinion which prevailed was that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfilment on the future action of Congress. In accordance with this view the territory acquired by the Louisiana purchase was governed as a mere dependency until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a territory into the United States, and the same rights were conferred in the same mode by which other territories had previously been incorporated, that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

Florida was ceded by treaty signed on February 22, 1819. 8 Stat. at L. 252. While drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view \*that [334] under the Constitution Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. General Jackson was appointed governor under this act, and exercised a degree of authority entirely in conflict with the conception that the territory was a part of the United States, in the sense of incorporation, and that those provisions of the Constitution which would have been applicable under that hypothesis were then in force. It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat. at L. 654, chap. 13), an act was passed as in the case of Missouri, and presumably for the same reason, which, while not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*

This treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the treaty,



and they were enforced by the executive officers of the government.

The intensity of the political differences which existed at the outbreak of hostilities with Mexico and at the termination of the war with that country, and the subject around which such conflicts of opinion centered, probably explain why the treaty of peace with Mexico departed from the form adopted in the previous treaties concerning Florida and Louisiana. That treaty, instead of expressing a cession in the form previously adopted, whether intentionally or not I am unable, of course, to say, resorted to the expedient suggested by Attorney General Lincoln to President Jefferson, and accomplished the cession by *changing the boundaries of the two countries*; in other words, by *bringing the acquired territory within the described boundaries of the United States*. The treaty, besides, contained a stipulation for rights of citizenship; in other words, a provision equivalent in terms to those used in the previous treaties to which I have referred. The controversy which was then flagrant on the subject of slavery pre-  
[335] vented the passage of a \*bill giving California a territorial form of government, and California, after considerable delay, was therefore directly admitted into the Union as a state. After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States; and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious.

Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that, as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico, as just stated. However, the treaty ceding Mexico contained an express provision  
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excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treaty-making authority to so provide, which must be the case if the limitation on the treaty-making power, which is here asserted, be well founded. The treaty concerning Alaska, therefore, adds \*cogency to the conception estab-  
[336] lished by every act of the government from the foundation,—that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted.

The demonstration which it seems to me is afforded by the review which has preceded is, besides, sustained by various other acts of the government which to me are wholly inexplicable except upon the theory that it was admitted that the government of the United States had the power to acquire and hold territory without immediately incorporating it. Take, for instance, the simultaneous acquisition and admission of Texas, which was admitted into the Union as a state by joint resolution of Congress, instead of by treaty. To what grant of power under the Constitution can this action be referred, unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new states, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence, it must be that the action of Congress at one and the same time fulfilled the function of incorporation; and, this being so, the privilege of statehood was added. But I shall not prolong this opinion by occupying time in referring to the many other acts of the government which further refute the correctness of the propositions which are here insisted on and which I have previously shown to be without merit. In concluding my appreciation of the history of the government, attention is called to the 13th Amendment to the Constitution, which to my mind seems to be conclusive. The 1st section of the amendment, the italics being mine, reads as follows: "Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not \*incorporated into it, and hence are  
[337] not within the United States in the completest sense of those words.

Let me now proceed to show that the decisions of this court, without a single exception, are absolutely in accord with the true rule as evolved from a correct construction of the Constitution as a matter of first impression, and as shown by the history of the government which has been previously epitomized.



mized. As it is appropriate here, I repeat the quotation which has heretofore been made from the opinion, delivered by Mr. Chief Justice Marshall, in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, where, considering the Florida treaty, the court said (p. 542, L. ed. p. 255):

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

In *Fleming v. Page* the court, speaking through Mr. Chief Justice Taney, discussing the acts of the military forces of the United States while holding possession of Mexican territory, said (9 How. 614, 13 L. ed. 281):

"The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority."

In *Gross v. Harrison*, 16 How. 164, 14 L. ed. 889, the question for decision, as I have previously observed, was as to the legality of certain duties collected both before and after the ratification of the treaty of peace, on foreign merchandise imported into California. Part of the duties collected were assessed upon importations made by local officials before notice had been received of the ratification of the treaty of peace, and when duties were laid under a tariff which had been promulgated by the President. Other duties were imposed subsequent to the receipt of notification of the ratification, and [338] these latter duties were laid \*according to the tariff as provided in the laws of the United States. All the exactions were upheld. The court decided that, prior to and up to the receipt of notice of the ratification of the treaty, the local government lawfully imposed the tariff then in force in California, although it differed from that provided by Congress, and that subsequent to the receipt of notice of the ratification of the treaty the duty prescribed by the act of Congress, which the President had ordered the local officials to enforce, could be lawfully collected. The opinion undoubtedly expressed the thought that by the ratification of the treaty in question, which, as I have shown, not only included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation, the territory had become a part of the United States, and the body of the opinion quoted the letter of the Secretary of the Treasury, which referred to the enactment of laws of Congress by which the treaty had been impliedly ratified. The decision of the court as to duties imposed subsequent to the receipt of notice of the ratification of the treaty of

peace undoubtedly took the fact I have just stated into view, and, in addition, was unmistakably proceeded upon the nature of the rights which the treaty conferred. No comment can obscure or do away with the patent fact, namely, that it was unequivocally decided that if different provisions had been found in the treaty a contrary result would have followed. Thus, speaking through Mr. Justice Wayne, the court said (16 How. 197, 14 L. ed. 903):

"By the ratification of the treaty California became a part of the United States. And, as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution; by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded \*by Taney, that the treaty-making [339] power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined?—is then the only question remaining for consideration.

The provisions of the treaty with respect to the status of Porto Rico and its inhabitants are as follows:

#### Article II.

Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam, in the Marianas or Ladrões.

#### Article IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes



her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve [340] \*their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

#### Article X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

It is to me obvious that the above-quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the "civil rights and political status of the native inhabitants of the territories hereby ceded" shall be determined by Congress. When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was brought about which the treaty itself—giving effect to its provisions—could not produce. And, in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole, seem to me plainly to manifest the intention of Congress that, for the present at least, Porto Rico is not to be incorporated into the United States.

The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the [341] Constitution are there in force. A \*further analysis of the provisions of the act seems to me not to be required in view of the fact that as the act was reported from the committee it contained a provision conferring citizenship upon the inhabitants of Porto Rico, and this was stricken out in the Senate. The argument, therefore, can only be that rights were conferred, which, after con-

sideration, it was determined should not be granted. Moreover I fail to see how it is possible, on the one hand, to declare that Congress in passing the act had exceeded its powers by treating Porto Rico as not incorporated into the United States, and, at the same time, it be said that the provisions of the act itself amount to an incorporation of Porto Rico into the United States, although the treaty had not previously done so. It in reason cannot be that the act is void because it seeks to keep the island disincorporated, and, at the same time, that material provisions are not to be enforced because the act does incorporate. Two irreconcilable views of that act cannot be taken at the same time, the consequence being to cause it to be unconstitutional.

In what has preceded I have in effect considered every substantial proposition, and have either conceded or reviewed every authority referred to as establishing that immediate incorporation resulted from the treaty of cession which is under consideration. Indeed, the whole argument in favor of the view that immediate incorporation followed upon the ratification of the treaty in its last analysis necessarily comes to this: Since it has been decided that incorporation flows from a treaty which provides for that result, when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although the condition to that end has been approved by Congress. That is to say, the argument is this: Because a provision for incorporation when ratified incorporates, therefore a provision against incorporation must also produce the very consequence which it expressly provides against.

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, \*because [342] the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me



to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the contrary, would only render them more dangerous. This must be the result, since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civil power.

And to me it further seems apparent that another and more disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished "all claim of [343]sovereignty \*over and title to Cuba." It was further provided in the treaty as follows:

"And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property."

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this court unanimously held in *Neely v. Henkel*, 180 U. S. 109, ante, 448, 21 Sup. Ct. Rep. 302, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if

there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not \*intended to be incor-[344]porated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed—which, of course, I do not think to be conceivable—that the judiciary would be authorized to draw to itself by an act of usurpation purely political functions, upon the theory that if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that under the rule clearly settled in *Neely v. Henkel*, 180 U. S. 109, ante, 448, 21 Sup. Ct. Rep. 302, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action,—a course which would be incompatible with the dignity and honor of the government.

I am authorized to say that Mr. Justice Shiras and Mr. Justice McKenna concur in this opinion.

Mr. Justice Gray, concurring:

\*Concurring in the judgment of affirmance [345] in this case, and in substance agreeing with the opinion of Mr. Justice White, I will sum up the reasons for my concurrence in a few propositions which may also indicate my position in other cases now standing for judgment.



The cases now before the court do not touch the authority of the United States over the territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii; but they relate to territory in the broader sense, acquired by the United States by war with a foreign state.

As Chief Justice Marshall said: "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." *American Ins. Co. v. 356 Bales of Cotton* (1828) 1 Pet. 511, 542, 7 L. ed. 242, 255.

The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine. There must, of necessity, be a transition period.

In a conquered territory, civil government must take effect either by the action of the [346] treaty-making power, or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, elected by the states, and the House of Representatives, chosen by and immediately representing the people of the United States. Treaties by which territory is acquired from a foreign state usually recognize this.

It is clearly recognized in the recent treaty with Spain, especially in the 9th article, by which "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the 4th and 13th articles of the treaty, the United States agree that for ten years  
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Spanish ships and merchandise shall be admitted to the ports of the Philippine islands on the same terms as ships and merchandise of the United States, and Spanish scientific, literary, and artistic works not subversive of public order shall continue to be admitted free of duty into all the ceded territories. Neither of these provisions could be carried out if the Constitution required the customs regulations of the United States to apply in those territories.

In the absence of congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning "foreign countries" remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in *Fleming v. Page*, 9 How. 603, 617, 13 L. ed. 276, 281.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

\*Such was the effect of the act of Congress [347] of April 12, 1900 (31 Stat. at L. chap. 191), entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes." By the 3d section of that act, it was expressly declared that the duties thereby established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico, should cease in any event on March 1, 1902, and sooner if the legislative assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the government established by that act.

The system of duties temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Peckham**, dissenting:

This is an action brought to recover monies exacted by the collector of customs at the port of New York as import duties on two shipments of fruit from ports in the island of Porto Rico to the port of New York in November, 1900.

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged, and the treaty proclaimed April 11, 1899. Then followed the act approved April 12, 1900. 31 Stat. at L. 77, chap. 191.

Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Peckham, and myself are unable



to concur in the opinions and judgment of the court in this case. The majority widely differ in the reasoning by which the conclusion is reached, although there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless, and notwithstanding the act of Congress, is not a part of the United States subject to the provisions of the Constitution in respect of the levy of taxes, duties, imposts, and excises.

[348] \*The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution.

The act creates a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, are constituted an executive council; local legislative powers are vested in a legislative assembly consisting of the executive council and a house of delegates to be elected; courts are provided for, and, among other things, Porto Rico is constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the President for the term of four years. The district court is to be called the district court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States. The act also provides that "writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied."

It was also provided that the inhabitants, continuing to reside in Porto Rico, who were Spanish subjects on April 11, 1899, and their children born subsequent thereto (except such as should elect to preserve their allegiance to the Crown of Spain), together with citizens of the United States residing in Porto Rico, should "constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

[349] \*All officials authorized by the act are required to, "before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico."

The 2d, 3d, 4th, 5th and 38th sections of the act are printed in the margin.†

\*It will be seen that duties are imposed [350] upon "merchandise coming into Porto Rico from the United States;" "merchandise \*com-[351] ing into the United States from Porto Rico;" taxes upon "articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn from consumption or sale" "equal to the internal-revenue tax imposed in the United States upon like articles of domestic manufacture;" and "on all articles of merchandise of United States manufacture coming into Porto Rico," "a tax equal in rate and amount to the internal-revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture."

And it is also provided that all duties collected in Porto Rico on imports from foreign countries and on "merchandise coming into Porto Rico from the United States," and "the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico,"

†Sec. 2. That on and after the passage of this act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided*, That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: *And provided further*, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: *And provided further*, That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States.

Sec. 3. That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue, and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and on all articles of merchandise of United States manufacture coming into Porto Rico, in addition to the duty above provided, upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Porto



shall be held as a separate fund and placed "at the disposal of the President to be used for the government and benefit of Porto Rico" until the local government is organized, when "all collections of taxes and duties under this act shall be paid into the treasury of Porto Rico, instead of being paid into the Treasury of the United States."

[352] The 1st clause of § 8 of article 1 of the Constitution\* provides: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Clauses 4, 5, and 6 of § 9 are:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"No tax or duty shall be laid on articles exported from any state.

Rico upon the like articles of Porto Rican manufacture: *Provided*, That on and after the date when this act shall take effect all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the Secretary of War, shall be admitted into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

Sec. 4. That the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury shall designate the several ports and sub-ports of entry into Porto Rico, and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: *Provided, however*, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the Treasury of the United States.

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

This act on its face does not comply with the rule of uniformity, and that fact is admitted.

The uniformity required by the Constitution is a geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Head Money Cases*, 112 U. S. 594, *sub nom. Edye v. Robertson*, 28 L. ed. 802, 5 Sup. Ct. Rep. 247. But it is said that Congress in attempting to levy these duties was not exercising power derived from the 1st clause of § 8, or restricted by it, because in dealing with the territories Congress exercises unlimited powers of government, and, moreover, that these duties are merely local taxes.

slons hereof: *Provided, however*, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the Treasury of the United States.

Sec. 5: That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

Sec. 38. That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal government, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: *Provided, however*, That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property.



This court, in 1820, when Marshall was Chief Justice, and Washington, William Johnson, Livingston, Todd, Duvall, and Story were his associates, took a different view of the power of Congress in the matter of laying and collecting taxes, duties, imposts, and excises in the territories, and its ruling in *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98, has never been overruled.

It is said in one of the opinions of the majority that the Chief Justice "made certain observations which have occasioned some embarrassment in other cases." Manifestly this is so in this case, for it is necessary to overrule that decision in order to reach the result herein announced.

[353] \*The question in *Loughborough v. Blake* was whether Congress had the right to impose a direct tax on the District of Columbia apart from the grant of exclusive legislation, which carried the power to levy local taxes. The court held that Congress had such power under the clause in question. The reasoning of Chief Justice Marshall was directed to show that the grant of the power "to lay and collect taxes, duties, imposts, and excises," because it was general and without limitation as to place, consequently extended "to all places over which the government extends," and he declared that, if this could be doubted, the doubt was removed by the subsequent words, which modified the grant, "but all duties, imposts, and excises shall be uniform throughout the United States." He then said: "It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

It is wholly inadmissible to reject the process of reasoning by which the Chief Justice reached and tested the soundness of his conclusion, as merely *obiter*.

Nor is there any intimation that the ruling turned on the theory that the Constitution irrevocably adhered to the soil of Maryland and Virginia, and therefore accompanied the parts which were ceded to form [354] the District, or that "the tie" between \*those states and the Constitution "could not be

dissolved without at least the consent of the Federal and state governments to a formal separation," and that this was not given by the cession and its acceptance in accordance with the constitutional provision itself, and hence that Congress was restricted in the exercise of its powers in the District, while not so in the territories.

So far from that, the Chief Justice held the territories as well as the District to be part of the United States for the purposes of national taxation, and repeated in effect what he had already said in *M'Culloch v. Maryland*, 4 Wheat. 408, 4 L. ed. 602; "Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported."

Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the states and their people as well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the states can only exist if and as granted by the Constitution. And by the Constitution Congress is vested with power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The territories are indeed not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

It is evident that Congress cannot regulate commerce between a territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the states, the power to so legislate is apparently \*rested on the assumption that the [355] right to regulate commerce between the states and territories comes within the commerce clause by necessary implication. *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Accordingly the act of Congress of August 8, 1890, entitled "An Act to Limit the Effect of the Regulations of Commerce between the Several States, and with Foreign Countries in Certain Cases," applied in terms to the territories as well as to the states. [26 Stat. at L. 313, chap. 728.]

In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity.

The fact that the proceeds are devoted by



the act to the use of the territory does not make national taxes local. Nobody disputes the power of Congress to lay and collect duties geographically uniform, and apply the proceeds by a proper appropriation act to the relief of a particular territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion certainly is not strengthened when based on the diversion of duties collected from all parts of the United States to a territorial treasury before reaching the Treasury of the United States. Clause 7 of § 9 of article 1 provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law," and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

It is also urged that Chief Justice Marshall was entirely in fault because, while the grant was general and without limitation as to place, the words, "throughout the United States," imposed a limitation as to place so far as the rule of uniformity was concerned, namely, a limitation to the states as such.

[356] Undoubtedly the view of the Chief Justice was utterly inconsistent with that contention, and, in addition to what has been quoted, he further remarked: "If it be said that the principle of uniformity, established in the Constitution, secures the District from oppression in the imposition of indirect taxes, it is \*not less true that the principle of apportionment, also established in the Constitution, secures the District from any oppressive exercise of the power to lay and collect direct taxes." [5 Wheat. 325, 5 L. ed. 100.] It must be borne in mind that the grant was of the absolute power of taxation for national purposes, wholly unlimited as to place, and subject to only one exception and two qualifications. The exception was that exports could not be taxed at all. The qualifications were that direct taxes must be imposed by the rule of apportionment, and indirect taxes by the rule of uniformity. *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497. But as the power necessarily could be exercised throughout every part of the national domain, state, territory, District, the exception and the qualifications attended its exercise. That is to say, the protection extended to the people of the states extended also to the people of the District and the territories.

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it is shown that the words, "throughout the United States," are but a qualification introduced for the purpose of rendering the uniformity prescribed geographical, and not intrinsic, as would have resulted if they had not been used.

As the grant of the power to lay taxes and duties was unqualified as to place, and the words were added for the sole purpose of preventing the uniformity required from being intrinsic, the intention thereby to circumscribe the area within which the power

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could operate not only cannot be imputed, but the contrary presumption must prevail.

Taking the words in their natural meaning,—in the sense in which they are frequently and commonly used,—no reason is perceived for disagreeing with the Chief Justice in the view that they were used in this clause to designate the geographical unity known as "The United States," "our great Republic, which is composed of states and territories."

Other parts of the Constitution furnish illustrations of the correctness of this view. Thus, the Constitution vests Congress with the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States."

\*This applies to the territories as well as [357] the states, and has always been recognized in legislation as binding.

Aliens in the territories are made citizens of the United States, and bankrupts residing in the territories are discharged from debts owing citizens of the states, pursuant to uniform rules and laws enacted by Congress in the exercise of this power.

The 14th Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;" and this court naturally held, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, that the United States included the District and the territories. Mr. Justice Miller observed: "It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided." And he said the question was put at rest by the amendment, and the distinction between citizenship of the United States and citizenship of a state was clearly recognized and established. "Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

No person is eligible to the office of President unless he has "attained the age of thirty-five years, and been fourteen years a resident within the United States." Clause 5, § 1, art. 2.

Would a native-born citizen of Massachusetts be ineligible if he had taken up his residence and resided in one of the territories for so many years that he had not resided altogether fourteen years in the states? When voted for he must be a citizen of one of the states (clause 3, § 1, art. 2; art. 12), but as to length of time must residence in the territories be counted against him?



[358] \*The 15th Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Where does that prohibition on the United States especially apply if not in the territories?

The 13th Amendment says that neither slavery nor involuntary servitude "shall exist within the United States or any place subject to their jurisdiction." Clearly this prohibition would have operated in the territories if the concluding words had not been added. The history of the times shows that the addition was made in view of the then condition of the country,—the amendment passed the house January 31, 1865,—and it is, moreover, otherwise applicable than to the territories. Besides, generally speaking, when words are used simply out of abundant caution, the fact carries little weight.

Other illustrations might be adduced, but it is unnecessary to prolong this opinion by giving them.

I repeat that no satisfactory ground has been suggested for restricting the words "throughout the United States," as qualifying the power to impose duties, to the states, and that conclusion is the more to be avoided when we reflect that it rests, in the last analysis, on the assertion of the possession by Congress of unlimited power over the territories.

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73. The opinion of the court, by Chief Justice Marshall, in that case, was delivered at \*the February term, 1803, and at the October term, 1885, the court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, speaking through Mr. Justice Matthews, said: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government ex-

ists and acts. And the law is the definition and limitation of power."

From *Marbury v. Madison* to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are "not prohibited, but consist with the letter and spirit of the Constitution."

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.

To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the states, and not the people, created the government.

It is again to antagonize Chief Justice Marshall, when he said: "The government of the Union, then (whatever may be the influence of this fact on the ease), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers." 4 Wheat. 404, 4 L. ed. 601.

The prohibitory clauses of the Constitution are many, and \*they have been repeatedly given effect by this court in respect of the territories and the District of Columbia.

The underlying principle is indicated by Chief Justice Taney, in *The Passenger Cases*, 7 How. 492, 12 L. ed. 790, where he maintained the right of the American citizen to free transit in these words: "Living, as we do, under a common government charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. . . . For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and re-pass through every part of it without interruption, as freely as in our own states."

In *Cross v. Harrison*, 16 How. 197, 14 L. ed. 903, it was held that by the ratification of the treaty with Mexico "California became a part of the United States," and that "the right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States."



In *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution, or, as Mr. Justice Curtis put it, by "the express prohibitions on Congress not to do certain things."

Mr. Justice McLean said: "No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr. Justice Campbell: "I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been [361] inaugurated, \*whose subject comprehended an empire, and which had no restriction but the discretion of Congress."

Chief Justice Taney: "The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the states, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by states. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the states, and guards them as firmly and plainly against any inroads which the general government might attempt under the plea of implied or incidental powers."

Many of the later cases were brought from territories over which Congress had professed to "extend the Constitution," or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body.

*Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580, is a fair illustration, for it was there ruled, citing *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Callan v. Wilson*, 127 U. S. 550, 32 L. ed. 226, 8 Sup. Ct. Rep. 1301; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, that "it is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia."

No reference whatever was made to § 34 of the act of February 21, 1871 (16 Stat. at L. 419, chap. 62), which, in providing for the election of a delegate for the District, closed with the words: "The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly; and the Constitution and all the laws of the United States, which are not lo-  
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cally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

\*Nor did the court in *Bauman v. Ross*, 167 [362] U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, attribute the application of the 5th Amendment to the act of Congress, although it was cited to another point.

The truth is that, as Judge Edmunds wrote, "the instances in which Congress has declared, in statutes organizing territories, that the Constitution and laws should be in force there, are no evidence that they were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a pre-existing truth to ease the doubts of casuists." Cong. Rec. 56th Cong. 1st Sess., p. 3507.

In *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, which was a criminal prosecution in the District of Columbia, Mr. Justice Harlan, speaking for the court, said: "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property,—especially of the privilege of trial by jury in criminal cases." And further: "We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States."

In *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, it was held that a statute of the state of Utah providing for the trial of criminal cases other than capital, by a jury of eight, was invalid as applied on a trial for a crime committed before Utah was admitted; that it was not "competent for the state of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a territory;" and that an act of Congress providing for a trial by a jury of eight persons in the territory of Utah would have been in conflict with the Constitution.

Article 6 of the Constitution ordains: "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

And, as Mr. Justice Curtis observed in *United States v. Morris*, 1 \*Curt. C. C. 50, [363] Fed. Cas. No. 15,815, "nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all times."

But it is said that an opposite result will be reached if the opinion of Chief Justice Marshall in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, be read "in connection with art. 3, §§ 1 and 2 of the Constitution, vesting 'the judicial power of the United States' in 'one Supreme Court,



and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," etc. And it is argued: "As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution."

And further, that if the territories "be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution."

By the 9th clause of § 8 of article 1, Congress is vested with power "to constitute tribunals inferior to the Supreme Court," while by § 1 of article 3 the power is granted to it to establish inferior courts in which the judicial power of the government treated of in that article is vested.

That power was to be exerted over the controversies therein named, and did not relate to the general administration of justice in the territories, which was committed to courts established as part of the territorial government.

[364] What the Chief Justice said was: "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that \*clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."

The Chief Justice was dealing with the subject in view of the nature of the judicial department of the government and the distinction between Federal and state jurisdiction, and the conclusion was, to use the language of Mr. Justice Harlan in *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949, "that courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that article."

But it did not therefore follow that the territories were not parts of the United States, and that the power of Congress in general over them was unlimited; nor was there in any of the discussions on this subject the least intimation to that effect.

And this may justly be said of expressions in some other cases supposed to give color

to this doctrine of absolute dominion in dealing with civil rights.

In *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747, Mr. Justice Matthews said: "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national. Their political rights are franchises, which they hold as privileges in the legislative discretion of the Congress of the United States."

In the *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 44, 34 L. ed. 491, 10 Sup. Ct. Rep. 803, Mr. Justice Bradley observed: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."

\*That able judge was referring to the fact[365] that the Constitution does not expressly declare that its prohibitions operate on the power to govern the territories, but, because of the implication that an express provision to that effect might be essential, three members of the court were constrained to dissent, regarding it, as was said, "of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments."

What was ruled in *Murphy v. Ramsey* is that in places over which Congress has exclusive local jurisdiction its power over the political status is plenary.

Much discussion was had at the bar in respect of the citizenship of the inhabitants of Porto Rico, but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream.

Yet although we are confined to the question of the validity of certain duties imposed after the organization of Porto Rico as a territory of the United States, a few observations and some references to adjudged cases may well enough be added in view of the line of argument pursued in the concurring opinion.

In *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 541, 7 L. ed. 255,—in which, by the way, the court did not accept the views of Mr. Justice Johnson in the circuit court or of Mr. Webster in argument,—Chief Justice Marshall said: "The course which the argument has taken will require that in deciding this question the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of con-



quered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as [366] its new master shall impose. \*On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state. On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

[367] \*General Halleck (International Law, 1st ed. chap. 33, § 14), after quoting from Chief Justice Marshall, observed:

"This is now a well-settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple and easily understood; but it is not so easy to distinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the constitution and laws of the conqueror change or replace those of the conquered. And in case the government of the new state is a constitutional government, of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases."

In *United States v. Percheman*, 7 Pet. 87, 8 L. ed. 617, the Chief Justice said:

"The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

Again, the court in *Pollard v. Hagan*, 3 How. 225, 11 L. ed. 572:

"Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

And in *Chicago, R. I. & P. R. Co. v. McGinn*, 114 U. S. 546, 29 L. ed. 271, 5 Sup. Ct. Rep. 1006: "It is a general rule of public law, recognized and acted upon by the United States, that whenever \*political juris-[368] diction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in



the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

When a cession of territory to the United States is completed by the ratification of a treaty, it was stated in *Cross v. Harrison*, 16 How. 198, 14 L. ed. 903, that the land ceded becomes a part of the United States, and that, as soon as it becomes so, the territory is subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right; and the latter ceased after the ratification of the treaty. This statement was made by the justice delivering the opinion, as the result of the discussion and argument which he had already set forth. It was his summing up of what he supposed was decided on that subject in the case in which he was writing.

[369] \*The new master was, in the instance of Porto Rico, the United States, a constitutional government with limited powers, and the terms which the Constitution itself imposed, or which might be imposed in accordance with the Constitution, were the terms on which the new master took possession.

The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.

Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. The 9th article of the treaty ceding Porto Rico to the United States provided that Spanish subjects, natives of the Peninsula, residing in the ceded territory, might remain or remove, and in case they remained might preserve their allegiance to the Crown of Spain by making a declaration of their decision to do so, "in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside."

The same article also contained this paragraph: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." This was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects

and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it \*purport to secure from the United States a guaranty of civil or political privileges. [370]

Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void.

"It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government." *The Cherokee Tobacco*, 11 Wall. 620, sub nom. *207 Half Pound Papers of Smoking Tobacco v. United States*, 20 L. ed. 229.

So, Mr. Justice Field in *Geofroy v. Riggs*, 133 U. S. 267, 33 L. ed. 645, 10 Sup. Ct. Rep. 297: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate. See 2 Tucker, Const. §§ 354, 355, 356.

In the language of Judge Cooley: "The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. 'No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.'"

I am not intimating in the least degree that any reason exists for regarding this article to be unconstitutional, but even if it \*were, the fact of the cession is a fact accomplished, and this court is concerned only with the question of the power of the government in laying duties in respect of commerce with the territory so ceded. [371]

In the concurring opinion of Mr. Justice White, we find certain important propositions conceded, some of which are denied or not admitted in the other. These are to the effect that "when an act of any department



is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication;" that, as every function of the government is derived from the Constitution, "that instrument is everywhere and at all times potential in so far as its provisions are applicable;" that "wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits;" that where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence cannot be frustrated by the action of any or all of the departments of the government; that the Constitution has conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but every applicable express limitation of the Constitution is in force, and even where there is no express command which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed though not expressed in so many words; that every provision of the Constitution which is applicable to the territories is controlling therein, and all the limitations of the Constitution applicable to Congress in governing the territories necessarily limit its power; that in the case of the territories, when a provision of the Constitution is invoked, the question is whether the provision relied on is applicable; and that the power to lay and collect taxes, duties, imposts, and excises, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a

[372] territory \*which has been incorporated into and forms a part of the United States.

And it is said that the determination of whether a particular provision is applicable involves an inquiry into the situation of the territory and its relations to the United States, although it does not follow, when the Constitution has withheld all power over a given subject, that such an inquiry is necessary.

The inquiry is stated to be: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, Congress can, in the same act and in the exercise of the power conferred by the 1st clause of § 8, impose duties on the commerce between Porto Rico and the states and other territories in contravention of the rule

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of uniformity qualifying the power. If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General, with a candor and ability that did him great credit.

But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

The accuracy of this view is supposed to be sustained by the act of 1856 in relation to the protection of citizens of the United States removing guano from unoccupied islands; but I am unable to see why the discharge by the United States of its undoubted \*duty to protect its citizens on *terra nullius*, [373] whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of Congress over the territories of the United States is unrestricted.

Great stress is thrown upon the word "Incorporation," as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of § 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power,—a suggestion to which I do not assent,—the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the states and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of repub-

lican government a system of domination over distant provinces in the exercise of unrestricted power.

[374] In our judgment, so much of the Porto Rican act as authorized "the imposition of these duties is invalid, and plaintiffs were entitled to recover.

Some argument was made as to general consequences apprehended to flow from this result, but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing "in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution" in giving it a construction not warranted by its words.

Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That however, furnishes no basis for judicial judgment, and if the producers of staples in the existing states of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished. The people of all the states are entitled to a voice in the settlement of that subject.

Again, it is objected on behalf of the government that the possession of absolute power is essential to the acquisition of vast and distant territories, and that we should regard the situation as it is to-day, rather than as it was a century ago. "We must look at the situation as comprehending a possibility—I do not say a probability, but a possibility—that the question might be as to the powers of this government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire."

But it must be remembered that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close of the convention, they well knew, was that star of empire whose course Berkeley had sung sixty years before.

[375] They may not, indeed, have deliberately considered a triumphal "progress of the nation, as such, around the earth, but as Marshall wrote: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception."

This cannot be said, and on the contrary, in order to the successful extension of our institutions, the reasonable presumption is 1140

that the limitations on the exertion of arbitrary power would have been made more rigorous.

After all, these arguments are merely political, and "political reasons have not the requisite certainty to afford rules of judicial interpretation."

Congress has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. If the end be legitimate and within the scope of the Constitution, then, to accomplish it, Congress may use "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution."

The grave duty of determining whether an act of Congress does or does not comply with these requirements is only to be discharged by applying the well-settled rules which govern the interpretation of fundamental law, unaffected by the theoretical opinions of individuals.

Tested by those rules our conviction is that the imposition of these duties cannot be sustained.

Mr. Justice Harlan, dissenting:

I concur in the dissenting opinion of the Chief Justice. The grounds upon which he and Mr. Justice Brewer and Mr. Justice Peckham regard the Foraker act as unconstitutional in the particulars involved in this action meet my entire approval. \*Those [376] grounds need not be restated, nor is it necessary to re-examine the authorities cited by the Chief Justice. I agree in holding that Porto Rico—at least after the ratification of the treaty with Spain—became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing that "all duties, imposts, and excises shall be uniform throughout the United States."

In view, however, of the importance of the questions in this case, and of the consequences that will follow any conclusion reached by the court, I deem it appropriate—without rediscussing the principal questions presented—to add some observations suggested by certain passages in opinions just delivered in support of the judgment.

In one of those opinions it is said that "the Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states;" also, that "we find the Constitution speaking *only to states*, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them." I am not sure that I correctly interpret these words. But if it is meant, as I assume it is meant, that, with the exception named, the Constitution was ordained by the states, and is addressed to and operates only on the states, I cannot accept that view.

In *Martin v. Hunter*, 1 Wheat. 304, 324, 326, 331, 4 L. ed. 97, 102, 104, this court 182 U. S.



speaking by Mr. Justice Story, said that "the Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'"

In *McCulloch v. Maryland*, 4 Wheat. 316, 403-406, 4 L. ed. 579, 600, 601, Chief Justice Marshall, speaking for this court, said: "The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a convention, [377]\* and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. . . . The government of the union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all."

Although the states are constituent parts of the United States, the government rests upon the authority of the people of the United States, and not on that of the states. Chief Justice Marshall, delivering the unanimous judgment of this court in *Cohen v. Virginia*, 6 Wheat. 264, 413, 5 L. ed. 257, 293, said: "That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. . . . In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests . . . is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory."

In reference to the doctrine that the Constitution was established by and for the states as distinct political organizations, Mr. Webster said: "The Constitution itself in its very front refutes that. It declares that [378]\* it is ordained and established by 'the people of the United States. So far from saying that it is established by the governments of 182 U. S.

the several states, it does not even say that it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate. Doubtless, the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution."

In view of the adjudications of this court I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government of or by the states in union, and that the prohibitions and limitations of the Constitution are addressed only to the states. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of states, held together by compact between themselves; whereas, as this court has often declared, it is a government created by the people of the United States, with enumerated powers, and supreme over states and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the national government is in any sense a compact, it is a compact between the people of the United States among themselves as constituting in the aggregate the political community by whom the national government was established. The Constitution speaks, not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States. *Martin v. Hunter*, 1 Wheat. 327, 4 L. ed. 103.

In the opinion to which I am referring it is also said that the "practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct;" that while all power of government may be abused, the same may be said of the power of the government "under the Constitution as well as outside of it;" that "if it once be conceded that we are at liberty to acquire foreign territory, a presumption arises that \*our power with respect to such [379] territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;" that "the liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself and little in the interpretation put upon it, to confirm that impression;" that as the states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that "if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;" that



if "we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions;" and that "the executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired."

These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the government this court has held steadily to the view that the government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted (*Martin v. Hunter*, 1 Wheat. 326, 331, 4 L. ed. 102, 104), we are now informed that Congress possesses powers *outside of the Constitution*, and may deal with new territory, \*acquired by treaty or conquest, in the same manner as other nations have been accustomed to act, with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent

with the spirit and genius, as well as with the words, of the Constitution.

The idea prevails with some—indeed, it found expression in arguments at the bar—that we have in this country substantially or practically two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. The glory of our American system \*of government is that it was created by a [381] written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. "To what purpose," Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch, 137, 176, 2 L. ed. 60, 73, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as "certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." They proceeded upon the theory—the wisdom of which experience has vindicated—that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty. They believed that the establishment here of a government that could administer public affairs according to its will, unrestrained by any fundamental law and without regard to the inherent rights of free-men, would be ruinous to the liberties of the people by exposing them to the oppressions of arbitrary power. Hence, the Constitution enumerates the powers which Congress and the other departments may exercise,—leaving unimpaired, to the states or the



people, the powers not delegated to the national government nor prohibited to the states. That instrument so expressly declares in "the 10th Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.

Again, it is said that Congress has assumed, in its past history, that the Constitution goes into territories acquired by purchase or conquest *only when and as it shall so direct*, and we are informed of the liberality of Congress in *legislating* the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution.

By the express words of the Constitution, every Senator and Representative is bound, by oath or affirmation, to regard it as the supreme law of the land. When the constitutional convention was in session there was much discussion as to the phraseology of the clause defining the supremacy of the Constitution, laws, and treaties of the United States. At one stage of the proceedings the convention adopted the following clause: "This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants, and the judges of the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding." This clause was amended, on motion of Mr. Madison, by inserting after the words "all treaties made" the words "or which shall be made." If the clause, so amended had been inserted in the Constitution as finally adopted, perhaps <sup>[383]</sup>there would have been some justification for saying that the Constitution, laws, and treaties of the United States constituted the supreme law only in the states, and that outside of the states the will of Congress was supreme. But the framers of the Constitution saw the danger of such a provision, and put into that instrument in place of the above clause the following: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in

every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." *Meigs's Growth of the Constitution*, 284, 287. That the convention struck out the words "the supreme law of the several states," and inserted "the supreme law of the land," is a fact of no little significance. The "land" referred to manifestly embraced all the peoples and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority.

Further, it is admitted that *some* of the provisions of the Constitution do apply to Porto Rico, and may be invoked as limiting or restricting the authority of Congress, or for the protection of the people of that island. And it is said that there is a clear distinction between such prohibitions "as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states." In the enforcement of this suggestion it is said in one of the opinions just delivered: "Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description." I cannot accept this reasoning as consistent with the Constitution or with sound rules of interpretation. The express prohibition upon the passage by Congress of bills of attainder, or of *ex post facto* laws, or the granting of titles of nobility, goes no more directly to the root of the power of Congress than does the express prohibition against the imposition by Congress of any *\*duty, impost, or ex-* <sup>[384]</sup> *cise* that is not uniform throughout the United States. The opposite theory, I take leave to say, is quite as extraordinary as that which assumes that Congress may exercise powers outside of the Constitution, and may, in its discretion, legislate that instrument into or out of a domestic territory of the United States.

In the opinion to which I have referred it is suggested that conditions may arise when the annexation of distant possessions may be desirable. "If," says that opinion, "those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large *concessions* ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action." In my judgment, the Constitution does not sustain any such theory of our governmental system. Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of



the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make "concessions" that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or [385] embarrassing circumstances. No such dispensing power exists in any branch of our government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve, because the import duty is many fold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its government, the validity or invalidity of that which is done must be determined by the Constitution.

In *De Lima v. Bidwell*, just decided, 182 U. S. 1, ante, 1041, 21 Sup. Ct. Rep. 743, we have held that, upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country and became a domestic territory of the United States. We have said in that case that from 1803 to the present time there was not a shred of authority, except a *dictum* in one case, "for holding that a district ceded to and in possession of the United States remains for any purpose

a foreign territory;" that territory so acquired cannot be "domestic for one purpose and foreign for another;" and that any judgment to the contrary would be "pure judicial legislation," for which there was no warrant in the Constitution or in the powers conferred upon this court. Although, as we have just decided, \*Porto Rico ceased, [386] after the ratification of the treaty with Spain, to be a foreign country within the meaning of the tariff act, and became a domestic country,—“a territory of the United States,”—it is said that if Congress so wills it may be controlled and governed outside of the Constitution and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts, and excises imposed by Congress "shall be uniform throughout the United States." How Porto Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell*, and yet, as is now held, not embraced by the words "throughout the United States," is more than I can understand.

We heard much in argument about the "expanding future of our country." It was said that the United States is to become what is called a "world power;" and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it *must* be allowed to exert all the power that other nations are accustomed to exercise. My answer is that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government \*by mere judicial in- [387] terpretation. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words "throughout the United States," in the taxing clause of the Constitution, do not embrace a domestic "territory of the United States" having a civil government established by the authority of the United States. This is a distinction which



I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

There are other matters to which I desire to refer. In one of the opinions just delivered the case of *Neely v. Henkel*, 180 U. S. 109, ante, 448, 21 Sup. Ct. Rep. 302, is cited in support of the proposition that the provision of the Foraker act here involved was consistent with the Constitution. If the contrary had not been asserted I should have said that the judgment in that case did not have the slightest bearing on the question before us. The only inquiry there was whether Cuba was a foreign country or territory within the meaning, not of the tariff act, but of the act of June 6th, 1900 (31 Stat. at L. 656, chap. 793). We held that it was a foreign country. We could not have held otherwise, because the United States, when recognizing the existence of war between this country and Spain, disclaimed "any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof," and asserted "its determination, when that is accomplished, to leave the government and control of the island to its people." We said: "While by the act of April 25th, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20th, 1898, expressly disclaimed any purpose  
88] to exercise sovereignty, jurisdiction,\* or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba. It is true that as between  
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Spain and the United States,—indeed, as between the United States and all foreign nations,—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action." In answer to the suggestion that, under the modes of trial there adopted, Neely, if taken to Cuba, would be denied the rights, privileges, and immunities accorded by our Constitution to persons charged with crime against the United States, we said that the constitutional provisions referred to "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United States acquired by treaty, except as Congress may provide, is more than I can perceive.

There is still another view taken of this case. Conceding \*that the national govern- [389]ment is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become *incorporated* into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government; for only Congress is given power by the Constitution to admit new states. But it is an entirely different question whether a domestic "territory of the United States," having an organized civil government established by Congress, is not, for all purposes of government by the nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into, the United States, subject to all the authority which the national government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty, if, as soon as the admission is made,—as quickly as the words expressing the thought can be uttered,—the Constitution is so liberally interpreted as to produce the same results as



those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct.

[390] Can it for a moment be doubted that the addition of Porto Rico to the territory of the United States in virtue of the treaty with Spain has been recognized by direct action upon the part of Congress? Has it not legislated in recognition of that treaty,\* and appropriated the money which it required this country to pay?

If, by virtue of the ratification of the treaty with Spain, and the appropriation of the amount which that treaty required this country to pay, Porto Rico could not become a part of the United States so as to be embraced by the words "throughout the United States," did it not become "incorporated" into the United States when Congress passed the Foraker act? 31 Stat. at L. 77, chap. 191. What did that act do? It provided a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a "governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education." §§ 17-25. It provided for an executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate. § 18. The governor was required to report all transactions of the government in Porto Rico to the President of the United States. § 17. Provision was made for the coins of the United States to take the place of Porto Rican coins. § 11. All laws enacted by the Porto Rican legislative assembly were required to be reported to the Congress of the United States, which reserved the power and authority to amend the same. § 31. But that was not all. Except as otherwise provided, and except also the internal revenue laws, the statutory laws of the United States, not locally inapplicable, are to have the same force and effect in Porto Rico as in the United States. § 14. A judicial department was established in Porto Rico, with a judge to be appointed by the President, by and with the advice and consent of the Senate. § 33. The court so established was to be known as the district court of the United States for Porto Rico, from which writs of error and appeals were to be allowed to this court. § 34. All judicial process, it was provided, "shall run in the name of the United States of America, ss: the President of the United States." § 16. And yet it is said that Porto Rico was not "incorporated" by the Foraker act into the United States so as to be part of the United

[391] States within the "meaning of the constitutional requirement that all duties, imposts, and excises imposed by Congress shall be uniform "throughout the United States."

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country

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with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the "United States." And this result comes from the failure of Congress to use the word "incorporate" in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act: "*Be it enacted by the Senate and House of Representatives in Congress assembled, That Porto Rico be and is hereby incorporated into the United States as a territory,*" would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution.

\*CHRISTIAN HUUS, *Appt.*, [392]  
v.

NEW YORK & PORTO RICO STEAMSHIP  
COMPANY.

(See S. C. Reporter's ed. 392-397.)

*Coastwise steam vessel—coasting trade with  
Porto Rico.*

A steamship engaged in trade between the ports of Porto Rico and the port of New York is a coastwise seagoing vessel within the meaning of U. S. Rev. Stat. § 4401, and, when under the control and direction of a pilot licensed under the Federal statute, is exempted by § 4444 from the provisions of state pilotage laws.

[No. 514.]

*Argued January 11, 14, 1901. Decided May  
27, 1901.*

ON CERTIFICATE from the Circuit Court of Appeals for the Second Circuit presenting questions as to whether a vessel engaged in trade between Porto Rico and New

NOTE.—As to liability of vessel or owners for compulsory pilotage fees—see note to *Clayton v. Hebb* (C. C. App. 4th C.) 39 L. R. A. 177.

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York is engaged in the coasting trade. Answered in the affirmative.

**Statement by Mr. Justice Brown:**

This was a libel filed in the district court for the southern district of New York to recover spoken pilotage upon the American built steamship Ponce, belonging to the defendant, a New York corporation.

The facts were that libellant, on June 25, 1900, offered his service as a Sandy Hook pilot to the master of the Ponce, then about entering the harbor of New York, her port of destination, from the port of San Juan, in the island of Porto Rico. Libellant, who was a duly licensed Sandy Hook pilot, was the first and only one to offer his services. These services were declined by the master of the vessel, who was himself a licensed pilot for the harbor of New York under the laws of the United States. The steamship was at the time duly enrolled and licensed for the coasting trade under the laws of the United States, and was engaged in trade between Porto Rico and New York. The libel was dismissed by the district court (105 Fed. 74), an appeal taken to the circuit court of appeals, which certified to this court the following questions of law, concerning which it desired instructions:

[393] "1. Since the proclamation of the treaty of peace between the United States and the Kingdom of Spain, and the passage of the act of Congress entitled 'An Act Temporarily to Provide \*Revenues and a Civil Government for Porto Rico, and for Other Purposes' (approved April 12, 1900), do Porto Rican ports remain foreign ports in the sense in which those words are used in the statutes of the state of New York regulating pilotage?

"2. Are vessels engaged in trade between Porto Rican ports and ports of the United States engaged in the coasting trade in the sense in which those words are used in the statutes of the state of New York regulating pilotage?

"3. Are steam vessels engaged in trade between Porto Rican ports and ports of the United States coastwise steam vessels in the sense in which those words are used in § 4444 of the Revised Statutes of the United States?"

Mr. William Lindsay argued the cause, and Messrs. Lindsay, Kremer, Kalish, & Palmer filed a brief for appellant:

The presumption is against the claim of Federal interference with the subject of port pilotage.

Moreover, the state laws in regard to port pilotage are to be liberally and beneficially construed for the benefit of pilots.

*Gillespie v. Winberg*, 4 Daly, 325.

This, because the claim for pilotage is not a penalty imposed by the state, but a compensation upon an implied contract.

*Ex parte McNiel*, 13 Wall. 236, 20 L. ed. 624.

And it is not a charge upon the vessels, but rather a regulation instituted for their benefit.

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*The Hanna*, L. R. 1 Adm. & Eccl. 290.

Other nations are bound to regard conquered country while held by the United States as part of its territory, but the conquered country forms no part of the Union, and, forming no part thereof, is foreign to the constitutional boundaries of the United States and territories included within such boundaries.

*Fleming v. Page*, 9 How. 615, 13 L. ed. 281; Halleck, Internat. Law.

Courts are not called upon to interpret treaties when their language is unambiguous, or to inquire into the reasons influencing the contracting parties.

*The Amiable Isabella*, 6 Wheat. 70, 5 L. ed. 207.

When Spain wished to secure to the subjects over which she was surrendering jurisdiction the rights of American citizenship, she caused the treaty to stipulate in terms for the speedy admission of the inhabitants of the ceded country (Florida) to the enjoyment of the privileges, rights, and immunities of citizenship of the United States.

See Treaty with Spain, 1819.

It may be true, as a general rule, that treaties made by the United States, like the laws of Congress, are to be so construed, if reasonably possible, as not to conflict with the Constitution. This treaty, however, in express language declares its purposes, and whether its provisions be constitutional or unconstitutional, Spain is under no obligation to regard, and cannot be compelled to submit to, this rule of interpretation.

If the treaty-making power of the United States exceeded its constitutional authority in contracting to confide the civil and political status of the Porto Ricans and Filipinos to the determination of Congress, then possibly the contract may be treated as void, in which event the relations between the United States and Porto Rico will remain as they existed at the time of the ratification of the void treaty.

The right to acquire and govern territory has always been an incident to war and treaty-making powers of government. Those powers were perfect and complete in the states, and the states delegated them, without reserve or qualification, to the Federal government. Those powers now exist and inhere in the Federal government, and may be exercised by that government as fully and completely as by any other independent state.

Story, Const. § 1287; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

From the beginning of our government we have been dealing with dependent commonwealths located in territory subject to the jurisdiction of the United States and within the boundaries of the Union. To the inhabitants of those commonwealths the Constitution has been extended from time to time as the wisdom of Congress has decided, but has never been held to extend of its own force.

The individual members of Indian tribes are not citizens, and have never been deemed

citizens, of the United States. Such tribes always have been regarded as having a semi-independent position when they preserve their tribal relations, not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or the state within whose limits they reside.

*United States v. Kagama*, 118 U. S. 381, 30 L. ed. 230, 6 Sup. Ct. Rep. 1109; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483.

A member of an organized Indian tribe, born as such, is not born in the United States in the sense of the provision of the 14th Amendment, which provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they are born.

*Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41.

For almost a hundred years Congress has recognized and acted on the assumed fact that the dominion of the United States extends, not only over the states and territories and the District of Columbia, but also over dependencies of the United States and over countries subject to the jurisdiction of the United States.

U. S. Rev. Stat. 1878, §§ 905, 906.

Should it be decided that Porto Rican ports are not foreign ports in the ordinary sense of the word, it would be a violent construction to interpret the language of the statute of the state of New York, passed in 1884, so as to exempt from pilotage vessels from a land then foreign, but since brought under the dominion of the United States. It is a fundamental rule of construction that laws are to be construed as of the time of their enactment.

23 Am. & Eng. Enc. Law, p. 327; *Mobile v. Eslava*, 16 Pet. 234, 10 L. ed. 948; *Griswold v. Atlantic Dock Co.* 21 Barb. 228.

The term "foreign trade," as used in the act of June 1, 1872, § 10, now U. S. Rev. Stat. § 2514, included of its own force trade between the Atlantic and Pacific ports of the United States.

*United States v. Patton*, 1 Holmes, 421, Fed. Cas. No. 16,007.

Under our revenue laws every port is regarded as a foreign one, unless the custom house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

*Fleming v. Page*, 9 How. 603, 13 L. ed. 276.

The term "coasting trade," as used in the navigation laws of the United States and the pilotage laws of the state of New York, means domestic trade carried on by vessels sailing along the coast of the United States. In order that trade may be coasting trade, two elements are necessary: the trade must be between ports of the same country, and

it must be carried on along the coast thereof.

Century Dict.; Standard Dict.; *North River S. B. Co. v. Livingston*, 3 Cow. 747; *Davison v. Mekibben*, 3 Brod. & B. 112.

A coastwise vessel is defined to be "one sailing by the way of or along the coast;" and a vessel sailing on the high seas a thousand miles from the American continent cannot be regarded as sailing along the coast, or defined as a coastwise vessel, without a clear abuse of language.

*Murray v. Clark*, 4 Daly, 468.

The congressional bill of April 12, 1900, entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes," does not make trade between Porto Rico and New York coasting trade, nor does it affect the subject of port pilotage.

It cannot be presumed that Congress intended to change the law other than by express terms or as it would arise by unmistakable implication, as it is not to be supposed that it would overturn an established principle "without expressing such intention with irresistible clearness."

23 Am. & Eng. Enc. Law, p. 35, and cases cited.

State regulations in regard to pilotage have always been favored, rather than condemned, by Congress and by the courts of the United States.

*Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Wilson v. McNamce*, 102 U. S. 572, 26 L. ed. 234.

*Mr. F. Kingsbury Curtis* argued the cause, and, with *Mr. William Edmond Curtis*, filed a brief for appellee:

Coasting trade is the carrying trade between any two ports of the United States; and its essential attribute is that it can be carried on only by American vessels.

U. S. Rev. Stat. §§ 4311, 4337; Treaty with Great Britain, 1794, art. 13; Commercial Treaty with Great Britain, 1815, art. 3; Treaty with Denmark, August 10, 1826, art. 2; Treaty with Austria, August 27, 1829, art. 7; Treaty with Belgium, March 8, 1875, art. 4; Treaty with Bolivia, May 13, 1858, art. 3; Treaty with Brazil, December 12, 1828, art. 3; Treaty with Colombia, December 12, 1846, art. 3; Treaty with Costa Rica, July 10, 1851, art. 2; Treaty with Greece, December 22, 1837, art. 5; Treaty with Haiti, November 3, 1864, art. 12; Treaty with Honduras, July 4, 1864, art. 2, ¶ 3; Treaty with Japan, November 22, 1894; Treaty with Mecklenburgh-Schwerin, art. 2; Treaty with Netherlands, August 26, 1852, art. 4; Treaty with Nicaragua, June 21, 1867, art. 2; Treaty with Peru, August 31, 1887, art. 7; Treaty with Prussia, May 1, 1828, art. 7; Treaty with Russia, December 18, 1832, art. 7; Treaty with Sweden and Norway, July 4, 1827, art. 6.

By virtue of § 9 of the act of April 12, 1900, commonly known as the "Porto Rico act," the trade with Porto Rico became coasting trade beyond question.



As Congress has supreme power over commerce and navigation it must necessarily have power to define the terms it uses in regulating such navigation, and to classify vessel trade between different places as it sees fit; and it is well settled that the provisions of the Federal statutes, and not any process of reasoning, decide what is to be regarded as coasting trade.

*Gibbons v. Ogden*, 9 Wheat. 214, 6 L. ed. 74; *North River S. B. Co. v. Livingston*, 3 Cow. 747; see also act May 31, 1900 (31 Stat. at L. chap. 600).

The treaties and statutes cited clearly show that the term "coasting trade" is not necessarily confined to vessels proceeding along the coasts of the United States.

See *North River S. B. Co. v. Livingston*, 3 Cow. 747; *Ravesies v. United States*, 37 Fed. 447; *Alameda v. Neal*, 32 Fed. 333.

The Treasury Department has obeyed the only possible construction of the Porto Rico act by granting enrollment and licenses to be employed in "the coasting trade" to the vessels of the New York & Porto Rico Steamship Company.

Treasury Decision, 22, 232.

Congress has likewise denominated trade with Alaska and its islands, which are no more a physical part of our coast than Porto Rico, "coasting trade."

U. S. Rev. Stat. § 4358.

Exactly the same language is used in chapter 339 of the statutes of 1899-1900, § 98, 31 Stat. at L. p. 161 (the Hawaiian act), approved April 30, 1900, regarding trade with Hawaii, which it describes as "coasting trade."

The above decision of the commissioner relating to trade with Porto Rico is in accordance with the cases cited, and also with the earlier rulings of the Treasury Department with regard to vessels trading between Alaska and other parts of the United States.

Treasury Decisions, 5618, 6106, 18,859, 19,364.

Later, the Hawaiian trade was held to have been made coasting trade by virtue of the same verbiage reproduced from the Alaskan statute.

Treasury Decision, 22,301, May 3, 1900.

The words used in the Federal acts in various places, "the coasting trade between Porto Rico and the United States," describe in adequate terms the trade between Porto Rico and the United States, and, within the above-named principle, are tantamount to a legislative enactment that such trade shall be and is coasting trade.

*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Post Master General v. Early*, 12 Wheat. 136, 6 L. ed. 577; *Wilson County v. Third Nat. Bank*, 103 U. S. 770, 26 L. ed. 488; *Wood v. Wood*, 54 Ark. 172, 15 S. W. 450.

The power of Congress on the subject of pilotage, when it once acts, is paramount.

*Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988.

The expression "coastwise steam vessels," used in the Federal statute, evidently means steam vessels engaged in the coasting trade.

*Ravesies v. United States*, 37 Fed. 447.

182 U. S. U. S., Book 45.

The decision of the commissioner of navigation granting a coasting license to the steamship Ponce is entitled to the greatest consideration and, like the decisions of any other lawfully constituted tribunal, should not be disregarded unless shown beyond any reasonable peradventure to be an error.

The word "regulated," as used in the Porto Rico act, is the broadest term that could be used in declaring that every provision "of law applicable to such trade between two great coasting districts of the United States" should be applicable to the trade with Porto Rico, and is the most apt and accurate for declaring that no provision of local law of any state which would be inapplicable to a vessel engaged in "such trade between any two great coasting districts of the United States" should be applied to this trade with Porto Rico.

*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The word "foreign," in statutes relating to revenue and shipping, has always been held to mean, not only beyond the jurisdiction of the United States, but also within the jurisdiction of some other country.

*The Eliza*, 2 Gall. 4, Fed. Cas. No. 4,346; *United States v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15, 336; *The Lark*, 1 Gall. 55, Fed. Cas. No. 8,090; *The Sally*, 1 Gall. 56, Fed. Cas. No. 12,257; *The Adventure*, 1 Brock. 235, Fed. Cas. No. 93; *Taber v. United States*, 1 Story, 1, Fed. Cas. No. 13,722; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98.

Decisions of the various departments of the Federal government are uniform in holding that Porto Rico, since the enactment of the Porto Rico act, is not a foreign country.

Treasury Decisions, Internal Revenue, 252; 3 Treasury Decisions, No. 49.

\*Mr. Justice Brown delivered the opinion [392] of the court:

Conceding it to be within the power of Congress to assume control of and regulate the whole system of pilotage as applied to vessels engaged in foreign or interstate commerce, it has for obvious reasons left to the several states the power to legislate upon this subject, and to prescribe rules for the licensing and government of pilots, the collection of their fees, and such other incidental matters as the nature of their services in the particular localities may require. The power to do this was recognized by this court in *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996, though it was subsequently said to be subject to such restrictions as Congress might see fit to impose. *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988.

By Rev. Stat. § 4235, it is expressly enacted that "until further provision is made by Congress all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be," subject, \*however, to a prohibition (§ 4237) against [394] "any discrimination in the rate of pilotage or half-pilotage between vessels sailing be-



tween the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam;" and to a further restriction (§ 4401) that "all coastwise seagoing vessels . . . shall be subject to the navigation laws of the United States, . . . and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." To further effectuate its control over coastwise seagoing vessels it is provided by § 4444 that "no state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States. . . . Nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title," . . . although "nothing in this title shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving a port in any such state, *other than coastwise steam vessels*, to take a pilot duly licensed or authorized by the laws of such state, or of a state situated upon the waters of such state."

The general object of these provisions seems to be to license pilots upon steam vessels engaged in the *coastwise* or interior commerce of the country, and, at the same time, to leave to the states the regulation of pilots upon all vessels engaged in *foreign* commerce.

This view was evidently accepted by the legislature of New York, which, in § 2119 of the consolidated act of 1882, declares that "no master of any vessel navigated under a coasting license and employed in the coasting trade by way of Sandy Hook shall be required to employ a licensed pilot when entering or departing from the harbor of New York;" but reserving its own control of vessels engaged in the foreign trade by enacting further in the same section that "all mas-  
[1895] ters of foreign \*vessels and vessels from a foreign port, and all vessels sailing under register bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or, in case of refusing to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel," with a final proviso that "this section shall not apply to vessels propelled wholly or in part by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade."

As the statement of facts connected with the question certified shows that the Ponce was an American-built steamship, sailing from New York, belonging to a New York corporation, enrolled and licensed for the coasting trade, navigated by a master duly licensed to act as pilot in the bay and har-

bor of New York, under the laws of the United States, and was engaged in trade between the island of Porto Rico and the port of New York, the only question remaining to be considered is whether she was a *coastwise seagoing steam vessel* under Rev. Stat. § 4401, and actually employed in the coasting trade by way of Sandy Hook under § 2119 of the New York consolidation act.

Under the commercial and navigation laws of the United States merchant vessels are divisible into two classes: First, vessels registered pursuant to Rev. Stat. § 4131. These must be wholly owned, commanded, and officered by citizens of the United States, and are alone entitled to engage in foreign trade; and, second, vessels enrolled and licensed for the coasting trade or fisheries. Rev. Stat. § 4311. These may not engage in foreign trade under penalty of forfeiture. § 4337. This class of vessels is also engaged in navigation upon the Great Lakes and the interior waters of the country—in other words, they are engaged in domestic instead of foreign trade.

The words "coasting trade," as distinguishing this class of vessels, seem to have been selected because at that time all the domestic commerce of the country was either interior commerce \*or coastwise, between [396] ports upon the Atlantic or Pacific coasts, or upon islands so near thereto, and belonging to the several states, as properly to constitute a part of the coast. Strictly speaking, Porto Rico is not such an island, as it is not only situated some hundreds of miles from the nearest port on the Atlantic coast, but had never belonged to the United States, or any of the states composing the Union. At the same time, trade with that island is properly a part of the domestic trade of the country since the treaty of annexation, and is so recognized by the Porto Rican or Foraker act. By § 9 the commissioner of navigation is required to "make such regulations . . . as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on April 11, 1899, . . . and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States." By this act it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade. This was the view taken by the executive officers of the government in issuing an enrollment and license to the Ponce, to be employed in carrying on the coasting trade, instead of treating her as a vessel engaged in foreign trade.

That the words "coasting trade" are not intended to be strictly limited to trade between ports in adjoining districts is also



evident from Rev. Stat. 4358, wherein it is enacted that "the coasting trade between the territory ceded to the United States by the Emperor of Russia, and any other portion of the United States, shall be regulated in accordance with the provisions of law applicable to such trade between any two great districts." These great districts were, for the more convenient regulation of the coasting trade, divided by the act of March 2, 1819 (3 Stat. at L. 492, chap. 48), as amended by act of May 7, 1822 \* (3 Stat. at L. 684, chap. 62, Rev. Stat. § 4348), as follows: "The first to include all the collection districts on the seacoast and navigable rivers between the eastern limits of the United States and the southern limits of Georgia; the second to include all the collection districts on the seacoast and navigable rivers between the river Perdido and the Rio Grande; and the third to include all the collection districts on the seacoast and navigable rivers between the southern limits of Georgia and the river Perdido." A provision similar to that for the admission of the territory of Alaska was also adopted in the act to provide a government for the territory of Hawaii (31 Stat. at L. 141, § 98), which provides that all vessels carrying Hawaiian registers on August 12, 1898, and owned by citizens of the United States or citizens of Hawaii, "shall be entitled to be registered as American vessels, . . . and the coasting trade between the islands aforesaid and any other portion of the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts."

This use of the words "coasting trade" indicates very clearly that the words were intended to include the domestic trade of the United States upon other than interior waters. The district court was correct in holding that the Ponce was engaged in the coasting trade, and that the New York pilotage laws did not apply to her.

The second and third questions are therefore answered in the affirmative. An answer to the first question becomes unnecessary.

[398] \*WILLIAM H. CARSON, *Plff. in Err.*,  
v.

SEWER COMMISSIONERS OF BROCKTON.

(See S. C. Reporter's ed. 398-405.)

*Drains and sewers—special assessment—for use—due process of law.*

1. An ordinance imposing an annual rental for the use of a public sewer, the use of which is optional with the taxpayer, who is not re-

quired to pay unless he uses it, does not deprive him of property without due process of law, though it was passed without giving him notice or opportunity for hearing.

2. The imposition of the cost of maintaining public sewers by special assessment upon property owners who have already been assessed for the cost of their construction, in case they make use of them, does not deprive them of property without due process of law, but is matter of public policy for the legislature, since they receive a special benefit from the construction of the sewer in the privilege of discharging their private sewers into it, even if they are not entitled to the free use of it.

[No. 249.]

*Argued April 18, 1910. Decided May 27, 1901.*

IN ERROR to the Supreme Judicial Court of Massachusetts to review a decision denying a petition for writ of certiorari to review a sewer assessment. *Affirmed.*

See same case below, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1.

Statement by Mr. Justice **Brown**:

This was a petition to the justices of the supreme judicial court for the county of Suffolk, for a writ of certiorari to the board of sewer commissioners of the city of Brockton, directing them to bring up certain proceedings connected with the assessment of taxes upon petitioner's land to the amount of \$42.53, for the maintenance and operation of a public sewer, and for an order quashing the proceedings.

The petitioner alleged the assessment to be illegal and void:

1. Because the city ordinance does not provide for notice to or hearing of persons whose estates are affected thereby, in violation of the state Constitution;

2. Because the method of computing the sewer charges is unreasonable and disproportionate;

3. Because petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax for the maintenance and operation of sewers from which he receives no special benefit;

4. Because such tax or sewer rental is in violation of the 14th Amendment to the Federal Constitution;

5. Because such tax is permissible only when founded upon peculiar and special benefits to the property so taxed, and then only to the amount of such benefits;

\*6. Because lands assessed for the construction of sewers cannot be said to receive an additional and special and peculiar benefit from the general oversight and operation of the same. [399]

By an act of the legislature of Massachu-

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Will* 182 U. S.

*son v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valton* (Mont.) 3 L. R. A. 194; *Ulman v. Baltimore* (Md.) 11 L. R. A. 225.

setts, passed in 1892 [chap. 245], "to give greater powers to cities and towns in relation to the construction of sewers," it was enacted as follows:

"Sec. 1. The city council of any city except Boston, or a town in which common sewers are laid under the provisions of §§ 1, 2, and 3 of chapter 50 of the Public Statutes, or a system of sewerage is adopted under the provisions of § 7 of said chapter, may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common sewer, and may change the same from time to time. Such charges shall constitute a lien upon the real estate using such common sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of such city or town. Sums of money so received may be applied to the payment of the cost of maintenance and repairs of such sewers or of any debt contracted for sewer purposes."

Pursuant to this authority the city council of Brockton, on August 23, 1894, adopted an ordinance, of which the following is the material provision:

"Sec. 4. Every person or owner of an estate who enters his particular sewer into a common sewer shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: For unmetered water service, \$8; for metered water service, 30 cents per 1,000 gallons of sewage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than \$8, it being provided, however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or owner may place at his own expense a water meter, [400] which shall be approved by the said commissioners, to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly, and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton."

The petition was denied, and petitioner sued out this writ of error.

Mr. William H. Carson argued the cause and filed a brief *in propria persona*:

A statute which regulates assessment proceedings, and fails to provide an opportunity for hearing, is invalid under the Constitution of the United States and under the constitutions of most of the states of the Union.

Cooley, Taxn. 2d ed. p. 363; Mass. Const. pt. 1, art. 12; U. S. Const. 14th Amend. § 1; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; 1152

*State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299; *New London Northern R. Co. v. Boston & A. R. Co.* 102 Mass. 386; *Remsen v. Wheeler*, 105 N. Y. 579, 12 N. E. 564; *Re Union College*, 129 N. Y. 308, 29 N. E. 460; *People ex rel. Butler v. Saginaw County Supers.* 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 156, 24 Am. Rep. 535; *Campbell v. Dwiggin*, 83 Ind. 473; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The constitutional validity of a statute is to be tested by what may be done under it, not by what has occurred.

*Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Collins v. New Hampshire*, 171 U. S. 33, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *Henderson v. New York*, 92 U. S. 268, sub nom. *Henderson v. Wickham*, 23 L. ed. 547; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

It cannot be said that, because the land of the plaintiff in error was connected with the sewer at his request, he waived his right to object to the constitutional validity of the ordinance or statute.

*State, New Brunswick Rubber Co. Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380.

The words in Mass. Stat. 1892, chap. 245, § 1, authorizing the city council of Brockton to change the rates of sewerage charges or assessments from time to time, clearly manifest an intention on the part of the legislature to assess such property connected with the sewer without regard to benefits; and the statute is therefore unconstitutional and void.

*Norwood v. Baker*, 172 U. S. 282, 43 L. ed. 448, 19 Sup. Ct. Rep. 187; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

A special assessment upon particular estates is permissible, under the Constitution of this commonwealth and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits.

*Boston v. Boston & A. R. Co.* 170 Mass. 182 U. S.



95, 49 N. E. 95; *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Mt. Auburn Cemetery v. Cambridge*, 150 Mass. 12, 4 L. R. A. 836, 22 N. E. 66; *Norwood v. Baker*, 172 U. S. 282, 43 L. ed. 448, 19 Sup. Ct. Rep. 187; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Wright v. Boston*, 9 Cush. 233; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *Erie v. Russell*, 148 Pa. 384, 23 Atl. 1102; *Williamsport's Appeal*, 187 Pa. 565, 41 Atl. 476; *Cooley*, Taxn. 2d ed. p. 663; 1 *Desty*, Taxn. pp. 26, 30, 275; *Dyar v. Farmington*, 70 Me. 527; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *Baltimore v. Hughes*, 1 Gill. & J. 482, 19 Am. Dec. 243; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *State, M'Closky, Prosecutor, v. Chamberlin*, 37 N. J. L. 388; *Hughes v. Momcnee*, 163 Ill. 535, 45 N. E. 302; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 416, 18 Am. Rep. 729.

The words "just and equitable," as they appear in Mass. Stat. 1892, chap. 245, § 1, relating to sewers and sewerage assessments, furnish no legal standard of assessment, as they do not measure or limit either the amount of the assessment or the benefit to be received. The words are vague, uncertain, and import no special limitation.

*Barnes v. Dyer*, 56 Vt. 471; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *State, Van Houten, Prosecutor, v. Paterson*, 37 N. J. L. 412; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *State, Evans, Prosecutor, v. Jersey City*, 35 N. J. L. 381.

The maintenance and operation of a sewer, the benefit of which accrues to the whole city in which it is located, irrespective of individual ownership of lands, is a subject for general taxation on personal as well as real estate, and is not a subject for a special assessment.

*Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Williamsport's Appeal*, 187 Pa. 565, 41 Atl. 476; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299; *Dyar v. Farmington*, 70 Me. 527; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *State, M'Closky, Prosecutor, v. Chamberlin*, 37 N. J. L. 388; *Erie v. Russell*, 148 Pa. 384, 23 Atl. 1102.

Taxing the property of the few for a benefit that accrues to the whole city is unequal and unjust, and is a discrimination against the land of those thus assessed. When such tax or assessment becomes a lien upon the lands, it is a taking of property without due process of law and in violation of the provisions of the 14th Amendment of the Constitution of the United States.

*Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Wright v. Boston*, 9 Cush. 182 U. S.

233; *Norwood v. Baker*, 172 U. S. 282, 43 N. E. 448, 19 Sup. Ct. Rep. 187; *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; Mass. Const. pt. 2, chap. 1, art. 4; *Cooley*, Taxn. 2d ed. p. 663; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 416, 18 Am. Rep. 729; *Dorgan v. Boston*, 12 Allen, 223.

Where the record discloses terms or amounts of a tax assessment or servitude against lands to be assessed, and such tax or assessment in and of itself amounts to the taking or destruction of such property, it is against the provision of § 1 of the 14th Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, or deny any person within its jurisdiction the equal protection of the law.

*Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

No brief was filed for defendants in error.

\*Mr. Justice **Brown** delivered the opinion[400] of the court:

This case involves the single question whether a municipal ordinance making an annual assessment upon property owners for the use of a common sewer infringes upon any provision of the Constitution of the United States.

The supreme judicial court of Massachusetts held that the petitioner received a special benefit in the use of the sewer for which he might be charged; that the city, by building the sewer and receiving a part of its cost from the petitioner, did not bind itself that the sewer should be maintained forever, or that the petitioner should be at liberty to use it free of further expense; that the charge for using it was a benefit distinct from that originally conferred by building it; that there was no charge unless the sewer were used; that the only questions were whether petitioner's sewer entered the common sewer, and what amount of sewage was delivered to it; and that, if the petitioner wished to be heard on either of these facts, he could resort to the courts; that the city council had a right to fix the charges without notice to the parties interested, unless, under the pretense of fixing an equitable rate, the ordinance should do what amounted to the taking or destruction of property.

The ordinance imposes an annual rental of \$8 for \*unmetered water service, and for metered water service 30 cents per 1,000 gallons for sewage delivered to the sewer,—the quantity to be so delivered to be determined by the meter readings,—with the privilege to the commissioners of making a discount when equitable. As the supreme judicial court held that the municipality had power to adopt this ordinance under the public statutes of the commonwealth, and

that such statutes were no violation of the state Constitution, we are concerned only with the question whether the petitioner was thereby deprived of his property without due process of law, or denied the equal protection of the laws within the 14th Amendment.

The validity of the legislative act is assailed upon the ground that no notice was required to be given to the property owner, nor provision made for a hearing, and that the authority given to the city council of Brockton to change the rate of sewerage charges and assessments from time to time manifested an intention on the part of the legislature to assess such property without regard to benefits. There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, subsequently re-examined in this court in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

Obviously these cases have no application to an ordinance which fixes beforehand the price to be paid for certain privileges, and leaves it optional with the taxpayer to avail himself of such privileges or not. As well might it be insisted that an ordinance which fixes water rates proportioned to the amount furnished is void because no notice is required to be given before such rate is fixed, or the taxpayer is assessed his proportionate charge under the ordinance. Where the use of such privilege is left optional with the taxpayer by his election to avail himself of it or not, he contracts with the city to pay the rental fixed by its ordinance, if he elect to use it. In such case there is no room for the question of notice. Where notice will \*avail nothing, no notice is required. *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780; *Com. v. Lehigh Valley R. Co.* 129 Pa. 429, 18 Atl. 406.

Thus in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, it was said by Mr. Justice Field (p. 708, L. ed. p. 572, Sup. Ct. Rep. p. 667): "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. . . . Of the different kinds of taxes which the state may impose, there is a vast number of which, from their na-

ture, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter." See also *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. Under the circumstances of this case no notice was necessary.

Similar considerations apply to the defense that petitioner has been, or is about to be, deprived of his property without due process of law. But of what property has he been deprived? None whatever. There has not been, nor is there anything to indicate there ever will be, any taking of his property within the meaning of the law. Assuming that the imposition of a burden which manifestly belongs to the public, upon private property, constitutes a deprivation of such property within the meaning of the 14th Amendment, there is nothing of the kind involved in this case. There is not even compulsory taxation of the property. The act of the legislature (chap. 245, act of 1892) merely provides that the city council "may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by \*every person who en- [403] ters his particular sewer into the common sewer, and may change the same from time to time." The municipal ordinance fixes the annual rentals, determinable upon a certain basis of water service, with a provision that the commissioners may make an equitable discount from such rates at their discretion. This was all there was to it. The lot owner could use the sewer or not, as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing. There is no element of deprivation here or even of taxation, but one of contract, into which the lot owner might or might not enter. There is no allegation in the petition that the petitioner was required by the board of health to discharge into the public sewer. There is no allegation that the particular charges fixed by the commissioners are unreasonable, only that the method is unreasonable, that is, that any charge is unreasonable.

The stress of petitioner's argument appears to be laid upon the proposition that his property having been once assessed for the construction of the common sewer, he has a right to the free use of such sewer forever afterwards, and that the expense of its maintenance must be raised by general taxation, and not by special assessment. This, however, is a question of state policy. It was for the legislature to say whether the construction of the sewer entitled the adjoining property owners to the free use of it, or only to the right to a free entrance to it of their particular sewers. As held by the supreme judicial court, there can be no doubt that the adjoining property owners did receive a special benefit in being permitted to discharge their private sewers into it.



The amount of such benefit was, under the statutes of the commonwealth, determinable by the city council, which fixed upon a certain rate for unmetered service and a certain other rate per 1,000 gallons of sewage discharged for metered service. We have held in the recent case of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, that it was competent for the legislative power to assess the amount of benefit specially received by abutting property, and so long as such amount is not grossly excessive, or out of all proportion to the benefit received, there is no reason to [404] complain, \*particularly if, as held by the supreme judicial court in this case, the question of connecting with the public sewer be left optional with the property owner.

The case is somewhat analogous to that of *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, wherein we held that the exaction of tolls, under a state statute, for the use of an improved national waterway, is not within the prohibition of the due process of law clause of the Constitution. Said Mr. Justice Field (p. 293, L. ed. p. 151, Sup. Ct. Rep. p. 115): "The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated. . . . Toll is the compensation for the use of another's property or of improvements made by him, and their amount is determined by the cost of the property or of the improvements, and consideration of the returns which such values or expenditures should yield. The legislature, acting upon information received, may prescribe at once the tolls to be charged, but ordinarily it leaves their amount to be fixed by officers or boards appointed for that purpose."

It is true that in *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876, decided in May, 1899, construing a similar statute applicable to the city of Boston, the supreme judicial court made a decision which it is difficult to reconcile with its opinion in the case under consideration, and held that "where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston, such as to subject them to a second special assessment. Expenses of this kind should be made the subject of general taxation," citing a number of cases in support of this proposition, none of which appear to be in point. *Hammitt v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615, was a case of widening and repaving a public street; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255, one of compelling the owners of farm lands lying within 1 mile on each side of a public highway to pay for grading, macadamizing, and improving it, by an assessment upon their lands by the acre; *Williamsport's Appeal*, 187 Pa. 565, 41 Atl. 476, [405] one of "reconstructing a sewer originally built by the city; *Erie v. Russell*, 148 Pa. 182 U. S.

384, 23 Atl. 1102, a similar case, except that the sewer was originally built by local assessments; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299, a question of want of notice; *Dyar v. Farmington*, 70 Me. 515, one of assessment for building a railroad; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739, one of the extent to which property was benefited by constructing a sewer. It needs no argument to show that these cases had no pertinence. The question of notice or want of notice was also considered in the *Sears Case*, but the court did not decide that question, intimating, however, an opinion somewhat adverse to the validity of the statute upon this ground.

We are not required, however, to reconcile these cases. It is sufficient that the supreme judicial court held that this case was "free from the elements which in *Sears v. Boston Street Comrs.* led to the conclusion that the petitioner was assessed without regard to the benefits received by him." Notwithstanding the former case we think the court was correct in holding in this case that the petitioner and other property owners whose lots abutted on this public sewer did receive a benefit not common to the inhabitants of the city generally, in being permitted to discharge into it the contents of their private sewers, that the amount of such benefit was determinable by the city council, and that in its action there was nothing violative of the Federal Constitution. It was properly said by Chief Justice Holmes in this connection: "No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it."

The judgment of the Supreme Judicial Court is therefore affirmed.

\*HOMER RAMSDELL TRANSPORTA- [406]  
TION COMPANY, Plff. in Err.,  
v.

LA COMPAGNIE GENERALE TRANSAT-  
LANTIQUE.

(See S. C. Reporter's ed. 406-417.)

Shipping—liability for negligence of pilot.

A shipowner is not liable for injuries inflicted exclusively by negligence of a pilot accepted by the vessel under N. Y. Laws 1882, chap.

NOTE—On compulsory pilotage—see note to *Clayton v. Hebb*, 29 L. R. A. 177.

As to responsibility of owner for the negligence of pilot—see note to *Thompson v. The Great Republic*, 23 L. ed. U. S. 55.

410, by which the acceptance of such pilot is made compulsory.

[No. 166.]

*Argued March 6, 1901. Decided May 27, 1901.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to the liability of the owner of a foreign vessel for damages caused by negligence of a compulsory pilot. *Liability denied.*

**Statement by Mr. Justice Gray:**

This was an action at law, brought by the Homer Ramsdell Transportation Company, a corporation of New York, against the Compagnie Générale Transatlantique, a corporation of the Republic of France, to recover damages caused by the defendant's steamship, the Bretagne, striking and injuring the plaintiff's pier in New York harbor.

The answer alleged, among other things, "that at the time of the said collision the said steamship, La Bretagne was in the command, and her movements and navigation entirely under the orders and direction, of a pilot duly licensed under, and compulsorily imposed upon the defendant by, the authority of the state of New York; and that the regular officers and crew of the said steamship in the service of the defendant had no part in the navigation of the said steamer except to carry out or execute the orders of the said pilot, which they did promptly and efficiently in every particular."

The case was referred by the circuit court of the United States for the southern district of New York to Hon. William G. Choate, who reported in favor of the defendant, and filed an opinion published in 63 Fed. 848. That court gave judgment on his report for the defendant; and the plaintiff appealed to the circuit court of appeals for the second circuit, which certified to this court, together with the pleadings, the judgment [407] \*of the circuit court, and the report and opinion of the referee, the following statement of facts and questions of law:

"The defendant in error is a foreign corporation owning and plying a regular line of steamers between Havre and New York. On the morning of December 10, 1892, one of the defendant's steamers, La Bretagne, while outward bound from the port of New York to Havre by way of Sandy Hook, with cargo and passengers, struck the plaintiff's pier, damaging it to the amount of upwards of \$13,000. The said vessel, at the time she left her pier, was in all respects seaworthy and properly manned, equipped, and supplied, and her owner exercised due diligence to make her so. She had on board a Sandy Hook pilot, duly licensed under and pursuant to the laws of the state of New York, and was navigated under his direction up to the time of said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers, and crew of said steamship. The said collision and

the damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the said pilot, and not by any want of skill or negligence on the part of the master, other officers, or crew of the said steamship.

"Certain questions of law arise in the cause concerning which the court desires the instructions of the Supreme Court for its proper decision, and which are as follows:

"First. Whether the provisions of chapter 467 of the Laws of New York passed June 28, 1853, as amended by chapter 196 of the Laws of said state passed April 11, 1854; chapter 243 of the Laws of the said state passed April 3, 1857; chapter 930 of the Laws of the said state passed May 16, 1867, and chapter 548 of the Laws of said state passed May 2, 1870, and consolidated into §§ 2093 to 2123, inclusive, of chapter 410 of the Laws of said state passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York court of appeals.

"Second. Whether in an action at common law the shipowner is liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Mr. William H. Harris argued the cause and filed a brief for plaintiff in error:

The pilotage law applicable to New York harbor is not compulsory. For the outward voyage, at all events, there is no compulsory pilotage; no law interferes with the free choice by the master of any pilot licensed either under the laws of New York or those of New Jersey.

*The Merrimac*, 14 Wall. 199, *sub nom. Creevy v. Eclipse Tow-Boat Co.* 20 L. ed. 873; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Brown v. Elwell*, 60 N. Y. 249; *Gillespie v. Zittlosen*, 60 N. Y. 449.

So far as the New York statute imposes a penalty for violation of its provisions, it is construed strictly.

*Sturgis v. Spofford*, 45 N. Y. 446.

Even where this court has followed the construction of the state statute, given by the highest court of that state, and such earlier construction has been overruled by the state court, this court will follow the later case, although it had previously adopted the rule laid down in the overruled cases.

*Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715.

A licensed pilot, even where pilotage is compulsory, is the servant of the owner, and the owner is liable for the pilot's negligence. This liability may be enforced as well by action at common law, *in personam*, as in admiralty, *in rem*.

*The Druid*, 1 W. Rob. 399; *Bold Buccleugh*, 3 W. Rob. 220; *The Halley*, L. R. 2 P. C. 193; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *The Merrimac*, 14 Wall. 199, *sub nom. Creevy v. Eclipse Tow-Boat Co.* 20 L. ed. 873; *Atlee v. Northwestern Union* 182 U. S.



*Packet Co.* 21 Wall. 389, 22 L. ed. 619; *The E. M. Norton*, 15 Fed. 686.

In admiralty, *in rem*, the vessel is liable for the negligent acts of a pilot compulsorily employed.

*The Washington v. Saluda*, Fed. Cas. No. 17,232; Story, Bailm. §§ 399, 400; *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67; *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *The Neptune the Second*, 1 Dod. Adm. 467; *The Merrimac*, 14 Wall. 199, *sub nom. Creevy v. Eclipse Tow-Boat Co.* 20 L. ed. 873; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *The E. M. Norton*, 15 Fed. 686.

The leading case in admiralty in this court, *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67, was decided on the authority of common-law cases, and the reasoning of both classes of cases is the same.

*Yates v. Brown*, 8 Pick. 23; *Bussy v. Donaldson*, 4 Dall. 206, 1 L. ed. 802; *Fletcher v. Braddick*, 5 Bos. & P. 182; *Williamson v. Price*, 4 Mart. (La.) 399; *Denison v. Seymour*, 9 Wend. 9; *The Eliza v. The Decatur*, 2 Whart. Dig. p. 685, § 524 (This case is there reported as decided in U. S. D. C., 1825, Mss.).

Mr. Edward K. Jones argued the cause and filed a brief for defendant in error:

The first question certified is foreclosed on its merits in this court by the decision in the case of *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67, which distinctly holds that the New York statute in reference to pilotage is compulsory.

In cases of controversy between citizens of different states (which, of course, includes controversies between a citizen of a state and foreign states, citizens, or subjects), this court will not be bound by the construction put upon the state statute by the highest court of the state.

*Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Pease v. Peck*, 18 How. 595, 15 L. ed. 518.

The statute in question is compulsory for three reasons: (1) Because the law requires every vessel from a foreign port to take a licensed pilot, and imposes a penalty for not doing it; (2) because if a pilot is not taken the underwriters are discharged (*Law v. Hollingsworth*, 7 T. R. 160); (3) because it is a misdemeanor, and indictable.

N. Y. Pen. Code, § 155; 1 Chitty, Crim. L. 239; 2 Hawk C. P. 171; *Rea v. Sainsbury*, 4 T. R. 457; *Rea v. Robinson*, 2 Burr. 799; *Rea v. Wigg*, 2 Salk. 460; *Rea v. Carlisle*, 3 Barn. & Ald. 161; *People v. Norton*, 7 Barb. 477.

The fact that the inward pilotage is compulsory renders it immaterial whether the outward pilotage is expressly compulsory or not, as a shipowner is exempt from liability in case a compulsory pilot is on board, although at the spot where the collision occurs there is no compulsion to take a pilot on board.

*General Steam Nav. Co. v. British & O. Steam Nav. Co.* L. R. 3 Exch. 330, Aff'd in 182 U. S.

L. R. 4 Ex. 238; see also *The Charlton*, Asp. Mar. Law. Cas. 29.

The rules of the common law are different in many respects from the rules of maritime law as administered by courts of admiralty.

*Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67; Holmes, Common Law, p. 25; *Workman v. New York City*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *Ralli v. Troop*, 157 U. S. 386, 39 L. ed. 742, 15 Sup. Ct. Rep. 657.

A shipowner is not liable in an action at common law for the negligence of a compulsory pilot; and the English statute expressly exempting the shipowner from liability in such cases is only an affirmation of the rule of common law.

*The Maria*, 1 W. Rob. 95; *The Halley*, L. R. 2 P. C. 193, 202.

The distinction rests upon the fundamental doctrine of the common law that, in order to constitute the relation of master and servant, and to found thereon the rule of *respondeat superior*, the servant must not only be employed by, but be under the general control and direction of, the master.

*Laugher v. Pointer*, 5 Barn. & C. 547; *Reedie v. London & Northwestern R. Co.* 4 Exch. 245; *Milligan v. Wedge*, 12 Ad. & El. 737; *The Bilbao*, Lush. 149, 153; Marsden, Collisions, 3d ed. pp. 70, 71; *Scott v. Scott*, 2 Stark. 438; *Hodgkinson v. Fernie*, 2 C. B. N. S. 415; *Laubheim v. De Koninglyke Nederlandasche S. B. Maatschappij*, 107 N. Y. 228, 13 N. E. 781; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266.

The analysis of the precedents shows that there can be no recovery against a shipowner in case of compulsory pilotage.

*The Neptune the Second*, 1 Dod. Adm. 467; *The Eden*, 2 W. Rob. 442; *Atty. Gen. v. Case*, 3 Price, 321; *Carruthers v. Sydebotham*, 4 Maule & S. 77; *Ritchie v. Bowsfield*, 7 Term. Rep. 309; *The Christiana*, 2 Hagg. Adm. 183; *The Girolamo*, 3 Hagg. Adm. 169; *The Baron Holberg*, 3 Hagg. Adm. 244; *The Protector*, 1 W. Rob. 55; *The Maria*, 1 W. Rob. 95; *Lucey v. Ingram*, 6 Mees. & W. 302; *The Agricola*, 2 W. Rob. 11; *The Bilbao*, Lush. 153; *The Annapolis and The Johanna Stoll*, Lush. 295; *The Halley*, L. R. 2 P. C. 202.

The cases in this country do not at all conflict with the English decisions upon the point raised in this case, when considered with reference to the question whether pilotage is compulsory or not compulsory.

*Bussy v. Donaldson*, 4 Dall. 206, 1 L. ed. 802; *Williamson v. Price*, 4 Mart. (La.) 399; *Smith v. The Creole and The Samson*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033; *The Lotty*, Olcott, 329, Fed. Cas. No. 8,524; *The Carolus*, 2 Curt. 69, Fed. Cas. No. 2,424; *Camp v. The Marcellus*, 1 Cliff, 481, Fed. Cas. No. 2,347; *Yates v. Brown*, 8 Pick. 23; *Denison v. Seymour*, 9 Wend. 9; *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67; *The Merrimac*, 14 Wall. 199, *sub nom. Creevy v. Eclipse Tow-Boat Co.* 20

L. ed. 873; *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *The E. M. Norton*, 15 Fed. 686.

A number of the English cases which were the basis of *dicta* in some of the American decisions, apparently against the contention of the defendant in error, have been overruled or reversed.

*The Eden*, 2 W. Rob. 444; *General Steam Nav. Co. v. British & C. Steam Nav. Co.* L. R. 3 Exch. 330, Aff'd in L. R. 4 Exch. 238; *The Charlton*, 8 Asp. Mar. L. Cas. 29.

The *dictum* in the case of *The China*, to the effect that the shipowner would also be liable *in personam*, rested upon cases since overruled or reversed.

*The Bold Buccleugh*, 3 W. Rob. 220; *Ralli v. Troop*, 157 U. S. 386, 39 L. ed. 742, 15 Sup. Ct. Rep. 657.

The authoritative text writers in this country uphold the doctrine that the shipowner is not liable in an action at common law for the negligence of a compulsory pilot.

Story, Agency, § 456a; Curtis, Merchant Seamen (1841), pp. 195-197.

[408] \*Mr. Justice Gray, after stating the case, delivered the opinion of the court:

The question whether the statutes of the state of New York impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook depends, as both counsel admit, upon the true construction of the provisions which are copied in the margin.†

[409] \*The statute of 1857, chap. 243, re-enacted in the statute of 1882, chap. 410, § 2119, after providing how the master of a vessel sailing under a coasting license to or from the port of New York by the way of Sandy Hook, "desirous of piloting his own vessel," may obtain a license for such purpose from

[410] the commissioners \*of pilots, provides that every master of a foreign vessel bound to or from the port of New York by the way of Sandy Hook "shall take a licensed pilot, or,

in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage, as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel." It then goes on to provide that "any person not holding a license as pilot under this act" or under the laws of New Jersey, who shall pilot any vessel to or from the port of New York by the way of Sandy Hook, shall be punished by fine or imprisonment, and that "all persons employing a person to act as pilot, and not holding a license under this act" or under the laws of New Jersey, shall pay a fine.

By these provisions, not only is the master of a foreign vessel required to take a licensed pilot, or, in case of refusal to take such pilot, required to pay pilotage to the pilot first offering his services; but the subsequent provision as to any "person not holding a license under this act," construed in connection with the previous provision as to licensing the master of a coasting vessel as its pilot, evidently includes the master of a foreign vessel, and subjects him to fine or imprisonment if he pilots his own vessel.

The requirement to take a licensed pilot or pay pilotage, together with the penalty imposed on a master who pilots his own foreign vessel, clearly imposes compulsory pilotage. And it was held by this court in *The China* (1868) 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67, that the statute of 1857 imposed such pilotage.

The statute of 1867, chap. 930, re-enacted in the statute of 1882, chap. 410, § 2100, enacts that a pilot bringing in a vessel from sea may by himself or one of his boat's company pilot her to sea when she next leaves the port; provided that if the owner shall desire to change the pilot, the commissioners of pilots may assign another one of the same pilot boat. But the right of the owner to object to one pilot does not make the selection of another by the commissioners a voluntary act of his.

†The statute of 1854, chap. 196, § 2, re-enacted in the statute of 1882, chap. 410, § 2100, provides that the commissioners of pilots "shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations for pilots, and make and duly promulgate and enforce new rules, or regulations not inconsistent with the laws of this state or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them; they may declare and impose and collect fines and penalties not exceeding \$250 for each offense, to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons, and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them: and

they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilots a sum not exceeding 3 per cent on the amount thereof, to defray their necessary expenses, including clerk hire and office rent."

By the statute of 1867, chap. 930, also re-enacted in the statute of 1882, chap. 410, § 2100, "Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the meantime a complaint for misconduct or incapacity shall have been made against such pilot or one of his boat's company, and proved before the board of commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot in the same pilot boat to pilot said vessel to sea."

The statute of 1857, chap. 243, re-enacted in the statute of 1882, chap. 410, § 2119, provides as follows: "If the master of any vessel above 150 and not exceeding 300 tons burden, and owned by a citizen of the United States, and sailing under a coasting license to



The cases in the New York court of appeals, cited by the plaintiff, do not affect this question. In *Brown v. Elwell* (1875) 60 N. Y. 249, the only point decided was that a [411] pilot\* licensed by the law of New Jersey could not recover pilotage under the statute of New York. And in *Gillespie v. Zittlosen* (1875) 60 N. Y. 449, the only point decided was that the pilot first offering his services could not recover pilotage if the master took another licensed pilot.

The answer to the first question certified must therefore be that the statutes of New York do impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by the way of Sandy Hook.

This action is at common law. It is not, and, being for damages inflicted on land, could not be, in admiralty. *The Plymouth* (1865) 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125.

At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot.

In *Carruthers v. Sydebotham* (1815) 4 Maule & S. 77, 85, Lord Ellenborough, in holding that the act of the pilot was not the act of the master or mariners or owner of the ship, said: "Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable

for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them."

In *Atty. Gen. v. Case* (1816) 3 Price, 302, 322, in the court of exchequer, the master of the vessel whose owners were held liable, as the court said, "was not compellable, at that time, in any way, either under the penalty of double the wages, \*or of paying even the [412] single wages, to have any pilot on board. It was his own act to have him; and it can be only in the case of such an officer having been forced upon them, and without his own election, that the responsibility of the owner can possibly be discharged."

In *The Maria* (1839) 1 W. Rob. 95, 106, Dr. Lushington, on a full review of those cases, held that upon general principles, and independently of the express provisions in the English statutes, the compulsory taking of a pilot relieved the owner from all responsibility for his acts.

In *Lucey v. Ingram* (1840) 6 Mees. & W. 302, 315, Baron Parke, delivering the judgment of the court of exchequer, spoke of the exemption of the master who was compelled to take a pilot, from liability by the common law, independent of statute, as follows: "It may, indeed, be admitted that in many of the cases the judges in giving their judgments refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation, on which it can rest independently of the statutes; but the language of the exempting clause in the last pilot act certainly carries the doctrine further, and it may well be conceived that this extension of the common-law doctrine was not accidental, but intentional. The object of the legislature in establishing pilots has been to secure, as far as possible, protection to life and property by supplying a class of men better qualified

or from the port of New York by the way of Sandy Hook, shall be desirous of piloting his own vessel, he shall first obtain a license for such purpose from the commissioners of pilots, who are hereby authorized and required to grant the same, if such master shall after an examination had by said commissioners be deemed competent; which said license shall be and continue in force one year from the date thereof, or until the determination of any voyage during which the license may expire. For such license, the master to whom it shall be granted shall pay to the said commissioners 4 cents per ton. All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or, in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this title or under the laws of the state of New Jersey, who shall pilot or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, except

such as are exempt by virtue of this title, or any master or person on board a steam tug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding \$100 or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot, not holding a license under this title or under the laws of the state of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of \$100."

By the statute of 1854, chap. 196, § 5, re-enacted in the statute of 1882, chap. 410, § 2120, "Any person not holding a license as pilot under this title or under the laws of the state of New Jersey, who shall pilot or offer to pilot any ship or vessel . . . to or from the port of New York by the way of Sandy Hook, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding \$100 or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this title or under the laws of the state of New Jersey shall forfeit and pay to the board of commissioners of pilots the sum of \$100."



than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot." He then proceeded to consider the extension of the exemption by statute, which has no bearing on this case.

[413] \*In *The Halley* (1868) L. R. 2 P. C. 193, 201, the judicial committee of the privy council agreed with Sir Robert Phillimore in the same case in the court of admiralty, L. R. 2 Admr. & Eccl. 3, "in his statement of the common law of England with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel while under the control of a pilot whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner."

There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67; *Ralli v. Troop* (1894) 157 U. S. 386, 402, 423, 39 L. ed. 742, 750, 757, 15 Sup. Ct. Rep. 657; *The John G. Stevens* (1898) 170 U. S. 113, 120-122, 42 L. ed. 969, 972, 973, 18 Sup. Ct. Rep. 544; *The Barnstable* (1901) 181 U. S. 464, *ante*, 954, 21 Sup. Ct. Rep. 684.

In *The China*, affirming the decision of the circuit court in admiralty, the liability of a vessel *in rem* for a collision from the fault of a compulsory pilot was put upon the maritime law, the court saying: "The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. . . . According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This, the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. . . . The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appel-

lees are seeking the fruit of their lien." 7 Wall. 68, 19 L. ed. 73.

Such was the view of that case taken by the whole court in *Ralli v. Troop*, in which the majority of the judges said of it: "That decision proceeded, not upon any authority or agency \*of the pilot, derived from the[414] civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; . . . but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer liable for the tort, and subject to a maritime lien for the damages." 157 U. S. 402, 39 L. ed. 749, 15 Sup. Ct. Rep. 663. And the dissenting judges said that in *The China* "this court held, contrary to the English, but conformably to the continental, authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also *in personam* in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner." 157 U. S. 423, 39 L. ed. 757, 15 Sup. Ct. Rep. 671.

In none of the cases in which actions at law have been maintained against the owner of a ship for the fault of a pilot was the owner compelled to employ the pilot.

In *Bussy v. Donaldson* (1800) 4 Dall. 206, in the supreme court of Pennsylvania, an action on the case was brought against the owner of a ship for damages by collision; and the defense that the ship "was in the charge of a public pilot of the port (a person not the choice, nor the voluntary agent, of the owner) when the injury was committed" was overruled. But the statute of Pennsylvania cited in that case simply provided that the pilot first offering himself to any inward-bound ship should be entitled to take charge of her; and that, if the master of any ship should refuse or neglect to take a pilot, the master, owner, or consignee should forfeit and pay a sum equal to half pilotage, to the use of the society for the relief of distressed and decayed pilots, their widows and children. Penn. Stat. April 11, 1793, §§ 8, 10; 3 Dall. Laws, 424, 426. The subsequent pilot laws of Pennsylvania have made similar provisions. *Cooley v. Philadelphia Port Wardens* (1851) 12 How. 299, 13 L. ed. 996. And the supreme court of Pennsylvania has held that they did not make the employment of a pilot compulsory, saying: "The legislature have wisely decided not to compel the owners to supply one, but have permitted them, if they please, to compound by \*paying half pilotage, for the benevolent and[415] beneficial purpose of relieving distressed and decayed pilots, their widows and children. The act sets out an inducement to avail themselves of their services, but does not compel them to do so." *Flanigen v. Washington Ins. Co.* (1847) 7 Pa. 306, 312. And see *Smith v. The Creole* (1853) 2 Wall. Jr. 485, 516, 517, Fed. Cas. No. 13,033.

So in *Williamson v. Price* (1826) 4 Mart. 182 U. S.



N. S. 399, the supreme court of Louisiana maintained an action for a collision by a vessel "at the time under the care and consequently the control of a licensed pilot." But the statutes of Louisiana, likewise, only provided that, "if the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot, who shall have offered to go on board and take charge of the pilotage of the vessel, half pilotage." Law of Territory of Orleans of March 31, 1805, § 17, p. 140; Louisiana Rev. Stat. 1853, p. 457, § 17; Rev. Stat. 1856, pp. 403, 404, §§ 9, 19. And this court has held that those statutes are not compulsory. *The Merimac* (1871) 14 Wall. 199, 203, *sub nom. Creevy v. The Eclipse Tow-Boat Co.* 20 L. ed. 873, 874.

In *Yates v. Brown* (1829) 8 Pick. 22, in the supreme judicial court of Massachusetts, in which the owners of a vessel were held liable for a collision by the fault of a pilot, it is only stated that he was duly authorized to pilot the ship, that he held his commission under the executive authority of the commonwealth, and that the owners had selected him for this service. And in Massachusetts, as has been observed by its court, "the statute does not make it incumbent on the master of a vessel subject to pilotage to receive a pilot, if he chooses to navigate her himself," although it makes him and the owner liable to pay full pilotage fees if a pilot offers his services and they are refused. *Martin v. Hilton* (1845) 9 Met. 371, 373.

In *Denison v. Seymour* (1832) 9 Wend. 9, in the supreme court of New York, the taking of a pilot was not compulsory, and the court said: "The officer here called the pilot is not the same as the pilot recognized in the laws regulating foreign commerce."

In *Atlee v. Northwestern Union Packet Co.* (1874) 21 Wall. 389, 22 L. ed. 619, which was [416] a suit *\*in personam* in the admiralty, where the owners of a vessel were held liable for the fault of a pilot, it does not appear that they acted under compulsion in appointing him, and the question of their liability for his acts was not discussed.

In *Sherlock v. Alling* (1876) 93 U. S. 99, 23 L. ed. 819, the case came to this court on writ of error from the supreme court of the state of Indiana, and therefore none but Federal questions were within the jurisdiction of this court; and the only questions decided, or which could have been decided, were that an act of Indiana making any person liable for the death of another caused by his wrongful act or omission was not, as applied to a tort committed on navigable waters within the state, an encroachment on the commercial powers of Congress; and that an act of Congress making the master and owners of a vessel liable for injuries to passengers under certain circumstances afforded no defense to the action.

The liability of the owner at common law for the act of a pilot on his vessel is well stated by Mr. Justice Story in his *Treatise on Agency*, 2d ed. § 456a: "The master of 182 U. S.

a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for in such a case the master acts voluntarily, although he is necessarily required to select from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and, *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he nor the owner will be liable for injuries occasioned by the negligence of the pilot; for in such a case the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per alium facit per se*, does not apply."

The answer to the second question must therefore be that in "an action at common law [417] the shipowner is not liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Answer to the first question in the affirmative; to the second in the negative.

LAKE STREET ELEVATED RAILROAD  
COMPANY, *Plff. in Err.*,  
v.

FARMERS' LOAN & TRUST COMPANY  
and Others.

(See S. C. Reporter's ed. 417, 418.)

Error to state court—Federal question—going beyond mandate on reversal.

The action of a state court to which a cause has been remanded on reversal by the Supreme Court of the United States, by which it not only complies with the mandate by reversing and setting aside a judgment and an injunction decree which it affirmed, but goes beyond the mandate in directing the dismissal of the bill to restrain proceedings in a Federal court, does not present any Federal question for review by the Supreme Court of the United States, since the dismissal of the bill, not affecting any Federal rights at all, is not a decision against the parties invoking them.

[No. 669.]

Submitted May 13, 1901. Decided May 27, 1901.

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

**I**N ERROR to the Supreme Court of Illinois to review a judgment directing a dismissal of a bill for an injunction against proceedings in a Federal court. *Dismissed.*

The facts are stated in the opinion.

Mr. **Clarence A. Knight** submitted the cause for plaintiff in error:

There is no question but that there is a Federal question involved in this case. The question is whether the supreme court of Illinois has given proper effect to the judgment of this court reversing the judgment of the supreme court of Illinois. Such a question is a Federal question.

*Martin v. Hunter*, 1 Wheat. 362, 4 L. ed. 111; *Perkins v. Fourniquet*, 14 How. 329, 14 L. ed. 442; *Hinckley v. Morton*, 103 U. S. 764, 26 L. ed. 458; *Mackall v. Richards*, 112 U. S. 369, 28 L. ed. 737, 5 Sup. Ct. Rep. 170; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Re Blake*, 175 U. S. 114, 44 L. ed. 94, 20 Sup. Ct. Rep. 42.

*Messrs. William Burry and Herbert B. Turner* submitted the cause for defendants in error.

[417] \*Mr. Justice **Shiras** delivered the opinion of the court:

When this cause was before us at October term, 1899, it was determined that the jurisdiction of the circuit court of the United States for the northern district of Illinois had attached, as respected the Lake Street Elevated Railroad Company and its property, before the institution, by the Lake Street Elevated Railroad Company, in the superior court of Cook county, Illinois, of a suit involving the same parties and questions as those in the Federal court; and, accordingly, it was held that the decree of injunction granted by the superior court and affirmed by the appellate court and by the

[418] supreme court of Illinois, \*enjoining and restraining the Farmers' Loan & Trust Company from proceeding with its suit in the circuit court of the United States, had been improperly granted; and thereupon the judgment of the supreme court was reversed, and the cause was remanded to that court for further proceedings not inconsistent with the opinion of this court. 177 U. S. 51, 62, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564.

In pursuance of the mandate and in conformity with the opinion of this court, the supreme court of Illinois, on April 17, 1901, reversed and set aside the judgment of the appellate court and the injunction decree of the superior court.

This action of the supreme court of Illinois was a full compliance with the mandate of this court.

But it is now complained that the supreme court went further, and beyond our mandate, in directing the superior court to dismiss the bill; and this writ of error was sued out asking us to supervise and reverse the action of the supreme court in that respect.

But the supreme court, in directing a dismissal of the bill, was in the exercise of its own jurisdiction over the cause pending in

the superior court of Cook county. Whether it should order that court to suspend action until the Federal court had exhausted its jurisdiction, or to dismiss the bill, leaving the parties to abide by the decree of the court whose jurisdiction had first attached, was for the supreme court of Illinois to determine; and as such action in nowise involved any Federal question this court has no jurisdiction to review it.

It cannot be said that, by ordering the dismissal of the bill, the supreme court of Illinois passed upon Federal questions involved in the litigation in such a sense as to give this court jurisdiction to review its decree. The record of the case when here before discloses that, so far as Federal rights were concerned, they were asserted by the defendants in the superior court, and hence the dismissal of the bill, if it affected such Federal rights at all, was not a decision against the parties invoking them, which alone would give us jurisdiction.

*The writ of error is dismissed.*

\*WILLIAM R. REAGAN, Appt., [419]

v.

UNITED STATES.

(See S. C. Reporter's ed. 419-427.)

*Commissioners—in Indian territory—removal.*

Commissioners of the United States court for the Indian territory are not taken out of the general rule which regards the power of removal as incident to the power of appointment, by the proviso of the act of Congress of March 1, 1895 (28 Stat. at L. 695, chap. 145, § 4), declaring them subject to removal by the judge of the district where they reside "for causes prescribed by law," since no causes for removal have been affirmatively specified by Congress, and the provision of the act of May 2, 1890, § 39, authorizing them to exercise the powers of justices of the peace under the laws of Arkansas, does not bring the commissioners under the provisions of the Arkansas statutes respecting the removal of justices of the peace.

[No. 239.]

*Argued April 15, 1901. Decided May 27, 1901.*

**A**PPEAL from a judgment of the Court of Claims dismissing a petition for salary as United States commissioner in the Indian territory. *Affirmed.*

See same case below, 35 Ct. Cl. 90.

Statement by Mr. Chief Justice **Fuller**: Appellant filed his petition in the court of claims October 13, 1897, and an amended petition October 27, 1899, seeking to recover salary as United States commissioner in the Indian territory, at the rate of \$1,500 per annum, from February 1, 1896, to September 30, 1899, aggregating \$5,375.

NOTE.—On the right to remove officers summarily—see *Trainor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95, and note.

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The findings of fact and conclusion of law were as follows:

1. The claimant was, on the 25th day of April, 1893, appointed by the United States court for the Indian territory United States commissioner within said territory, under the provisions of § 39 of an act of Congress approved May 2, 1890, chapter 182 (1st Supp. Rev. Stat. 737), and upon the 1st day of March, 1895, the claimant was one of the present commissioners, then holding office under an existing appointment. On April 17, 1895, the following order was entered of record in the United States court in the Indian territory, southern district:

"It appearing from the records of this court that the said William R. Reagan was a duly appointed, qualified, and acting commissioner for the United States court for the third judicial division of the Indian territory, located at Chickasha, on the 1st day of March, 1895, it is hereby ordered that in accordance with the act of Congress approved March 1, 1895, the said William R. Reagan be, and he is hereby, continued in office, and the bond hereinbefore recited be, and the same is, in all things approved and confirmed. C. B. Kilgore, Judge."

2. He continuously performed the duties and received the salary of said office until the 31st day of January in the year 1896, when the following letter was entered upon the records of the United States court in the Indian territory, in the southern district, by the Hon. Constantine B. Kilgore, judge of said court:

"In Chambers,  
"Ardmore, Indian Territory,  
January 31st, 1896.

"Hon. William R. Reagan, United States Commissioner for the Fourth Commissioner's District in and for the Southern District of the Indian Territory.

"Sir:—

"I feel it my duty to declare the office of commissioner in that district vacant, and to notify you that you are no longer United States commissioner for that district, and your successor will be named at once.

"There are many reasons which I could assign for my action in this behalf, but I will only suggest one now, that is, your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office.

"Very respectfully, your obedient servant,

"C. B. Kilgore,  
"Judge U. S. Dist. Court, S. Dist."

The letter was not sent to the claimant or served upon him. No other statement of cause was made. The claimant was given no notice of any charge against him. No hearing was allowed the claimant and no opportunity to submit proof in his defense.

3. The claimant protested that said letter was insufficient to effect his removal, and duly served such protest upon the Hon. Constantine B. Kilgore, judge of said court.

4. On February 10, 1896, one John R. Williams, who had been designated by said judge as United States commissioner in the claim-  
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ant's place, came to claimant's office with two armed deputy marshals, and, presenting his order of appointment, demanded possession of the dockets, books, and papers belonging to claimant's office as United States commissioner.

5. The order of appointment of said Williams is as follows:

"In Chambers,  
"Ardmore, Indian Territory,  
January 31st, 1896.

"John R. Williams, a resident of Ryan, southern district of Indian territory, is hereby appointed United States commissioner in and for the fourth district of the southern district of the Indian territory.

"Said appointment to take effect at once.

"It is further ordered that said commissioner shall reside at Ryan, and that he shall hold court at Ryan and at the town of Duncan in said district until further ordered, the time to be divided so as to dispose of the business at both points, which time shall be determined upon hereafter.

"C. B. Kilgore,  
"Judge U. S. Ct., So. Dist."

6. The claimant protested and refused to recognize said Williams as his successor in said office, excepting so far as he was compelled thereto by the exercise of superior force on the part of the deputy marshals aforesaid and said Williams. Thereupon the claimant and said Williams joined in the following instrument of writing:

"Duncan, Indian Territory, }  
Southern District. }

"This instrument of writing witnesseth:

"That whereas C. B. Kilgore, judge of the United States court for the southern district of the Indian territory, on the 31st day of January, A. D. 1896, made, and caused to be entered upon the docket of his court at Ardmore, Indian territory, an order declaring my office of United States commissioner for the Ryan division of said district vacant; and at the same time appointing John R. Williams to be my successor in said office. \*and the said Reagan having appealed to the [422] courts of the United States from said order, on the ground that said order is contrary to the law:

"Now, therefore, it is agreed by and between the parties hereto that said Reagan will turn over and surrender the dockets, books, and papers belonging to said office under protest, and that said Williams receives the same with the understanding that said Reagan yields no rights by so doing that he would otherwise have.

"Witness our hands this 10th day of February, A. D. 1896.

"Jno. R. Williams.  
"Wm. R. Reagan."

7. The claimant received a salary of \$1,500 per annum up to the 3d day of February, 1896, but since that date has not been paid said salary or any part thereof.

8. Claimant took no other or further action to assert his claim to said office, or to obtain a reversal of the action of Judge Kilgore until the institution of this proceeding.

9. From the 3d day of February, 1896,  
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until the 7th day of October, 1897, John R. Williams, who was appointed by Judge Kilgore to said office in claimant's stead, exercised said office and was paid the salary thereof. On said date one Horace M. Wolverton was appointed as the successor of said John R. Williams by Hon. Hosea Townsend, United States judge for said district, and since that time has exercised said office and has been paid the salary thereof.

10. From the 3d day of February, 1896, until the commencement of this action, the disbursing clerk of the Department of Justice paid to the persons who succeeded claimant to said office the salary of said office, in the absence of any notice on the part of claimant that he claimed to be lawfully entitled to said office and the salary thereof, or any claim or demand on the part of claimant for the payment to him of such salary for said period of time or any part thereof.

*Conclusion of Law.*

Upon the foregoing findings of fact, the court decide, as a conclusion of law, that the petition be dismissed.

[423] \*Judgment was thereupon rendered dismissing the petition, and the case was brought to this court by appeal. The opinion below is reported 35 Ct. Cl. 90.

**Mr. William B. King** argued the cause and filed a brief for appellant.

**Assistant Attorney General Pradt** argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[423] \***Mr. Chief Justice Fuller** delivered the opinion of the court:

Section 39 of the act of May 2, 1890 (26 Stat. at L. 98, chap. 182), provided:

"That the United States court in the Indian territory shall have all the powers of the United States circuit courts or circuit court judges to appoint commissioners within said Indian territory, who shall be learned in the law, and shall be known as United States commissioners; but not exceeding three commissioners shall be appointed for any one division, and such commissioners when appointed shall have, within the district to be designated in the order appointing them, all the powers of commissioners of circuit courts of the United States.

"They shall be *ex officio* notaries public, and shall have power to solemnize marriages.

"The provisions of chapter ninety-one of the said laws of Arkansas, regulating the jurisdiction and procedure before justices of the peace, are hereby extended over the Indian territory; and said commissioners shall exercise all the powers conferred by the laws of Arkansas upon justices of the peace within their districts; but they shall have no jurisdiction to try any cause where the value of the thing or the amount in controversy exceeds one hundred dollars."

The act of March 1, 1895 (28 Stat. at L. 695, chap. 145), provided for additional judges of the court, and by § 4:

"That each judge of said court shall have

the powers conferred by law upon the United States circuit courts to appoint commissioners within the district in which he presides, who, at the time of their appointments, shall be duly enrolled attorneys of some court of record of the United States or of some state, \*and shall be competent and of good stand-[424] ing, and shall be known as United States commissioners; but not exceeding six commissioners shall be appointed for any district hereinbefore constituted:

"Provided, That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law. The judge for each district may fix the place where or the time when each commissioner shall hold his regular terms of court.

"The order appointing such commissioners shall be in writing and shall be spread upon the records of one of the courts of the district for which they are appointed; and such order shall designate, by metes and bounds, the portion of the district for which they are appointed. They shall have all the powers of commissioners of the circuit courts of the United States.

"They shall be *ex officio* notaries public and *ex officio* justices of the peace within and for the portion of the district for which they are appointed, and shall have the power as such to solemnize marriages."

Appellant was appointed a commissioner April 25, 1893, and was such on March 1, 1895. In view of the proviso he was continued in office until January 31, 1896, when he was removed by the judge of the district where he resided, and another person appointed.

He now contends that the removal was void, because the cause assigned for the action of the judge was not a "cause prescribed by law," and because he was given no notice of any charge against him, and no hearing, contrary to the statute.

The commissioners appointed by the judges of the United States court in the Indian territory are inferior officers, not holding their offices for life or by any fixed tenure, and they fall within the settled rule that the power of removal is incident to the power of appointment. *Ex parte Hennen*, 13 Pet. 230, 258, 10 L. ed. 138, 152; *Parsons v. United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880. But it is assumed that because of the language of the proviso commissioners appointed by the court prior to March 1, 1895, formed an \*exceptional class [425] from commissioners appointed by the judges of that court after that date, and hold office until they are removed for causes prescribed by existing law, or until Congress passes a law defining such causes. The latter view may be rejected at once, for the words, "causes prescribed by law," manifestly relate to causes prescribed when the act was approved, or at least when the removal was made. Not only is there nothing here to give them any other meaning, but it cannot be presumed that Congress intended to forbid the



cise by the judges of their power in the matter of these appointments in the instance of these particular commissioners, or to provide that they should hold office during life, or until Congress should specify causes subjecting them to removal, while all other commissioners were removable at the will of the power appointing them.

The proviso was enacted apparently out of abundant caution lest the legislation in respect of the United States court in the Indian territory might operate in itself to turn the then commissioners out of office; and if Congress had intended in addition that they should hold office free from the rule applicable to others, we think that the intention would have been plainly expressed.

The inquiry is, therefore, whether there were any causes of removal prescribed by law March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.

The suggestion that the proviso refers to such causes as courts might recognize as just will not do, for "prescribed by law" is prescribed by legislative act, and removal for cause, when causes are not defined nor removal for cause provided for, is a matter of discretion, and not reviewable.

It does not appear that any causes for removal of these court officers were ever affirmatively specified by Congress; but it is said that Congress had prescribed such causes by the adoption "in the Indian territory of certain laws of Arkansas. By § 31 of the act of May 2, 1890, some of those laws were put in force in the Indian territory, and by § 39 the commissioners were authorized to exercise all the powers conferred by the laws of Arkansas on justices of the peace within their districts, and the provisions of chapter 91 of those laws regulating the jurisdiction of and procedure before justices of the peace were extended to that territory. By the act of March 1, 1895, these were re-enacted, and chapters 45 and 46 of Mansfield's Digest, treating of criminal law and criminal procedure, were also put in force there.

The argument is that the effect of these provisions was to put the commissioners in the place of justices of the peace in Arkansas, and that consequently the causes prescribed by law for the removal of justices of the peace must be taken as prescribed by law as causes for the removal of commissioners.

In our opinion this conclusion does not follow. In order to clothe the commissioners with the powers pertaining to justices of the peace, this was conveniently accomplished by reference, but that did not convert these officers of the United States court in the Indian territory into justices of the peace, or change the relations between them and the judges of that court. Justices of the peace in Arkansas by state Constitution

and laws hold office for two years, and cannot be removed except for cause and on notice and hearing. The commissioners hold office neither for life nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment, unless otherwise provided. By chapters 45 and 46 justices of the peace on conviction of the offenses enumerated are removable from office, but these necessarily do not include all causes which might render the removal of commissioners necessary or advisable. Congress did not provide for the removal of commissioners for the causes for which justices of the peace might be removed, and if this were to be ruled otherwise by construction the effect would be to hold the commissioners in office for life unless some of those specially enumerated causes became applicable to them.

\*We agree with the court of claims that [27] this would be a most unreasonable construction, and would restrict the power of removal in a manner which there is nothing in the case to indicate could have been contemplated by Congress.

If causes of removal had been prescribed by law before the removal of appellant, that would have presented a different question, but as there were then none such the proviso did not operate to take him out of the rule expounded in *Ex parte Hennen*, and the mere fact that in that particular this part of the proviso was inoperative as to him did not change the result.

*Judgment affirmed.*

JETTA SIMON, *Plff. in Err.*,  
v.

JOHN N. CRAFT.

(See S. C. Reporter's ed. 427-437.)

*Constitutional law—due process—absence of alleged lunatic from hearing.*

1. A person is not deprived of liberty without due process of law by being adjudged a lunatic in his absence, under Ala. Civ. Code 1886, § 2393, providing that the sheriff may take possession of the person, "and, if consistent with his health or safety, have him present at the place of trial," where such person is duly served with process, but is not produced by the sheriff at the trial because, on exami-

NOTE.—On the necessity of notice of lunacy proceedings to the alleged lunatic—see note to *Evans v. Johnson* (W. Va.) 23 L. R. A. 737.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Willson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

For an extended discussion of the question, What service of process is sufficient to constitute due process of law?—see note to *Pinney v. Providence Loan and Invest. Co.* 50 L. R. A.

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nation by a physician, it is deemed to be inconsistent with his health or safety, and he is not in fact prevented from attending the hearing or refused opportunity to be represented there by counsel.

2. There is no presumption that a sheriff having custody of an alleged lunatic whom he does not produce on the trial of lunacy proceedings exerted his power of detention for the purpose of preventing such person from attending the hearing or being represented there and contesting the proceeding.
3. The proceedings in a state court, in order to constitute due process of law under U. S. Const. 14th Amend., need not be by any particular mode, if they constitute a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.

[No. 191.]

*Argued March 12, 1901. Decided May 27, 1901.*

**I**N ERROR to the Supreme Court of the State of Alabama to review a decision affirming a judgment in an action of ejectment. *Affirmed.*

See same case below, 118 Ala. 625, 24 So. 380.

**Statement by Mr. Justice White:**

[428] This is a writ of error to review a judgment of the supreme \*court of Alabama affirming a judgment in favor of John N. Craft, the defendant in error herein. The judgment thus affirmed was entered by a lower state tribunal upon a verdict rendered on the second trial of an action in ejectment, wherein Jetta Simon, plaintiff in error herein, was plaintiff.

In brief the facts are as follows: In 1889, Jetta Simon, a widow, resided in Mobile, Alabama, with several minor children. She lived at that time in a house of which she was the owner, being the real estate affected by the action of ejectment heretofore referred to. On January 30, 1889, Ralph G. Richard filed in the probate court of Mobile county, Alabama, a petition for an inquisition of lunacy as to Mrs. Simon. In this petition it was represented that Richard was a friend of Mrs. Simon and of her family; that she was of the age of forty-nine years, a resident of Mobile, of unsound mind and incapable of governing herself or of conducting and managing her affairs. Upon this petition an order was entered for a hearing on February 6, 1889, and that a jury "be drawn, as the law directs, for the trial of this issue." The order also provided that a writ issue to the sheriff, "requiring him to take the said Jetta Simon, so that he have her in this court to be presented at said trial, if consistent with the health and safety of said Simon." The writ issued. Therein was stated the substance of the allegations of the petition, and that the order had been entered appointing February 6, 1889, "for hearing said petition and for the due trial thereof." The command of the writ was that—

"If it be consistent with the health and

safety of said Jetta Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be impaneled to make said inquisition.

"And have you then and there this writ with your return thereon as to how you have executed the same."

The writ was duly returned with the following indorsement:

Received January 31st, 1889, and on the same day I executed the within writ of arrest by taking into my custody the within-named Jetta Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety of the within-named Jetta Simon to have her present at the place \*of [429] trial, and on the advice of Dr. H. P. Hirshfield, a physician, whose certificate is hereto attached, she is not brought before the honorable court.

W. H. Holcombe, Sheriff,  
By Wm. H. Sheffield, D. S.

Mobile, February 5th, 1889.

The certificate referred to reads as follows:

Mobile, Ala., Jan. 30th, 1889.

To the Sheriff of Mobile County, Ala.:

I, H. P. Hirshfield, a regular physician, practising in Mobile County, Ala., hereby certify that I am acquainted with Mrs. Jetta Simon, and have examined her condition on yesterday, and find that she is a person of unsound mind, and it would not be consistent with her health or safety to have her present in court in any matter now pending.

H. P. Hirshfield, M. D.

One Vaughan was appointed by the probate court the guardian *ad litem* of Mrs. Simon "in the matter of the petition to inquire into her lunacy." The appointment was accepted, and the guardian filed in said proceeding an answer averring "that he wholly denies all the matters and things stated and contained in said petition, and requires strict proof to be made thereof according to law." Thereupon a hearing was had before a jury, who returned a verdict that Mrs. Simon was "of unsound mind." The probate court then entered the following order or decree:

Jetta Simon, Lunatic.

State of Alabama, }

Mobile County. }

Probate Court of said County,

February 6th, 1889.

This being the day appointed, by reference to an entry thereof made upon the minutes of the court on the 30th of January, 1889, for the hearing of the petition of Ralph G. Richard, filed, alleging the lunacy of the said Jetta Simon and praying an inquisition thereof, and it being shown that it would not be consistent with the health and safety of said lunatic to bring her into court at this time, and it appearing that due process \*had [430] been served upon said lunatic notifying her

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of this proceeding, now comes the said Richard and a jury of good and lawful men, who reside in the county of Mobile, and who, having been summoned, to wit, John Pollock, Jr., and eleven others, who, having heard the evidence, the arguments of counsel, and the charge of the court in the premises, and being first duly tried, impaneled, and sworn well and truly to make inquisition of the facts alleged in said petition and a true verdict to render according to the evidence, upon their oath say, "We, the jury, find Mrs. Jetta Simon to be of unsound mind."

It is ordered, adjudged, and decreed by the court that said petition and all other proceedings thereon, together with the aforesaid verdict of said jury declaring the said Jetta Simon a lunatic, be recorded.

Subsequently, on February 11, 1889, Richard was duly appointed guardian of the estate of Mrs. Simon, and regular proceedings were had by which, under authority of the court, a sale of the real estate in question was ordered to be made for the payment of the debts of Mrs. Simon and for the support and maintenance of her family. Such sale was had in May, 1889, when Henry J. Simon became the purchaser, who sold the property to John N. Craft, defendant in error herein. In September, 1895, more than six years after the sale to Simon, the action in ejectment heretofore referred to was instituted against one Brown, a tenant of Craft. Craft, as landlord, was subsequently substituted in the stead of Brown. Upon a second trial of the issues joined, the defendant Craft, among other evidence, introduced the record of the proceedings in the probate court upon the inquisition of lunacy, to which reference has already been made, and the record of the subsequent proceedings resulting in the sale to Henry J. Simon. Objection to the introduction of such records was made upon specified grounds, all which are stated in the margin.† The objections\* were overruled and the record allowed to be read in evidence, to which action of the court exception was duly taken. The approval by the supreme court of Alabama of this ruling is what is here complained of.

The opinion of the supreme court of Alabama reversing the judgment entered on a verdict in favor of Mrs. Simon rendered at

the first trial of the action of ejectment is contained in 118 Ala. 625, 24 So. 380. The judgment entered in favor of Craft upon the second trial was affirmed upon the authority of the previous opinion.

Mr. Harry T. Smith argued the cause, and, with Mr. Gregory L. Smith, filed a brief for plaintiff in error:

The suggestion contained in the opinion of the majority of the supreme court of Alabama, that the inquisition of lunacy was in the nature of a proceeding *in rem*, and that jurisdiction attached upon the filing of the petition to have Mrs. Simon declared a lunatic, and that all other defects in the proceedings constituted mere irregularities and could not be reached upon collateral attack, was not intended to refer to an omission of the service of due process of law, so as to bring the alleged lunatic before the court to defend; but if it be so understood it is fully answered by the case of *Windsor v. McVeigh*, 93 U. S. 278, 23 L. ed. 916.

*Scott v. McNeal*, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Bradstreet v. Neptune Ins. Co.* 3 Sumn. 601, Fed. Cas. No. 1,793.

The denial of an opportunity to be heard is in effect a denial of notice of the proceedings; and an opportunity to be heard is made necessary by constitutional requirements as to due process of law.

*Smith v. Woolfolk*, 115 U. S. 149, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 172, 41 L. ed. 393, 17 Sup. Ct. Rep. 56; *McVeigh v. United States*, 11 Wall. 267, 20 L. ed. 81; *Lent v. Tillson*, 140 U. S. 327, 35 L. ed. 425, 11 Sup. Ct. Rep. 825; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Burns v. Multnomah R. Co.* 8 Sawy. 543, 15 Fed. 183; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 751; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 599; *Calhoun v. Fletcher*, 63 Ala. 584.

Even in those states which hold that a recitation of the service of process cannot be collaterally impeached, the doctrine has always been limited to cases where the reci-

†1st. In that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held.

2d. In that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held.

3d. In that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not.

4th. In that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy.

5th. In that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprive her of the opportunity to be heard at the inquest of lunacy.

6th. In that the sheriff's return shows that

under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy.

7th. Because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with article 5 of the Amendments to the Constitution of the United States, which provides, "Nor be deprived of life, liberty, or property without due process of law," and in conflict with article 14 of the Amendments to said Constitution:

1a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

2a. In that it authorizes a citizen to be deprived of his or her property without due process of law.

8th. Because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause.

tation was not expressly contradicted by other portions of the record.

*Beasley v. Howell*, 117 Ala. 505, 22 So. 989; *Harris v. McClanahan*, 11 Lea, 181; Black, Judgm. § 723; see also *Settlemier v. Sullivan*, 97 U. S. 448, 24 L. ed. 1111.

It cannot be doubted that the Federal courts are of foreign jurisdiction to those of the state, or that any judgment of a state court which is relied upon as the basis of a right may be collaterally attacked in the Federal court because of the want of jurisdiction, either of the subject-matter or of the parties.

*Cooper v. Newell*, 173 U. S. 567, 43 L. ed. 812, 19 Sup. Ct. Rep. 506; *Thormann v. Frame*, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446.

That the legislature of a state cannot bind the Supreme Court of the United States by its enactments as to what shall constitute the service of due process of law has been thoroughly established.

*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 232, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; *Smyth v. Ames*, 169 U. S. 527, 42 L. ed. 842, 18 Sup. Ct. Rep. 418; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Cooley*, Const. Lim. p. 431.

And we understand the same rule to have been repeatedly announced in reference to collateral attack upon judgments.

Bradley, J. in *Thompson v. Whitman*, 18 Wall. 468, 21 L. ed. 901.

To say that the plaintiff in error is now precluded from questioning the validity of the proceedings in the probate court for the want of the service of due process of law, because of the recitations contained in the judgment, which is itself contradicted by the return of the sheriff contained in the record, is to assume its validity and binding effect as a basis upon which to argue the truth of the premises assumed.

*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

Upon the right of the defendant to collaterally attack the enforcement of any judgment which may be rendered against him without the service of due process of law depends the correctness of those cases in which it has been held in this court that the mere entry of a judgment, without the service of due process of law, does not deprive the defendant of his life, liberty, and property without due process of law, because such a judgment is a mere nullity, which will not be given any force or effect in any other tribunal.

*York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; *Kauffman v. Wootters*, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298.

The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and

brought before the latter by a party claiming the benefit of such proceedings.

*Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 147, 35 L. ed. 119, 11 Sup. Ct. Rep. 512; *Noble v. Union River Logging R. Co.* 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271; *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398; *Elliott v. Peirsol*, 1 Pet. 340, 7 L. ed. 170; *Williamson v. Berry*, 8 How. 541, 12 L. ed. 1190.

Where the question is whether the statute provides due process of law, the Supreme Court of the United States will place its own construction upon the statute.

*Rose v. Himely*, 4 Cranch, 241, 2 L. ed. 608; *Thompson v. Whitman*, 18 Wall. 460, 21 L. ed. 899; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

*Mr. H. Pillans* argued the cause, and, with *D. P. Bestor*, filed a brief for defendant in error:

Due process of law, as found in the Constitution, signifies the law of the land, to use the language of Magna Charta. The Constitution makes no attempt to define what proceedings constitute due process, but assumes that custom and law have already settled what it is.

*Den ex dem. Murray v. Hoboken*, 18 How. 275, 15 L. ed. 373; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Reagh v. Spann*, 3 Stew. 108; *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Holman v. Manning*, 65 N. H. 228, 19 Atl. 1002; *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Weimer v. Bunbury*, 30 Mich. 201; *Wulzen v. San Francisco City & County Supers.* 101 Cal. 15, 35 Pac. 353.

If, notwithstanding the peculiar character of this lunacy proceeding, personal notice to the alleged lunatic is essential to its validity, all that need appear is that notice actually came to the party; the form is immaterial.

*Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 230; *Chase v. Hathaway*, 14 Mass. 222; *Fore v. Fore*, 44 Ala. 478.

Notice by the sheriff taking the alleged lunatic under the writ is sufficient, and none other is needed.

*Fore v. Fore*, 44 Ala. 478; *Craft v. Simon*, 118 Ala. 625, 24 So. 380.

The mere form of the procedure is not regarded; it is enough if the interested person had actual notice.

*Louisville & N. R. Co. v. Schmidt*, 177 U. S. 236, 44 L. ed. 750, 20 Sup. Ct. Rep. 230.

As the presence of the alleged lunatic has always been deemed desirable, statutes usually require the presence of such person when practicable, and have been upheld in the courts.

Ind. Rev. Stat. 1881, § 2547; *Martin v. Motsinger*, 130 Ind. 555, 30 N. E. 523; *Meafee v. Com.* 3 B. Mon. 305; *Re Blewitt*, 182 U. S.



131 N. Y. 541, 30 N. E. 587; *Re Wendell*, 1 Johns. Ch. 600; *Re Tracy*, 1 Paige, Ch. 580; *Southern Tier Masonic Relief Asso. v. Laudendbach*, 5 N. Y. Supp. 901; *Dutcher v. Hill*, 29 Mo. 271, 77 Am. Dec. 572; *Re Vanauken*, 10 N. J. Eq. 186; *Re Newman*, 2 Ch. Chamb. 390.

[431] \*Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

By subdivision 6 of § 787 of the Civil Code of Alabama of 1886, courts of probate in that state are vested with original jurisdiction over the appointment and removal of guardians for minors and persons of unsound mind. Pertinent provisions of the

[432] \*statutes of Alabama relating to the mode of appointment of guardians of persons of unsound mind, contained in said Civil Code, are excerpted in the margin.†

In the proceedings to inquire into the sanity of Mrs. Simon the writ which issued to the sheriff was evidently based upon the following clause of § 2393 of the Civil Code of 1886:

[433] \*"2393. The judge of probate . . . must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or

safety, have him present at the place of trial."

The invalidity of the proceedings in the inquisition of lunacy which formed the basis of the subsequent proceedings for the sale of the property of Mrs. Simon is in substance predicated on the contention that the writ directed to the sheriff authorized that official to determine whether it was consistent with the health and safety of Mrs. Simon to be present at the trial of the question of her sanity; that the sheriff decided this question against her, and she was detained in custody and not allowed to be present at the hearing on the inquisition. This latter claim, however, is founded upon the return indorsed by the sheriff on the writ directed to him. At the trial below there \*was no offer to prove, by any form of evidence, that Mrs. Simon was in fact of sound mind when the proceedings in lunacy were instituted, or that she desired to attend, and was prevented from attending, the hearing, or was refused opportunity to consult with and employ counsel to represent her. The entire case is thus solely based on the inferences which are deduced, as stated, from the face of the return of the sheriff. And upon the assumptions thus made it is contended that the statute, as well as the proceedings thereunder,

†Sundry sections of part 2, title 5, chapter 4, of the Civil Code of Alabama of 1886, pp. 535 et seq.:

"2390 (2753, 2754). Appointment. — The court of probate has authority, and it is a duty, to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the state, having within the county property requiring the care of a guardian, under the limitations, and in the mode hereinafter prescribed.

"2391. Guardian not appointed until after inquisition. — A guardian for a person alleged to be of unsound mind, residing in the county, must not be appointed until an inquisition has been had and taken as hereinafter directed.

"2392 (2757). Inquisition; proceedings. — Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age, and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof.

"2393 (2758). Jury summoned; writ of arrest. — The judge of probate must issue a writ directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof, and also issue subpoenas for witnesses, as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.

"2394 (2759). Oaths of jurors; vacancies filled. — At the time set for the trial, if good cause be not shown for continuance, the jury must be impaneled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict render according to the evidence. If any of the jurors are excused from serving, fail to attend, or are set aside for any

cause, their places may be supplied from the bystanders.

"2395 (2760). On verdict of insanity, papers filed, and guardian appointed. — If the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition and all the proceedings thereon to be recorded, and appoint a suitable guardian of such person.

"2396 (2761). Proceedings when person of unsound mind is confined in asylum. — If the person alleged to be of unsound mind is a resident of the county, and is at the time of the application confined in an hospital or asylum within or without the state, the inquisition may be had and taken without notice to him, but on the filing of the application the court must appoint a guardian *ad litem* to represent and defend for him; it is the duty of such guardian by answer to put in issue the facts stated in the application, and to employ counsel at the expense of such person of unsound mind to appear and defend.

"2397 (2804). Application for revocation of guardianship. — At any time after the inquisition the person ascertained to be of unsound mind, by himself or by next friend, may apply in writing to the court of probate for a revocation of the proceedings against him, and of the letters of guardianship; the application to be accompanied by the certificate in writing of two physicians or of two other competent persons, stating that after examination of such person they believe him to be of sound mind.

"2398 (2804). Proceedings on application. — On the filing of such application the court must appoint a day for the hearing thereof, not more than ten days thereafter, and the guardian and the person at whose instance the inquisition was had and taken must be cited to appear and show cause against it.

"2399 (2805, 2806). Contest of application. — If the guardian or person at whose instance the inquisition was had and taken appear and in writing deny the allegations of the application, the court must appoint a day for the trial



were violative of the clause of the 14th Amendment to the Constitution of the United States, which forbids depriving anyone of life, liberty, or property without due process of law.

It is not seriously questioned that the Alabama statute provided that notice should be given, to one proceeded against as being of unsound mind, of the contemplated trial of the question of his or her sanity. Indeed, it would seem that it was not urged before the supreme court of Alabama that the statutes [435] of that state failed to provide for notice, and that that court assumed in its opinion that no question of that character was presented. As a matter of fact, a copy of the writ which issued and which embodied a notice of the date of the hearing of the proceedings in lunacy is shown by the record to have been actually served on Mrs. Simon. As early as 1870 the supreme court of Alabama in *Fore v. Fore*, 44 Ala. 478, 483, held that the service of the writ upon a supposed lunatic was the notice required by the statute, and brought the defendant into court, and that, if he failed to avail of such matters of defense as he might have, he must suffer the effect of his failure to do so.

We excerpt in the margin the portion of the opinion of the supreme court of Alabama which dealt with the objection that Mrs. Simon was deprived of opportunity to be heard.†

of such contest, not more than ten days thereafter, and must cause a jury to be summoned for the trial thereof, and the like proceedings must be had as upon the original inquisition; or if there be no contest of the allegations of the application, and the court is satisfied of the truth thereof, a decree must be entered revoking the proceedings on the inquisition and the guardianship, and declaring that the ward must be restored to the custody and management of his estate.

"2400 (2807). Judgment on contest; costs thereof.—If on the trial of the contest the jury find the facts stated in the application to be true, the court must enter a decree revoking the proceedings on the inquisition and the guardianship, and declaring that the ward must be restored to the custody and management of his estate, and must adjudge the costs as is just and equitable; but if the verdict of the jury negatives the facts stated in the application, a judgment of dismissal at the costs of the applicant or of the next friend must be entered.

"2401 (2803). Revocation on application of guardian.—If, at any time after his appointment, the guardian becomes satisfied that the ward has been restored to sanity and is capable of managing his estate, and the judge of probate is of opinion, from the proof and the facts stated, that such representation is correct, he must make an order that the guardian be discharged and that the estate of the ward be restored to him."

†"The second ground of objection is that the appellee had no opportunity to be heard at the inquisition. This objection is based upon the character and wording of the writ directed to the sheriff. The provision of the statute is that the judge must 'issu[e] a writ, directed to the sheriff, to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.' The writ that issued, after setting

The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody, and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred the state court interpreted the \*statute—that the purpose in the command [436] of the writ, "to take the person alleged to be of unsound mind, and, if consistent with her health or safety, have her present at the place of trial," was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 230. We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon

out the facts averred in the petition, proceeded: 'Now, therefore, if it be consistent with the health and safety of said Jetta Simon, you are hereby required to take her body so that you may have her in said court,' etc. The statute is that the sheriff be directed to take her body, and, if consistent with health, etc. By the statute it is made the duty of the sheriff to take the body without condition, and, if consistent with health and safety, to have her present at the trial. The writ issued, directed to the sheriff, 'if consistent with health and safety, to take her body,' etc. The return of the sheriff shows that the writ was executed in accordance with the statute. It is: 'I executed the within writ of arrest by taking into my custody the within-named Jetta Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety . . . to have her at the place of trial . . . she is not brought before the court.' Technically the writ of the judge was not accurately correct. Its meaning, however, is evident. The sheriff's return was complete and regular in every respect. We do not doubt she was brought into the court in the manner prescribed by statute, and that she was subject to its jurisdiction. The second objection cannot be sustained." 118 Ala. 636, 24 So. 383.



her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable. The view we take of the statute was evidently the one adopted by the judge of the probate court, where the proceedings in lunacy were heard, since that court, upon the return of the sheriff, and the failure of the alleged lunatic to appear, either in person or by counsel, in order to protect her interests, entered an order appointing a guardian *ad litem* "in the matter of the petition to inquire into her lunacy;" and \*an answer was filed by such guardian, denying all the matters and things stated and contained in the petition, and requiring strict proof to be made thereof according to law.

It is also urged as establishing the nullity of the appointment of a guardian of the estate of Mrs. Simon, that the proceedings failed to constitute due process of law, because (1) they were special and statutory, and the petition failed to state sufficient jurisdictional facts; (2) a jury was not impaneled as provided by law; and (3) there was no finding in the verdict of the jury or the order entered thereon, ascertaining and determining all the facts claimed to be essential to confer jurisdiction to appoint a guardian. But the due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 230, and cases cited. If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity, under the state statute, of the practice pursued in the particular case. Tested by these principles, we accept as conclusive the ruling of the supreme court of Alabama that the jury which passed on the issues in the lunacy proceeding was a lawful jury, that the petition was in compliance with the statute, and that the asserted omissions in the recitals in the verdict and order thereon were at best but mere irregularities which did not render void the order of the state court appointing a guardian of Mrs. Simon's estate.

*Judgment affirmed.*

[438] \*JOHN T. PIRIE, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott, and James Grassie, Trading as Carson, Pirie, Scott, & Company, Appts.,

v.

CHICAGO TITLE & TRUST COMPANY,  
Trustee.

(See S. C. Reporter's ed. 438-456.)

*Bankruptcy — preferences by payment of*  
182 U. S.

*money — surrender and repayment — requiring repayment of dividend.*

1. Payments in money are transfers of property within the meaning of the bankruptcy act of 1898, § 60a, relating to preferences by transfers of property of insolvent persons.
2. A creditor who has received payments of money from an insolvent debtor within four months before petition in bankruptcy was filed for the debtor, but who did not know or have reasonable cause to believe that the payments were intended to give him a preference, the debtor not intending to give a preference, cannot be compelled, under the bankruptcy act, § 60b, to repay the money to the trustee in bankruptcy, but under § 57g he must surrender the preference that he has received, before any claim by him against the estate can be allowed.
3. The provision of the bankruptcy act, § 57g, for the surrender of preferences as a condition of proving claims, is not a penal requirement to be strictly construed.
4. An order of the court of bankruptcy rejecting a claim, and, in addition thereto, requiring the creditor to repay to the trustee the amount of a dividend theretofore received, is not made in a suit within the meaning of the bankruptcy act, § 23b, relating to suits by the trustee.

[No. 391.]

*Argued January 18, 21, 1901. Decided May 27, 1901.*

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirming a decree in a bankruptcy proceeding. *Affirmed.*  
See same case below, 41 C. C. A. 681, 102 Fed. 1005.

Statement by Mr. Justice McKenna:

In proceedings in bankruptcy in the matter of Frank Brothers, bankrupts, in the district court for the northern district of Illinois, the appellants filed a claim for goods, wares, and merchandise sold and delivered to said bankrupt firm for the sum of \$3,093.98. The claim was allowed, and subsequently a dividend of 15 per cent was paid thereon.

\*On the 31st of August, 1899, the appellee, [439] the Chicago Title & Trust Company, filed a petition for a reconsideration of the claim and its rejection on the ground that Carson, Pirie, Scott, & Company had within four months prior to the filing of the petition in bankruptcy received from the bankrupts large sums of money as preferences, which preferences had not been surrendered. The recovery of the dividend paid was also prayed for.

To the petition Carson, Pirie, Scott, & Company made the following answer:

"They admit that they have collected in the usual and ordinary course of their business, from said bankrupts, Frank Brothers, within four (4) months prior to the filing of the petition in bankruptcy, the sum of one thousand three hundred and thirty-six and 79/100 dollars (\$1,336.79).

"Further answering, Carson, Pirie, Scott, & Company say that they did not know, or

have reason to believe, that the said Frank Brothers were insolvent at the time the payments were made, nor did they have reasonable cause to believe that such payments were made with any intent to give them a preference, nor did said Frank Brothers intend the payments so made to be preferences."

The matter came up before Frank L. Wren, referee, and he substantially found the facts, from the stipulation of the parties, as hereinafter stated in the findings of the circuit court of appeals, and that the payments constituted a preference. He adjudged, therefore, that the claim be reconsidered and rejected, and the dividend paid thereon be given up. On review the district court also found the facts as the referee found them, and on the 9th of May, 1900, made and entered an order, the conclusion of which was as follows:

"It is therefore ordered, adjudged, and decreed that said claim of said Carson, Pirie, Scott, & Company, heretofore filed herein and allowed, should be reconsidered.

"That said claim of Carson, Pirie, Scott, & Company should be rejected and expunged.

"That said Carson, Pirie, Scott, & Company forthwith pay \*to the trustee herein the amount of the dividend heretofore paid to them by the trustee herein, to wit, the sum of \$464.10."

Carson & Company excepted, and subsequently took an appeal to the circuit court of appeals, which court affirmed the order of the district court, upon its opinion in *Re Fort Wayne Electric Corp.* 39 C. C. A. 582, 99 Fed. 400. The case was then brought here.

The findings of fact and conclusions of law of the circuit court of appeals are as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank, and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm: said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares, and merchandise amounting to the total sum of \$4,403.77.

"Third. That said appellants in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares, and merchandise so sold and delivered to said Frank Brothers, the sum of \$1,336.79, leaving a balance due, owing, and unpaid, amounting to \$3,093.98.

"Fourth. That at the time this payment was made said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and that when said payments were made, and at the time of the adjudication in bankruptcy of the bankrupts herein, the assets of said bankrupts did not exceed the sum of \$125,000, while their liabilities exceeded \$500,000.

"Fifth. That at the time of the payment

above set forth neither said appellants nor any of their agents had knowledge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent, and that when said payment was made said appellants did not have reasonable cause to believe that said bankrupts by said payment intended thereby to give a preference. Nor did said bankrupts by said payments intend thereby to give a preference.

"\*Sixth. That at or about the time of the [441]

first meeting of the creditors herein, to wit, on March 17, 1899, said appellants duly filed a claim herein against said bankrupts' estate for their balance of said claim for goods, wares, and merchandise sold by them to the bankrupts as aforesaid,—said balance amounting to the sum of \$3,093.98, and that at or about the time of the said first meeting of creditors herein said claim was duly allowed at the sum last above set forth; that thereafter, and on the 28th day of April, 1899, a dividend of 15 per cent upon all claims which were allowed against said bankrupts' estate was duly declared by the referee herein, and that said dividend was paid to the various creditors who had proved their claims, including appellants'; that the amount of the dividend paid to appellants was \$464.10, which money appellants still retain, no part thereof having been repaid or returned to the trustee herein or anybody acting on behalf of said trustee.

"Seventh. That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof the trustee was not aware of the fact that said appellants had received any preference on their claim and demand against said bankrupts.

"Eighth. The said appellants have refused to surrender to the trustee the amount of the payment made to them by said bankrupts above set forth, as a condition of the allowance of their said claim, and have by their counsel declared that it is the intention of said claimants to retain the full amount of said payment so made to them by said bankrupts, and not to surrender the same.

"Ninth. That the appellee, Chicago Title & Trust Company, trustee, which had been duly appointed trustee of the bankrupt estate of said Frank Brothers, filed its petition praying that the claim of appellants against the bankrupts' estate be reconsidered and rejected, and that said appellants be ordered and required to repay to the trustee the amount of the dividend on the said claims theretofore paid to appellants; the grounds of said petition being that said appellants had within four months prior to the adjudication in bankruptcy of said bankrupts received large sums of money as preferences, which \*preferences said appellants had not [442] surrendered; that said appellants appeared in said proceedings and answered said petition.

"That the referee upon the evidence presented before him decided that the said payment made by the bankrupts to said appel-



lants constituted a preference, and that by reason of said preferences the appellants' claim should be reconsidered and rejected, and that appellants should repay to appellee the amount of the dividend on appellants' said claim theretofore paid by appellee to them, the sum of \$464.10; that upon appellants' application and upon the certification of the questions presented to the United States district court for the northern district of Illinois, the decree of the referee was confirmed, and an order in the district court was entered in accordance with the referee's said report, from which order an appeal was taken to this court.

"Upon the foregoing facts this court makes the following conclusions of law:

"First. That the payment made by appellants to the bankrupts at the time and in the manner above shown constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender said preferences they were not entitled to prove their claim against the bankrupts' estate.

"Second. That the district court had the power and authority to order, require, and compel appellants to repay to the trustee the amount of the dividend received by appellants."

**Messrs. Henry Ach and A. J. Pfau** argued the cause, and, with **Messrs. George Packard, Joseph M. Rothschild, and S. O. Levinson** filed a brief for appellants:

Bankrupt acts are remedial, and must be liberally construed to effect their objects and purposes.

*Crook v. People's Nat. Bank*, 29 Misc. 30, 60 N. Y. Supp. 309; *Tiffany v. Lucas*, 15 Wall. 421, 21 L. ed. 198; *Re Muller, Deady*, 513, Fed. Cas. No. 9,912; *Re Silverman*, 1 Sawy. 410, Fed. Cas. No. 12,855; *Blake v. Francis-Valentine Co.* 89 Fed. 691; *Southern Loan & T. Co. v. Benbow*, 96 Fed. 514; *Loveland, Bankr.* p. 13, § 71; *Mayer v. Hellman*, 91 U. S. 501, 23 L. ed. 378; *Re California P. R. Co.* 3 Sawy. 252, Fed. Cas. No. 2,315.

If there be an ambiguity in a statute, the court in construing the law must arrive at the intention of the legislature, and in so doing can look beyond the mere words, and will never impute an intention which will lead to injustice, oppression, absurd consequences, or great public or private mischief.

*Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 74 Am. Dec. 572; *Re Griffin, Chase*, 364, Fed. Cas. No. 5,815; *Taylor v. Taylor*, 10 Minn. 107, Gil. 81; *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. ed. 879; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *Endlich, Interpretation Stat.* § 295; *Mattison v. Hart*, 14 C. B. 385; *Sutherland, Stat. Constr.* § 324; *Knowles v. Yeates*, 31 Cal. 83; *People v. Turner*, 39 Cal. 370; *San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875; *Potter's Dwarria, Stat.* 182 U. S.

130; *United States v. Snow*, 4 Utah, 322, 9 Pac. 697; *Wike v. Campbell*, 5 Colo. 131; *Hollingworth v. Palmer*, 4 Exch. 281; 23 *Thomp. Enc. Law*, p. 305; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 341; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Jackson ex dem. Scofield v. Collins*, 3 Cow. 89; *Delafield v. Brady*, 108 N. Y. 524, 15 N. E. 428; *Fowler v. Padget*, 7 T. R. 509; *Lau Ow Baw v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *Smith v. Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; *Bloomer v. McQuowan*, 14 How. 539, 14 L. ed. 532; *United States v. Babbitt*, 1 Black, 55, 17 L. ed. 94; *Paper-Bag Mach. Cases*, 105 U. S. 766, 26 L. ed. 959; *Siemens v. Sellers*, 123 U. S. 276, sub nom. *Guarantee Ins. T. & S. D. Co. v. Sellers*, 31 L. ed. 153, 8 Sup. Ct. Rep. 117; *Blake v. National City Bank*, 23 Wall. 307, 23 L. ed. 119; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

Frequently in construing statutes, for considerations of expediency, or to prevent extreme hardship, great injustice, public or private mischief, or to avoid an absurdity or unquestioned evil consequences, courts will construe a statute against its literal meaning and against its terms, and will change, add, or omit a word, supply a sentence, or change the structure thereof.

*Endlich, Interpretation Stat.* § 295; 6 *Am. & Eng. Enc. Law*, 2d ed. p. 924; *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753; *Wisconsin Industrial School for Girls v. Clarke County*, 103 Wis. 651, 79 N. W. 422; *Hawkins v. Filkins*, 24 Ark. 286; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *United States v. Morrissey*, 32 Fed. 148; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 22 N. E. 188; *Carpy v. Dowdell*, 129 Cal. 244, 61 Pac. 1126; *Sutherland, Stat. Constr.* §§ 246, 323; *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 341; *Ex parte Walton*, L. R. 17 Ch. Div. 746; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 359, 8 Am. Dec. 243; *Jackson ex dem. Scofield v. Collins*, 3 Cow. 89; *Delafield v. Brady*, 108 N. Y. 524, 15 N. E. 428; *Fowler v. Padget*, 7 T. R. 509; *Heydenfeldt v. Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The present bankrupt law, for the purpose of carrying out the supposed intention of Congress, has been construed against its literal terms in the following cases:

*Re Scanlon*, 2 N. B. N. Rep. 58; *Re Grubbs-Wiley Grocery Co.* 96 Fed. 183; *Re Carolina Cooperage Co.* 2 N. B. N. Rep. 23; *Re Richards*, 2 N. B. N. Rep. 38.

A payment made in the ordinary course of business on account, to a creditor who has no knowledge of the insolvency of his

debtor at the time of receiving the payment, and no reasonable cause to believe such debtor insolvent, is not a preference within the meaning of the bankrupt act.

30 U. S. Stat. at L. 1898, p. 544; *Loveland*, Bankr. § 135; *Blakey v. Boonville Nat. Bank*, 95 Fed. 267; *Re Piper*, 2 N. B. N. Rep. 9; *Re Smoke*, 2 N. B. N. Rep. 831, 996; *Re Hall*, 2 N. B. N. Rep. 1126.

*Messrs. A. J. Pflaum, Henry Ach, George Packard, and S. O. Levinson* filed an additional brief for appellants:

To constitute a preference under the bankruptcy act, within either § 57g or § 60a, at least the intent on the part of the bankrupt to prefer must be present.

This court held under the bankruptcy law of 1867, that if the debtor did not intend to give a preference, and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer was valid, although the debtor was then insolvent.

*Mays v. Fritton*, 20 Wall. 414, 22 L. ed. 389.

Under the act of 1867 the decisions were that intent means an actual design in the mind and must be proved as a question of fact.

*Re Drummond*, 1 Nat. Bankr. Reg. 231, Fed. Cas. No. 4,093; *Re Cowles*, 1 Nat. Bankr. Reg. 280, Fed. Cas. No. 3,297; *Perry v. Langley*, 2 Nat. Bankr. Reg. 596, Fed. Cas. No. 11,006; *Re Goldschmidt*, 3 Nat. Bankr. Reg. 164, Fed. Cas. No. 5,520.

Also, that the intent need exist only on the part of the person making the transfer. If this exists, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person to whom the transfer is made.

*Re Drummond*, 1 Nat. Bankr. Reg. 231, Fed. Cas. No. 4,093.

*Messrs. Eli B. Felsenthal and Herman Frank* argued the cause and filed a brief for appellee:

A creditor who has received payments on account within four months prior to the adjudication in bankruptcy cannot have his claim allowed without first surrendering such payments. Such payments constitute preferences under §§ 57g and 60a, although they were received in due course of business, in good faith, and without intent on the part of either the creditor or debtor, or knowledge on the part of the creditor that a preference was intended by such payment.

*Ft. Wayne Electric Corp.* 39 C. C. A. 582, 99 Fed. 400; *Re Fixen*, 50 L. R. A. 605, 42 C. C. A. 354, 102 Fed. 235; *Re Jones*, 4 Am. Bankr. Rep. 563; *Re Tetslow*, 104 Fed. 229; *Re Arndt*, 104 Fed. 234; *Re Gillette*, 104 Fed. 770; *Re Schmechel Cloak & Suit Co.* 104 Fed. 64; *Re Conhaim*, 97 Fed. 923; *Re Sloan*, 102 Fed. 116; *Re Rogers' Mill. Co.* 102 Fed. 687; *Re Christensen*, 101 Fed. 243; *Re Strobel & W. Co. v. Knost*, 99 Fed. 409; *Re Beswick*, 2 N. B. N. Rep. 808; *Re Thompson*, 2 N. B. N. Rep. 1010; *Re Jourdan*, 2 N. B. N. Rep. 581; *Re Wise*, 2 N. B. N. Rep. 157; *Re Ft. Wayne Electric Corp.* 96 Fed. 803; *Re Ryan*, 2 N. B. N. Rep. 693; *Re* 1174

*Siegel-Hillman Dry Goods Co.* 2 N. B. N. Rep. 933; *Re Flick*, 3 N. B. N. Rep. 71; *Loveland*, Bankr. 257; *Collier*, Bankr. 285, 286; *Brandenburg*, Bankr. 296; *Lowell*, Bankr. 43.

The province of construction lies wholly within the domain of ambiguity.

*Hamilton v. Rathbone*, 175 U. S. 416, 44 L. ed. 220, 20 Sup. Ct. Rep. 155.

Courts are not to tamper with the clear and unequivocal meaning of the words, although the consequences may be such as were not contemplated by the legislature. There can be no departure from the plain meaning of a statute on grounds of unwisdom or of public policy.

*Sedgw. Stat.* 231; *Cooley*, Const. Lim. 5th ed. 197; *United States v. Fisher*, 2 Cranch, 399, 2 L. ed. 317; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168.

If the meaning of the act is plain, it must be obeyed, even if great inconvenience might result from construction in conformity with the meaning.

*United States v. Fisher*, 2 Cranch, 385, 2 L. ed. 313.

The absurdity must be of such a degree that the action of the court in sanctioning an interpretation leading to absurd consequences must be stultifying.

*Sturges v. Crowninshield*, 4 Wheat. 203, 4 L. ed. 550; *Potter v. Douglas County*, 87 Mo. 239; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278.

From the rule that, where but one meaning can attach to the terms of a statute, there is no room for construction, it follows that nothing can be added to or taken from the statute, unless to construe its words according to the obvious meaning would give rise to manifest inconsistency, incongruity, or ambiguity. A court may insert limitations only as to special cases which fall within the scope of the general terms used in the statute.

*United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460; *Miller v. Ragan*, 2 Wheat. 25, 4 L. ed. 175; *Lake County Comrs. v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Words may not be imported into a statute in order that it may include a case which has been omitted, merely because there seems to be no good reason why it should be omitted, and the omission seems to have been merely unintentional.

*Dwarris*, Stat. 2d ed. 579.

It is, therefore, only in cases where the words of a statute are capable of two meanings, or where, by giving them their literal interpretation, the statute will be inconsistent or ambiguous, that the courts resort to the secondary rules of construction to aid in determining the real meaning of the legislature.

*Denn v. Reid*, 10 Pet. 524, 9 L. ed. 519; *Priestman v. United States*, 4 Dall. 30, 1 L. ed. 728.

The rules of construction favor the interpretation adopted by the court below.



Sedgw. Stat. Law, 247; 23 Am. & Eng. Enc. Law, 372-374; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Re Hirsch*, 96 Fed. 468; *Re Marshall Paper Co.* 43 C. C. A. 38, 102 Fed. 872.

The cardinal purpose of the bankrupt act is (a) to procure a ratable distribution of the bankrupt's assets among his creditors; and (b) to discharge the insolvent from his debts.

*Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723; *Re Scrafford*, 4 Dill. 376, Fed. Cas. No. 12,556; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 153.

Remedial statutes being made to supply defects or abridge superfluities in the law, that construction which tends to suppress the mischief or advance the remedy should be favored. In construing a statute of like nature, there must always be kept in view the old law, the mischief, and the remedy.

*Heydon's Case*, 3 Coke, 7b; *Stradling v. Morgan*, 1 Plowd. 205; Coke, Litt. 11, 42; *Van Horne v. Dorrance*, 2 Dall. 316, Fed. Cas. No. 16,857.

And courts, within certain prescribed limits, have even declared that that which is within the mischief intended to be remedied is considered within the statute, though not within the letter thereof, and that which is not within the mischief is not within the statute, though within the letter.

*Eyston v. Studd*, 2 Plowd. 464; *State v. Canton*, 43 Mo. 48; *People ex rel. Wood v. Lacombe*, 99 N. Y. 49, 1 N. E. 599; *United States v. Freeman*, 3 How. 565, 11 L. ed. 728.

The bankrupt act may work hardships in individual cases, but when courts undertake to make laws for "hard cases" they pass out of their proper sphere. Courts cannot undertake to add provisions not found in the statutes, for the purpose of preventing an apparent hardship.

*Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *Cooke v. School Dist. No. 12*, 12 Colo. 458, 21 Pac. 496, 719; *Cheyenne County Comrs. v. Bent County Comrs.* 15 Colo. 320, 25 Pac. 508.

From the moment of actual insolvency all creditors become entitled to share *pro rata* in the estate, because it represents the credit given the insolvent by his creditors, and in good morals belongs to them, and not to him.

*Re Knost*, 1 N. B. N. 403.

And it is certainly not inequitable to require one who has received an undue portion of that estate, no matter if innocently, to surrender that advantage before participating in further distributions of it with those who have not received such preference.

*Collier*, Bankr. 1st ed. 286; *Re Siegel-Hillman Dry Goods Co.* 2 N. B. N. Rep. 933.

The bankruptcy court has the power, in proceedings brought to reconsider and reject claims which have been allowed and upon which dividends have been paid, to require the creditor whose claim has been so reconsidered and rejected, and who has received a dividend, to repay such dividend to the trustee.

Bankruptcy act 1898, § 57, subds. 2, d, f, 182 U. S.

k, l, and n; § 2 (2), (7), (15); *Ex parte Bolton*, 1 Deacon & C. 556.

The creditor who proves his claim is in every respect a party to the proceedings, subject to the order of the court, and amenable to its processes.

*Wiswall v. Campbell*, 93 U. S. 347, 23 L. ed. 923.

The effect of the rejection of a claim that has once been allowed, the allowance of the claim being, as we have shown, equivalent to a judgment, is analogous to the result of the reversal, on appeal, of a judgment which has been made in full. It is the law that on the reversal of a judgment the party is to be restored to all things which he lost by the judgment below, and if he has paid money on an execution upon the judgment he will be entitled to judgment of restitution for the sum collected from him. This power to compel restitution is inherent in all courts and should be exercised in all proper cases.

*Andrews v. Thum*, 18 C. C. A. 308, 33 U. S. App. 393, 71 Fed. 763; *Eames v. Stevens*, 26 N. H. 117; *Pangburn v. Ramsay*, 11 Johns, 143; *Jones v. Hacker*, 5 Mass. 264; *Boyet v. Vaughan*, 86 N. C. 725; *Ming v. Suggett*, 34 Mo. 364; *Scott v. Conover*, 10 N. J. L. 61; *Crawford v. Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870.

After stating the case as above, Mr. Justice McKenna delivered the opinion of the court:

"The question presented by this record is [442] whether payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference within the meaning of the bankrupt act of 1898, and were required to be surrendered as a condition of proving the balance of the debt or other claims of the creditor. [443]

The solution of the question depends primarily upon the interpretation of subdivisions a and b, § 60, of the law of 1898, and certain related sections. Subdivision a of § 60 is as follows:

"Preferred Creditors.—a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [30 Stat. at L. 544, chap. 541.]

It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by "transfers of property" payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in § 1. It is there provided that "transfer" shall include the sale and every other and different mode of disposing of or parting

with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value,—anything which has debt-paying or debt-securing power.

We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it. It would be very strange indeed if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term "securities" should be included. We certainly cannot so declare upon one meaning of the word "transfer." If the word itself permitted such declaration, which we do not admit, the definition in the statute forbids it. "Transfer" is defined to be not only the sale of property, but "every other and different mode of disposing of or parting with property." All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor "to obtain a greater percentage of his debt than any other creditors of the same class."

But it is said "that Congress in passing the law had in mind the distinction between the payments of money and the transferring of property; otherwise they indulged in tautology" in subdivision *d*. By that it is provided: "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, *pay money or transfer property* to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

That all the words of a statute should, if possible, be given effect, we concede, but tautology sometimes occurs. Is there not an example in subdivision *e* of § 67 (which, by the way, and notwithstanding, is relied on

by the appellants)? It provides that "all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt," in fraud of creditors, shall be null and void as to them.

\*Manifest tautology, but certainly not used [445] to detract from the definition of "transfer" in § 1, or to exclude application of that section in proper cases. Conveyances, assignments, and encumbrances of property are but modes of its absolute or conditional disposition (transfer), as payment of money is a mode of its disposition (transfer), and there was a particular expression of each mode on account of the primary purpose to be secured in each case,—the purpose being, in 60 *d*, to control payments to attorneys; in 67 *e* the purpose being to prohibit the disposition of property by the debtor to persons other than creditors in fraud of the act.

But, construing transfers of property to include payments of money, it is nevertheless urged that, not only must the act and state of mind of the giving debtor be considered, but the act and state of mind of the receiving creditor must be considered. It is not enough that an advantage in fact be given, but to make it a preference "the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference." In other words, it is contended that the quoted words should be read into subdivision *a* from subdivision *b*, and the necessity of doing so is claimed to be established by other sections of the statute. The other sections are inserted in the margin.†

\*Section 60 *b* is as follows:

[446]

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Subdivisions *a* and *b* are concerned with a preference given by a debtor to his creditor. Subdivision *a* defines what shall constitute it, and subdivision *b* states a conse-

†Sec. 60c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

Sec. 3. Acts of Bankruptcy.—*a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors.

Sec. 3 *b*. A petition may be filed against a



quence of it,—gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered; provided, however, that the preference was given within four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. So far, so clear.

7] If the conditions \*mentioned exist, the preference may be avoided. But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that the condition being absent, its effect will be absent. In other words, he may keep the property transferred to him, whether it be a complete or partial discharge of his debt. But if only a partial discharge, may he prove the balance of his debt or other debts?

Section 57 *g* provides for such case. "The claims of creditors," it provides, "who have received preferences, shall not be allowed unless such creditors shall surrender their preferences."

There is certainly no ambiguity so far. What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts. His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence, but, aiming to secure equality between him and other creditors, can the law indulge further? He may have been paid something,—maybe a greater percentage than other creditors can be. That is his advantage, and he may keep it. If paid a less percentage he can obtain as much as other creditors by surrendering the payment, and an equality of distribution of the assets of the bankrupt is assured. The effect is equitable, and that it was intended is supported by prior legislation.

The bankrupt act of 1867 had provisions against preferences. §§ 23 and 35, 5084 and 5123, Rev. Stat. They could be recovered, and had to be surrendered to enable the cred-

itor to prove his debt, but the law was careful to express upon what condition in each case. They could be recovered back if the creditor had "reasonable cause to believe" the debtor was insolvent, and they were given "in fraud of the provisions of this title." § 5123, Rev. Stat. They had to be surrendered if received under like condition. Section 5084, Rev. Stat., provided that "any person who . . . has accepted any preference *having reasonable cause to believe that the same was made or given by the debtor* contrary to any provisions of the act of \*March 2, 1869, chap. 176, . . . shall [448] not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference."

The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose. This rule we lately applied in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. In that case, in determining whether the jurisdiction of the circuit and district courts of the United States was concurrent with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.

Sec. 67 *d*. Liens given or accepted in good faith and not in contemplation of or in fraud  
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upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

Sec. 68. Set-offs and Counterclaims.—*a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid.

*b*. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

We might rest the discussion here, but counsel have ably urged against our interpretation of the statute considerations which should be noticed. They assert its incorrectness because: (1) That the provisions of 57 *g*, which denies allowance to the claims of creditors unless such creditors surrender the preferences they have received, are penal and should be strictly construed. Being penal, it is contended, there should be a guilty intent to incur their punishment. (2) Of the defectiveness of 60 *a*, and the necessity of explaining it and enlarging it by other provisions. (3) Of the consequences of the construction,—consequences which are declared to be anomalous and even absurd.

[449] 1. We cannot concur in the view that 57 *g* is a penal requirement. It is hardly necessary to assert that the object of a bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt,—not among some of the creditors, but among all of them. Such object could not be secured if there were no provisions against preferences,—no provisions for defeating their purpose. And it is no reflection on the statute that it does not do so entirely. It allows complete payments, and counsel has seen and urges what seems to be inequitable in that,—the giving favor to the diligence which secured it,—and strongly argues that if complete payments may be retained without penalty, why not partial payments; if diligence (and diligence is made a great deal of in the argument) is favored in the one case, why not in the other? The view is too narrow and partial. Comparing such creditors, there may be inequality, but, considering other creditors, what shall be said? Some thought must be had of them, and considering them—indulgent creditors as well as diligent creditors—an attempt to secure the best remedies and results in the circumstances was, no doubt, the aim of the legislature. And advantage may be left with the preferred creditor. As we have already said, if the preference exceed the share of the bankrupt's estate which the creditor would be entitled to, he may keep the preference. If it be less, he may surrender it and share equally with the other creditors. If the purposes of the statute are to be considered, this is certainly not punishment, but benefit. If it is discrimination at all, it is discrimination against the other creditors.

[450] 2. Undoubtedly all the sections of the act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent. It does not follow that because the terms of a section are defined elsewhere, or the consequences of its provisions are expressed elsewhere, that it becomes a nullity, or that it is \*defective. Not that we may not "travel outside," to use counsel's expression, of any section, if it be necessary to travel outside. We may travel outside for some things, not necessarily for all things. The argument is, you must travel outside of

subdivision *a* for a time within which the preference must have been given, and four months are selected in analogy to subdivision *b* and of § 3 *b*. This may be conceded, and the meaning of subdivision *a* would not be otherwise altered. There would still remain a clear definition of a preference.

The argument is strong which is urged to support a four months' limitation, but it can be argued in opposition that subdivision *a* needs no explanation from other parts of the statute "in order to obtain a time limit on the question of preference." It can be argued that subdivision *a* gives such limit in the existence of insolvency. But we are not required to decide either way on this record. A time limit is entirely independent of the belief of the creditor or of the belief which may be attributed to him,—entirely independent of his right to a greater proportion of the bankrupt's property than other creditors. It is urged, however, that a time limit—whether of four months, or extending indefinitely before the filing of the petition in bankruptcy, having no limit but the statute of limitations—differently affects the creditor receiving the preference, and the difference should be considered in construing the statute. It is pointed out that insolvency has a different meaning under the act of 1898 than it had under the act of 1867. Under the latter, the debtor was insolvent when he was unable to pay his debts in the ordinary course of business. Under the former, when the aggregate of his property at a fair valuation is insufficient to pay his debts, and, it is said, this being practically impossible to ascertain on account of the uncertainty of its factors, therefore a time limit to a preference is necessary, and also that there should be a guilty knowledge on the part of the creditor of the guilty intent upon the part of the debtor. There are two weaknesses in the argument. It ascribes a penal character to § 57 *g*, and regards the requirement of the surrender of the preference as a condition of proving debts as a \*punishment, [451] and not a provision to secure equality among creditors. On this we have sufficiently commented. The other weakness in the argument is that it exaggerates the difference between the definitions of insolvency, and overlooks an advantage to the creditor in the definition contained in the act of 1898. Inability to pay debts in the ordinary course of business usually accompanies an insufficiency of assets. It may not, of course. At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that form by which payments may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors. But the discussion need not be extended. The law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences, not only to the debtor, but to his creditors and to purchasers of his property.

3. It is but one rule of construction that the consequences of a statute may be consid-



ered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed and adequate to convey a definite meaning. It is true, it is urged that the word "preference" imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon § 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed [452] with favor or with alarm; \*some regretted, but accepted as inevitable,—accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce. *United States v. Fisher*, 2 Cranch, 389, 2 L. ed. 314. Therefore the sound rule expressed in *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. ed. 550: "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, . . . and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

So, in *United States v. Goldenberg*, 168 U. S. 103, 42 L. ed. 398, 18 Sup. Ct. Rep. 4, where Mr. Justice Brewer, answering the argument based on the consequences of an act of Congress against the meaning expressed by its words, said:

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justifies U. S.

fy any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511); it involves no injustice, oppression, or absurdity (*United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92); there is no overwhelming necessity for applying in the one clause the same \*limita- [453] tion of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally, with protest, follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them."

Let us apply these principles to the present case. The consequence of the construction of the circuit court of appeals is said to be that it will "harass and embarrass the business of the country," and the specification is that any payment to a creditor may become a preference and the alternative forced upon him of giving it up or losing the right to prove his claim or claims against his debtor's estate. That consequence does not seem to us very formidable, even in the instance of payments to private bankers by their depositors, as illustrated by counsel, or, as also illustrated, if the payments should be distributed as gifts to relatives, or to endow universities, and cannot be obtained to be surrendered. Granting that such situation may be produced, is it anything after all but putting the creditor to an election of comparative and debatable courses where some loss must occur, whichever be taken? Business life has many such examples, and a law which has that consequence in seeking equality among creditors is certainly not absurd in even the loosest and most inconsiderate meanings of the word. Other illustrations are used which present the same situation or depend upon it,—that is, the election which a preferred creditor is forced to make in order to prove his debts. A trader is insolvent and owes \$100,000. His assets are \$75,000. He owes \$50,000 to A and B; the other \$50,000 to other letters of the alphabet. He makes payments to the latter in order to prefer them, and then goes into bankruptcy. A and B, having nonpreferred, hence provable, claims, elect a trustee. What of the other creditors? Counsel, having full control of the imaginary situation, makes them ignorant of the debtor's affairs, and therefore unwilling to risk a division with A and B. That it is possible for such \*ignorance and doubt to exist may be conceded [454] ed, but it does not occur to us how either can reasonably continue for the time debts may be proved against the estate under the disclosures required of the bankrupt by the

statute, and the information obtained by the trustee of the estate in its administration.

But it is said a debtor may even make money by going into voluntary bankruptcy, and the result is worked out by circumstances carefully imagined to that end, combined with, as absolutely necessary to the result, the ignorance and timidity of creditors. The illustration is that, suppose a bankrupt has made partial payments to every one of his creditors within four months preceding bankruptcy; that his assets at the time of the filing of the petition amounted to \$50,000, and his liabilities to \$100,000. Hesitating in this extraordinary situation to surrender their payments,—no creditor being tempted by \$50,000,—the conclusion is confidently advanced that “if the construction of the court below is sound, there are no creditors who have provable claims against the bankrupt.” And the query is put, Who gets the \$50,000? The implied answer is that the bankrupt gets them, and the result is easily pronounced absurd. It is an absurdity which the “construction of the court below” is not responsible for. What a court would do with such a scheme as a fraud upon the act, we are not called upon to say. We may well doubt if a scheme of that kind will ever come up for decision. We find it impossible to conceive a case in which \$50,000, or, indeed, any surplus, would not be an inducement to some creditor to add it, or some portion of it, to the payment of his claim.

It is further contended “that to constitute a preference under the bankruptcy act within either 57 *g* or 60 *a*, at least the intent on the part of the bankrupt to prefer must be present.” In support of this it is said that an act of bankruptcy consists, under § 3 (2) of a transfer by a debtor while insolvent of any portion of his property to one or more of his creditors, *with intent* to prefer such creditors over other creditors, and in such case a petition in involuntary insolvency may be filed against him. Section 3 *b*. It is hence deduced, reading those provisions with § 60 *a*, that preferences under the latter must be \*taken with the intent declared in the former, because it is not reasonable to assume that Congress intended that there could be preferences which were not acts of bankruptcy. The claim overlooks the fact that the language of § 3 (2) implies a difference between a preference and the intent with which it is given, and, besides, confounds the different purposes of the sections and their different conditions. It was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor by a surrender of his preference, as to make the former depend upon an intent to offend the provision of the statute, and the latter not so depend. And we see nothing unreasonable in the distinction or purpose. Nor does the contention of appellants find support in the provisions of the act of 1867, and the cases of *Mays v. Fritton*, 20 Wall. 414, 22 L. ed. 389, and *Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723. In that act there was a careful expression of

the intent of the debtor (§ 5021, Rev. Stat.), and as careful an expression of the state of mind of the preferred creditor. §§ 5084, 5128.

Nor, again, do we find anything which militates against our conclusion in subdivision *c* of § 60. That subdivision is applicable to the cases arising under *b*, and allows a set-off which otherwise might not be allowed.

The interpretation of the statute which we have given has also been given by the circuit court of appeals of the ninth circuit, in a well-considered opinion by Circuit Judge Morrow, *Re Fiwen*, 50 L. R. A. 605, 42 C. C. A. 354, 102 Fed. 295.

The second assignment of error is that the court erred in compelling the appellants to repay the amount of dividends received by them. Error is asserted because of the provision of subdivision *b* of § 23. The whole section is as follows:

“Jurisdiction of the United States and State Courts.—*a*. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy \*pro-[456]ceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

“*b*. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

“*c*. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.”

The proceedings we are reviewing were not a suit within the meaning of that section, and the order of the court requiring the repayment of the dividend was properly and legally made.

*Judgment affirmed.*

The CHIEF JUSTICE, Mr. Justice Shiras, Mr. Justice White, and Mr. Justice Peckham dissent.

UNITED STATES *ex rel.* THEODORE QUEEN and Others, *Petitioners*,  
*v.*

RICHARD H. ALVEY, Chief Justice, Martin F. Morris, Associate Justice, and Seth Shepard, Associate Justice, of the Court of Appeals of the District of Columbia, *Respts.*

(See S. C. Reporter's ed. 456-461.)

*Appeal—time for docketing.*

An appeal which is not to operate as a supersedeas, as well as one which is to so operate,  
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is within the provisions of the rule of the court of appeals of the District of Columbia limiting the time for filing a transcript in case of an appeal which shall operate as a supersedeas, and thereafter providing that "in any and all cases" after the time limited for filing the transcript the appeal may be docketed and dismissed for default of such filing.

[No. 17, Original.]

*Argued February 25, 1901. Decided May, 27, 1901.*

**P**ETITION for writ of mandamus to compel the reinstatement of an appeal that has been dismissed. *Rule discharged.*

Statement by Mr. Justice **McKenna**:

Upon filing the petition for a mandamus a rule was issued and served. The respondents have replied thereto. The question presented is the interpretation of a rule of the court of appeals of the District of Columbia hereinafter set out.

The case of petitioners as presented by their petition is substantially as follows: Marcella Jarboe, a widow, died without issue in the District of Columbia, on the 28th [457] day of March, 1899, \*aged eighty-eight years. The petitioners were her heirs at law. After her death a paper writing purporting to be her will, dated February 24, 1892, and two other paper writings purporting to be codicils, dated respectively October 20, 1892, and February 15, 1898, were offered for probate by William Myer Lewin, executor, in the supreme court of the District of Columbia, holding a special term for orphans' court business, as her last will and testament.

The relators filed caveats to the probate of the will, traversing the due execution of the papers as a will, and alleging incapacity, undue influence, and fraud. Upon the issue thus formed testimony was taken, and at its close the court instructed the jury to render a verdict for the will and codicils. Exception was duly made, and subsequently, on May 10, 1900, a motion for new trial was made and overruled, and an order was passed admitting the will and codicils to probate and directing letters testamentary to issue. An appeal was allowed to the court of appeals of the District, and a bond fixed for costs, not to operate as a supersedeas. The bond was duly approved, and filed May 17, 1900.

On July 2, 1900, the trial justice extended the time for filing the transcript forty days from the expiration of the time then limited. The transcript, however, was not filed within the extended time, and Mr. Justice Cole again extended it to October 15, 1900.

The transcript was filed October 9, 1900, but not until after appellees had given notice of a motion to docket and dismiss under the rule. When the motion came on to be heard it was abandoned, and by leave of the court a motion to dismiss was substituted. It was granted October 19, 1900, and the appeal dismissed with costs. This petition

was then filed. The rule, the interpretation of which is involved, is as follows:

"All cases, the records or transcripts of which shall be received by the clerk of this court before the last twenty days of the term, shall be considered for trial in the course of that term; but such cases shall be placed on the docket in the order of time in which the records or transcripts shall be received; and if received within twenty days of the next succeeding term, either \*party [458] shall be entitled to a continuance; but when an appeal is entered in the court below which shall operate as a supersedeas of the judgment, order, or decree appealed from, or when there has been a special order or appeal bond for the stay or supersedeas of the judgment, decree, or order appealed from, in all such cases it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below (unless such time for special and sufficient cause be extended by the court below, or the judge thereof by whom the judgment, decree, or order may have been rendered, such time to be definite and fixed), to produce and file with the clerk of this court a transcript of the record of such cause; and if he shall fail to file the transcript within the time limited therefor the appellee shall be allowed to file a copy or transcript of the record with the clerk of this court, and the cause shall stand for trial in the like manner as if the transcript had been filed by the appellant in due time; or the said appellee may, on producing a certificate from the clerk of the court below, stating the cause, and that an appeal has been entered, and the date thereof, and that the judgment, decree, or order appealed from is stayed or superseded by bond or otherwise, have the said appeal docketed and dismissed; or, *in any and all cases*, the appellee may, after the time limited for filing the transcript in this court by the appellant, and his or her default in respect thereto, upon producing a certificate showing the entry of appeal and the date thereof, have said appeal docketed and dismissed; and in no case shall the appellant be entitled to docket a case and file the record after said appeal shall have been docketed and dismissed under this rule, unless by special order of the court, upon satisfactory reason shown."

The answer of the respondents alleged the promulgation of the rule in pursuance of the act of Congress creating the court, and that under the same act on the 29th of September, 1894, the court amended the rules in several respects and promulgated them as amended. The amendment consisted in the insertion of the words "in any and all cases" for the words "in any case," and numbered rule 15.

**Messrs. Walter D. Davidge and Walter D. Davidge, Jr.**, argued the cause and filed a brief for petitioners:

Like any other default, the transcript may be filed at any time after the expiration of the time limited by the rule, but during the life of the writ of error or appeal, provided

the appellee or defendant in error has not availed himself of his right to docket and dismiss.

*Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493; *Green v. Elbert*, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188; see also *Bingham v. Morris*, 7 Cranch, 99, 3 L. ed. 281; *Owings v. Tiernan*, 10 Pet. 24, 9 L. ed. 333.

However the motion to dismiss may be regarded, there was no attempt to comply with the requirements of rule 15 by filing the clerk's certificate, without which an appeal will not be docketed and dismissed.

*West v. Brashear*, 12 Pet. 101, 9 L. ed. 1016.

**Mr. A. S. Worthington** argued the cause, and, with **Mr. Charles L. Frailey**, filed a brief for respondents:

The forty-day limit applies to cases where the appeal does not operate as a supersedeas.

*Mackall v. Willoughby*, 8 App. D. C. 143.

Unless the transcript of the record be filed before expiration of the term next after the taking of the appeal or writ of error, the court is without jurisdiction to entertain the cause.

*Hill v. Chicago & E. R. Co.* 129 U. S. 170, 32 L. ed. 651, 9 Sup. Ct. Rep. 269; *Small v. Northern P. R. Co.* 134 U. S. 514, 33 L. ed. 1006, 10 Sup. Ct. Rep. 614.

[459] \***Mr. Justice McKenna**, after stating the case as above, delivered the opinion of the court:

By the act of Congress of February 9, 1893, which established a court of appeals for the District of Columbia, it was provided—

"That any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, may appeal therefrom to the court of appeals hereby created; and upon such appeal the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just." [27 Stat. at L. 434, chap. 74.]

And it was also provided—

"That said court of appeals shall establish by rule of court such terms in the court in each year as to it may seem necessary: *Provided*, however, that there shall be at least three terms in each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court. And said court of appeals shall have power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal and the form of bills of exception, and to require that the original papers shall be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals, whether in the court below or in said court of appeals." [28 Stat. at L. 160, chap. 172.]

Under this provision the rule set out in the return of the respondents was established and amended. The question now is as to the interpretation of the rule. It will be

observed that the rule states that "when an appeal is entered in the court below which shall operate as a supersedeas of the judgment, order, or decree appealed from, or when there has been a special order or appeal bond for the stay or supersedeas of the judgment,\*decree, or order appealed from, in[460] all such cases it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below (unless such time for special and sufficient cause be extended by the court below, or the judge thereof by whom the judgment, decree, or order may have been rendered, such time to be definite and fixed), to produce and file with the clerk of this court a transcript of the record of such cause."

The contention of the parties turns on this provision. Is it to be interpreted independently or in connection with and as receiving meaning from the subsequent provision commencing with the words "in any and all cases?" Or, in other words, is the rule to be applied differently when the appeal operates as a supersedeas from what it does when the appeal does not so operate? The appeal of relators did not so operate, and the relators contend that their cause "was not of the class of cases to which the rule relates," and therefore no rule or authority imposed on them the duty of filing the transcript within the forty days, but that their case falls under that part of the rule which provides for filing the record in cases where there was no supersedeas or stay. "It does not enlarge in any manner," counsel say, "the cases specified in the former part of the rule, and to which the duty of filing within forty days is confined." The court of appeals held otherwise, and declares in its reply, which is very circumstantial, that the rule, even as originally framed, was intended to have a different meaning from that which relators put upon it, but upon doubts arising it was amended to remove the doubts, and "in all cases, whether there had been a supersedeas or not, to fix a period of time within which the transcript should be filed in the court of appeals (subject to the authority given by the rule itself, to the court below or a judge thereof, to extend the time). Otherwise there would have been no provision at all for cases in which there should be no supersedeas."

The answer also states—

"The rule as so understood and construed by the respondents has been enforced in every case in which it has been brought to the attention of the respondents. So far as they know no case has arisen since September 29,[461] 1894, in which the transcript has not been filed within forty days from the time of the appeal entered and perfected in the court below, except where the time has been extended in accordance with the rule, by an order made by a judge of the court below before the expiration of the time limited by the rule or by a previous order. In the case of the *District of Columbia v. Humphries*, 11 App. D. C. 68, the appeal was dismissed solely because the transcript was not filed in the court of appeals within the forty



days prescribed by the rule in question, and without reference to whether the appeal operated as a supersedeas. The opinion of the court of appeals in that case was published among the regular reports of that court in 1898.<sup>55</sup>

Under these circumstances we are of the opinion that the rule must receive the interpretation which was given it by the court of appeals.

*Rule discharged.*

HENRY CLEWS, Charles M. Foster, and  
James B. Clews, *Petitioners*,  
v.

MALCOLM M. JAMIESON, Roland C. Nick-  
erson, Harry F. Billings, *et al.*

(See S. C. Reporter's ed. 461-498.)

*Equity—remedy at law—suit to enforce trust—stock exchange—substitution of purchaser—gaming contract—sale to fix damages.*

1. Equity may have jurisdiction of a suit to enforce a right in a trust fund, though the only relief sought is a recovery of money.
2. A remedy by bill of interpleader on the part of the holder of a trust fund against rival claimants thereof does not preclude a suit in equity by one of such claimants to establish his rights in the trust fund.
3. A suit in equity may be maintained by one who by a broker has sold stock on an exchange, against the governing committee of the exchange and a person who has bought the same amount of stock from another party, but who by the rules of the exchange is to be deemed a purchaser of the former stock, but has refused to take it, where the relief sought is a recovery of damages from him for his refusal to take the stock, and also the enforcement of rights in an alleged trust fund which has been deposited with the governing committee of the exchange by him and by the broker as margins on said stock.
4. Privity of contract exists between the undisclosed principal of a broker who sells stock on an exchange and one who buys an equal amount of stock from another party, but who is made a substituted purchaser of the stock sold by said broker by virtue of the rules of the exchange.
5. A contract of sale by a broker is not lacking in mutuality when ratified by the principal, merely because the broker exceeded his authority in making the sale on the terms agreed.
6. Failure of a principal to repudiate a sale of stock made by his broker on a stock exchange,

immediately after it is reported to him, operates as a ratification and precludes him from subsequently contending that the terms of the sale were unauthorized.

7. The existence of contracts by a broker for different principals for the sale of stock on an exchange by the rules of which a purchaser of the same amount of stock from a different party may be made a substituted purchaser from such broker does not prevent a privity of contract between such substituted purchaser and the principal of the broker.
8. A presumption of an intent to make a gaming contract under the guise of a sale of stock for future delivery does not arise from the mere fact that the seller did not at the time own the stock.
9. A direction to a broker to sell certain stock "for the account" presumes the intention to deliver the stock, where the sale is made for future delivery on the last day of the month, though the seller does not at the time own any stock, but the rules of the exchange on which the sale is made, as well as the law of the state, make any fictitious sale illegal.
10. A tender of stock by a broker on behalf of his principal, for whom he has made a sale, is not invalidated by the fact that the principal did not at the time have any legal title to the stock.
11. A sale of stock bought on an exchange, to the highest bidder, is a fair basis upon which to determine the amount of damages sustained by a purchaser's refusal to take the stock, when at the time of the sale the exchange has been closed by order of its governing committee, and the sale is made to the highest bidder after proper notice to the purchaser, with opportunity for full and open competition.

[No. 245.]

*Argued April 17, 18, 1901. Decided May 27, 1901.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirming a judgment dismissing a bill in equity. *Reversed.*

See same case below, 38 C. C. A. 473, 96 Fed. 648.

Statement by Mr. Justice Peckham:

\*The petitioners and complainants, being [462] residents of the state and city of New York, commenced this suit in equity in the United States circuit court for the northern district of Illinois against certain of the defendants composing the governing committee of the Chicago Stock Exchange, to recover funds deposited with them in trust, and also to recover damages against other defendants com-

NOTE.—On the jurisdiction of equity where remedy at law exists—see notes to *Meldrum v. Meldrum* (Colo.) 11 L. R. A. 65; *Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co.* (N. J.) 6 L. R. A. 855; *Tyler v. Savage*, 36 L. ed. U. S. 83.

As to the right of a third party to sue upon contract made for his benefit—see *Jefferson v. Asch* (Minn.) 25 L. R. A. 257, and note.

On mutuality in contracts—see note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.

On ratification by principal of acts of agent—see *Wheeler v. McGulre* (Ala.) 2 L. R. A. 182 U. S.

808, and note; *Carruth-Byrnes Hardware Co. v. Deere, M. & Co.* (Ark.) 7 L. R. A. 405, and note; *Dempsey v. Chambers* (Mass.) 13 L. R. A. 219, and note. And see notes to *Parsons v. Armor*, 7 L. ed. U. S. 726; *Owings v. Hull*, 9 L. ed. U. S. 246.

On the validity of a sale of goods to be delivered in the future—see note to *Kimball v. Gafford* (Iowa) 4 L. R. A. 398.

On wagers and wagering contracts—see notes to *Harvey v. Merrill* (Mass.) 5 L. R. A. 200; *Bumgardner v. Leavitt* (W. Va.) 12 L. R. A. 777; *Irwin v. Williar*, 28 L. ed. U. S. 225.

posing the firm of Jamieson & Company, brokers belonging to the exchange, alleged to have been sustained by the complainants by a violation by those defendants of their contract to purchase and pay for certain stock sold them by the complainants. Still other defendants composed the firm of Schwartz & Company, the brokers who effected the sales of the stock for the complainants, no recovery being sought against them. All of the defendants were residents of the state of Illinois. The circuit court after a hearing gave judgment for a dismissal of the bill for want of any privity of contract between complainants and defendants, Jamieson & Company, \*against whom a money recovery was sought. On appeal the circuit court of appeals for the seventh circuit affirmed the judgment of dismissal, and in the opinion discussed only the question whether or not the contract sued on was a gaming one and in violation of the statute of Illinois on that subject, §§ 130 and 131 of the Criminal Code hereinafter set forth. It held that the contract violated those sections, and that the bill was properly dismissed for want of equity, and it therefore affirmed the decree of dismissal. The complainants thereupon petitioned this court for a writ of certiorari, which was granted, and the case brought here.

No important question arises upon the pleadings, with the exception that it was set up by way of defense that the complainants had an adequate remedy at law, and the facts upon which the defense is rested are sufficiently adverted to in the opinion. The pleadings admit the sales and purchases of stock which were all made subject to the rules of the exchange. The case was referred to a master to take testimony and to report the same to the court with his conclusions thereon, and it was subsequently brought to a hearing upon the master's report and the testimony taken before him and upon a stipulation as to facts, entered into between the parties. The facts reported by the master are, among others, the following:

There has existed in the city of Chicago since the year 1882 a voluntary association known as the Chicago Stock Exchange, composed of brokers having places of business in the vicinity of the exchange, and who are elected to membership therein in accordance with the provisions of the constitution and by-laws; the association is governed by a governing committee composed of the president of the exchange *ex officio*, and twenty-four members, and every member is required to sign the constitution and by-laws, or assent thereto in writing, and obligate himself to abide thereby and by the rules theretofore or thereafter to be adopted.

Article 17 of the constitution provides as follows:

"Sec. 1. No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee.

[464] "Sec. 2. Any member who shall make fictitious or trifling bids or offers, or who shall offer to buy or sell any stock or security other

than government bonds at a less variation than  $\frac{1}{2}$  of 1 per cent shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article 29 is as follows:

"Any member of this exchange who is interested in or associated with, or whose office is connected directly or indirectly by wire or other method of contrivance with, any organization, firm, or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a bona fide purchase or sale of said commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange."

Articles 16 and 17 of the by-laws read as follows:

#### "Article XVI.

"Sec. 1. In any contract either party may call at any time during the continuance of the same for a deposit of \$10 per share upon the par value of the securities bought and sold; and whenever the market price of the securities shall change so as to reduce the margin of said deposit, either way below the \$10, either party may call for a deposit sufficient to restore the margin to \$10, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called they shall be made within one banking hour from the time of such call.

"Sec. 2. In case either party shall fail to comply with the demand for a deposit in accordance with the provisions of this article, the party calling, after having given due notice, may report the default to an officer of the exchange, who shall repurchase or resell the security forthwith in the exchange, and any difference that may accrue shall be paid over to the party entitled thereto. The notice above referred to shall be either personal or shall be left in writing at the office of the party to \*be notified, or in case he has no of-[465] fice, then by public announcement whenever the exchange may be in session.

#### "Article XVII.

"Should any member neglect to fulfil his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by § 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order, shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the



signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfilment of such contract is delayed, hindered, or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two thirds of the members present at [466] the meeting. \*When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall not be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time, and places that govern defaults in other contracts shall apply to borrowed securities, which, on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

The rules of the clearing house in regard to buying or selling for "the account" (under which these transactions were had) read as follows:

**"Clearing House Rules.**

"Sec. 1. Under the following regulations transactions may be made for 'the account' in any securities listed for that purpose dealt in at the exchange.

"Sec. 2. Deliveries of cash, stock, or transactions for 'the account' shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday, or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first business day preceding.

"Sec. 3. All purchases and sales 'for the account' shall be entered upon the blanks furnished by the manager sealed for that purpose, and said blanks properly filled out, balanced, accompanied by a proof-sheet, and signed, must be delivered to said manager before 9:45 A. M. It shall be the duty of the manager to compare and examine the state-

ments rendered, and to report, should any errors be found, to the parties making such errors before 12 M., by written notice, which must be called for at the manager's office. Parties in error must at once proceed to adjust the same and correct their statements. All balances \*due from members as shown by [467] the statements shall be paid by certified check drawn to the order of the bank designated for that purpose, and delivered to the manager before 10:15 A. M., the same day, except on Saturdays, when the balance must be paid before 9:45 A. M.

"Sec. 4. On balances due to members, as shown by the statements, a draft for the amount, payable to their own order, shall be drawn upon the bank designated for that purpose, and delivered to the manager before 10:20 A. M. (except on Saturday). The manager shall cause said draft, if correct, to be accepted by said bank and returned to the parties entitled thereto at the manager's office.

"Sec. 5. At or before 9:45 A. M. parties who have not borrowed or loaned their stock balances for 'the account' shall extend said balances on their statements at the closing bid price, designated as short or long, and shall request the manager, in writing, to borrow or loan said stock balances for their account and risk at the closing bid price. Notice that such loans have been made and the names of the parties thereto will be delivered at the manager's office on or before 2 P. M. Loans made by the manager are for one day only, unless renewed between members.

"Sec. 6. Stock balances as shown by the statements rendered for cash settling days must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 P. M. Provided however, if satisfactory evidence is shown the clearing-house committee that the cash stock is on hand in New York or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing-house committee shall cause to be purchased for account of delinquent said stock in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom, but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other.

"Sec. 7. Whenever a member fails to pay the balance due on his statement by 10:15 A. M. (except on Saturday), the manager \*shall notify the presiding officer of the ex-[468] change, whose duty it shall be to forthwith cause the stock balance, as shown by the statement of the delinquent, to be bought in or sold out under the rules, as the case may be, and assess the party in interest on the statement *pro rata*. In case any member owes an additional amount caused by errors, disputes, or assessments, said amount shall be paid within one hour from the time of notification of the same, otherwise the party

will be considered as having failed, and be treated accordingly.

"Sec. 8. Whenever a member is unable to meet his contracts or transactions made for 'the account,' he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange.

"Sec. 9. The manager or any assistants employed by him in the manager's office are positively prohibited from receiving any securities or currency or any other evidences of value, except the checks and drafts hereinbefore mentioned in these rules.

"Sec. 10. The same rules as to notice, time, and place that govern defaults in other contracts shall apply to transactions for 'the account.'

"Sec. 11. Neither the exchange nor any of its members (except those making the errors), the manager or any assistants employed by him, shall be responsible for any errors made in the statements to the manager, but the errors must be settled and adjusted at once between the members making said errors when notified by the manager to do so. The manager shall report any neglect or refusal to comply with these rules to the presiding officer of the exchange.

"Sec. 12. The margin to be deposited on stocks trading in clearing house, selling at \$100 or over per share, shall be \$10 per share, and on all stocks selling under \$100 per share the margin shall be \$5 per share.

"Sec. 13. Margins deposited on trades in the clearing house shall be considered as a margin or as a part of same under § 1 of article 16 of the by-laws of the stock exchange. All such margins to be deposited in the clearing house.

[469] "Sec. 14. The clearing of trades and money is not completed \*until the trades and substitutions are all made and notice posted to that effect by the manager of the clearing house.

"Sec. 15. The brokers have the party they may trade with or party received from the clearing house on the substitution of the day before, in case of any failures between the hours the sheets are put in the clearing house, 9:45 A. M., and the time the notice is posted that the substitutions are ready for that day.

"Sec. 16. In the event of the announcement of the failure of any member to meet his contract, all stock bought in on or sold out for him as 'account' stock shall be settled outside of the clearing house, and only such stocks as appear on the substitution sheet of the day of the failure shall be allowed to clear on the clearing-house sheet of the following morning.

"Sec. 17. When any member fails to execute any contracts required of him by the clearing house, the margin checks deposited by such member for the protection of other members contracting with him through the clearing house shall be held first for that special purpose, and after satisfying the claims of such members to the extent of the margin rule of the clearing house, the balance, if any, shall be held for a period not

exceeding ten days, as a trust fund for a *pro rata* distribution among other creditors, who are members of the Chicago Stock Exchange."

The master further reported the facts relating to the sales in dispute as follows:

"That such rules and by-laws being in force, complainants, on the 16th day of July, 1896, wired their brokers, Schwartz, Dupce, & Company, as follows:

"'Sell 500 Diamond Match at 220½ for account;' which was done; that later on the same day said brokers wired complainants as follows:

"'Sold 500 Diamond Match at 221½ for the account.'

"That on the 20th day of July, 1896, said brokers received telegram from complainants as follows:

"'Sell 200 Diamond Match at 221 for the account at opening of market.'

"That later on the same day said brokers wired complainants as follows:

"\*'Sold 200 Diamond Match 221½ for the[470] account.'

"That on the 25th day of July, 1896, complainants wired said brokers as follows:

"'Change the Diamond Match over to August account at 2½ per cent. If you cannot do it let us know at once.'

"That shortly after on the same day complainants wired said brokers as follows:

"'You sent us the difference this morning at 2½; at what difference can you do it now?'

"That later on the same day complainants wired said brokers as follows:

"'Change the 500 at 2 cents or better.'

"That afterwards, and about 12 o'clock on the same day, said brokers wired complainants as follows:

"'Bought Diamond Match 227 for the account; sold 500, 229 account 2d.'

"That on July 27th complainants wired said brokers as follows:

"'Change 200 more Diamond Match 2 per cent or better.'

"Later on the same day said brokers wired complainants as follows:

"'We changed the 200 Match at 2½ difference. Will give you price later.'

"And shortly afterwards on the same day said brokers wired complainants as follows:

"'Bought 200 Match 226½, account; sold 200 second account 229.'

"That these purchases on July account balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account; that on the 3d day of August the clearing department of said stock exchange sent to Schwartz, Dupce, & Company, and Jamieson & Company, clearing-house sheets as follows:"

(Here follow copies of the sheets; that of Schwartz & Company showed that all trades on their sheet had been settled, with the exceptions therein stated, among which were 1,150 shares of Diamond Match Company's stock at \$222, for which \*Jamieson & Com-[471]pany had been substituted as buyers: the no-



tice to Jamieson & Company from the clearing department contained a like statement, showing that Jamieson & Company had bought 1,150 shares of Diamond Match stock at \$222, Schwartz & Company being substituted as sellers.)

The 1,150 shares of Diamond Match stock at \$222 were made up in part of 700 shares sold by Schwartz & Company upon August account for the complainants, and the substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold was made by the clearing department of said stock exchange according to its uniform custom.

The master also found that Jamieson & Company had settled with Schwartz & Company for 450 shares of the 1,150 shares referred to between those parties on the clearing-house sheet of August 3, 1896, but that such settlement did not include the 700 shares in question in this case.

The master further found as to the manner of making sales "for the account:"

"That the method of doing business on said exchange is as follows: At 10 o'clock there is an official call at which the secretary and manager call all the stocks, bonds, and securities on the official printed list, and as this call progresses, any member wishing to buy or sell bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at 1:30, when the manager of the clearing house announces the clearing house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed

[472] that where a broker has \*purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying, and the other selling, the same kind of stocks or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of someone else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same

stock from Y, and X and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold 100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing-house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins required by the rules, unless margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account.

"IV. That being advised of the substitution on account, as aforesaid, said Schwartz, Dupee, & Company, and said Jamieson & Company on said 3d day of August, 1896, exchanged trading cards with each other, on which appears the following:

"Chicago, Aug. 3, 1896.

"M. Jamieson & Co.:

"We hereby confirm sales made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Am't.	Kind of property.	Price. [473]
1,150	Substitution trades—Sold.	
	Match	222
	Difference { Collect	
	Pay	287 50
(Signed)	Schwartz, B. & Co."	

"Chicago, Aug. 3, 1896.

"M. Schwartz:

"We hereby confirm purchases made by us for the account to-day, under the rules of the Chicago Stock Exchange, also substitution trades.

Am't.	Kind of property.	Price.
1,150	Substitution trades—Bought.	
	D. Match	222
	Difference { Collect	
	Pay	287 50
(Signed)	Jamieson & Co."	

"That these cards were handed by the parties receiving them to the clearing-house department, so that it appeared at the close of business on said 3d day of August, by the clearing sheet, that Schwartz, Dupee, & Company had sold to Jamieson & Company on account, for August, 1,150 shares of the stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case, delivery of which under rule 2 of the clearing house was to be made on the last day of August, 1896; that Schwartz, Dupee, & Company and Jamieson & Company each deposited with the said clearing house \$7,000 as margins on said 700 shares of stock, which amount is still held by the said stock exchange in trust.

"V. That on the 3d day of August, 1896, the governing committee, of which defendant Jamieson was then *ex officio* president, by virtue of his being then president of said exchange, held a meeting at which the following resolution was adopted, the said de-

pendant Jamieson voting in favor of its adoption:

"*Resolved*, That the exchange adjourn on Tuesday morning, the 4th instant, and remain closed pending further action by this committee."

[474] "That pursuant to said action, said exchange did not open \*on said August 4, or thereafter, until the 5th day of November, 1896.

"VI. That on the 31st day of August, 1896, Schwartz, Dupee, & Company tendered to Jamieson & Company 10 certificates of the stock of the Diamond Match Company for 100 shares each, and three like certificates for 50 shares each, making 1,150 shares of said stock, which said Jamieson & Company examined and refused to receive."

On September 9, 1896, Schwartz & Company wrote the following letter to Jamieson & Company:

"Chicago, September 9, 1896.

"Messrs. Jamieson & Co., No 187 Dear-born street, Chicago, Illinois.

"Dear Sirs: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27th, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of said stock.

"This is to notify you that said sales were made by us as agent for Henry Clews & Co. of New York, who may rightfully take any proceedings to enforce the contracts for said sales and who are authorized to make settlement therefor.

"Very truly yours,

"Schwartz, Dupee, & Co."

(This tender of the 700 shares was part of the total tender made to Jamieson & Company on the 1,150 shares sold them.)

The complainants on the next day (the 10th of September) gave Jamieson & Company notice in writing of their intention to sell 700 shares of Diamond Match Company stock, at public sale, to the highest bidder, and named the place and time, and that they would hold Jamieson & Company responsible for any loss on the sale on account of the contracts.

It was further admitted "that Schwartz, Dupee, & Company have no claim whatever of any kind or character against the \$14,000, \$7,000 of which was respectively contributed [475] by Schwartz, Dupee, & Company and \*Jamieson & Company to the clearing house of the Chicago Stock Exchange." And it was testified that the \$7,000 deposited by Schwartz & Company were for the account of complainants, in whom is the real interest in such fund.

The stipulation as to facts signed by the parties for the purpose of the trial contained long and detailed statements of the actions of Jamieson & Company and Schwartz & Company in relation to all purchases and sales by them of Diamond Match

Company's stock, for both July and August accounts, whether between themselves directly or not, and the stipulation ended with this statement:

"That the transactions heretofore set out in this stipulation of purchase and sale of Schwartz, Dupee, & Company, Jamieson & Company, and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller.

"In other words, the settlements by substitutions or otherwise through the clearing house were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves except where the same broker had both purchased and sold for the same client."

It was also admitted that when complainants gave their orders to sell and at the time that they were executed by Schwartz & Company the latter did not have in their hands any stock of the Diamond Match Company belonging to the complainants, nor did Schwartz & Company at any time thereafter have in their hands any of the stock of that company, which was the property of the complainants; that the 1,150 shares of capital stock of the Diamond Match Company tendered to Jamieson & Company by Schwartz & Company in behalf of complainants, \*on August 31, 1896, were not the prop-[476] erty of the complainants, nor any part thereof; that the 700 shares of stock alleged to have been sold in the bill of complaint, on September 22, 1896, were not delivered to the alleged purchaser after the sale, but were delivered to J. W. Conley, a member of the firm of Schwartz & Company by the individual who conducted the sale on behalf of the complainants, for safekeeping by Conley. The stock tendered belonged to Schwartz & Company, who tendered it on behalf and for the benefit of complainants.

The various facts set forth in the stipulation form a somewhat complicated mass of detail and, when taken in connection with the oral evidence and the findings of the master, it is not clear that they are all perfectly consistent.

Upon the hearing before the master, Mr. Joseph R. Wilkins, the secretary and chairman of the Chicago Stock Exchange and manager of the clearing house, was called as a witness in behalf of the complainants. After giving a statement of the manner in which business was done on the exchange in relation to sales for "the account," he testified that the expressions in the telegrams from the complainants to the brokers, in which the word "difference" occurred, did



not mean the difference between the then market price of the stock and the contract price, but meant the charges made for carrying the stock for the customer until the next delivery day. The price for this service differs from day to day, and is matter of agreement for each transaction; it is in effect the interest charged by the individual who carries the stock, on the amount necessary to carry it until the next delivery day. The rate of interest differs, of course, according to the demand, and is matter of agreement between the parties. The charge bears no relation whatever to the difference between the market price and the contract price of the stock. He also testified that a sale for "the account" on any day up to the 25th of the month means a sale of the stock which has to be delivered and paid for and taken at the end of the month. In other words, an actual delivery of the stock is contemplated by such a contract, and if a change from that delivery day to the next delivery day, thirty days thereafter, is asked for, it will depend upon the agreement of the parties upon what \*terms it shall be made. He also said that a sale for "the account" under the rules of the exchange assumed that there might be changes or substitutions of names during the period between the sale and the delivery day, and this happened by reason of the clearing-house custom, under which all the sheets showing the transactions of the brokers in the sales and purchases in a given stock during the day were examined in the clearing house and the sheets balanced, so that at the end it appears there are a certain number of shares sold and the same number bought, and if the sheets do not balance the work stops and does not go on until a balance is made. After the balance is arrived at the substitution of names takes place, and the tickets or cards are sent to the brokers who are "long" and "short" of the stock respectively, and they then send to each other cards confirming the sale each day, and the cash deposit with the committee is added to by the one side and taken from by the other, according to the fluctuation of the stock, so that the full amount of deposit is kept at all times with the committee until the transaction is closed.

In regard to the fluctuations of price from day to day and the manner in which a party selling or buying at a certain price finally obtains or pays it on delivery day, although the original purchaser may have substituted another name at a different price, the witness explained that such original price was realized by means of the margin in the hands of the committee, which was added to daily by the party against whom the price of the stock turned, and drawn from by the party in whose favor it turned, so that, taking such payments and adding the price the stock actually sold for on the delivery day, the party selling or purchasing obtains his original selling or purchase price, which results in a loss or a gain, as the price of the stock on delivery day is higher or lower than the original contract price.

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Mr. Henry D. Estabrook argued the cause, and, with Messrs. Frank O. Lowden and Herbert J. Davis, filed a brief for petitioners:

Schwartz, Dupee, & Company were fully authorized by Clews & Company to enter into the contract of August 3d in their behalf, and Clews & Company were bound thereby.

*Masted v. Paine*, L. R. 6 Exch. 132; *Hodgkinson v. Kelly*, L. R. 6 Eq. 496; *Higgins v. McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Sheppard v. Murphy*, 16 Week. Rep. 948; *Hawkins v. Malby*, L. R. 4 Eq. 572, Affirmed in L. R. 3 Ch. 188; *Irwin v. Williar*, 110 U. S. 511, 28 L. ed. 230, 4 Sup. Ct. Rep. 160; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Dos Passos*, Stock Brokers, chap. 5, subd. 7.

But even if unauthorized to enter into the contract of August 3d, Schwartz, Dupee, & Company in making it affected to act as agents of petitioners, and the latter have ratified the contract and adopted it as their own.

*Hagedorn v. Oliverson*, 2 Maule & S. 485; *Cook v. Tullis*, 18 Wall. 338, 21 L. ed. 936; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 279; Wharton, Contr. § 2; Wharton, Agency, § 81; 19 Cent. L. J. 482; Mechem, Agency, § 179, criticised in 25 Am. L. Reg. 74; 9 Harvard Law Review, p. 64.

And even if it should be held that the contract of July 25th, at \$299 per share, had been lost or dissipated, and in lieu thereof petitioners' agents had attempted to substitute the contract of August 3d, at \$222 per share, petitioners are entitled in equity to avail themselves of such contract.

*Cook v. Tullis*, 18 Wall. 338, 21 L. ed. 936; 2 Pom. Eq. Jur. § 1051; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

Furthermore, and in any event, all parties in interest being before the court, there should have been an end to the litigation by ordering, if need be, the filing of a cross bill.

*Sims v. Burk*, 109 Ind. 214, 9 N. E. 902; *Chamley v. Dunsany*, 2 Sch. & Lef. 690.

The remedy provided by the rules of the stock exchange for breach of contract does not oust the courts of jurisdiction, for the following reasons:

1. The rules do not declare such remedy to be exclusive.

By-laws of Stock Exchange, arts. 7, 17.

2. Such a provision in a contract would be against public policy and voidable.

*Gourlay v. Somerset*, 19 Ves. Jr. 429; *Waugh v. Schlenk*, 23 Ill. App. 433; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 338, 18 N. E. 804; *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Scott v. Avery*, L. R. 5 H. L. Cas. 811; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Kinney v. Baltimore & O. Employe's Relief Asso.* 35 W. Va. 385, 15 L. R. A. 142, 14 S. E. 8; *Dos Passos*, Stock Brokers, pp. 78-83.

3. Particularly in view of the indefinite closing of the stock exchange.

*Morse*, Arbitration & Award, pp. 229, 234, 236, and authorities cited.

The price bid for 700 shares of Diamond Match stock at the public sale conducted at the instance of petitioners raised a prima facie presumption of value, which, in the absence of controverting evidence, becomes conclusive. Particularly is this true when the method of establishing value urged by respondents as the exclusive method would have resulted in greater loss to the respondents.

*Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Fisher v. Newark City Ice Co.* 10 C. C. A. 546, 17 U. S. App. 514, 62 Fed. 569, Affirmed in 22 C. C. A. 261, 39 U. S. App. 335, 76 Fed. 427; 2 Benjamin, Sales, chap. 5, § 794; *Rhea v. Riner*, 21 Ill. 526; *Seckel v. Scott*, 66 Ill. 106; *Barrow v. Window*, 71 Ill. 214; *Owens v. Weedman*, 82 Ill. 409; *Bagley v. Findlay*, 82 Ill. 524; *Ullmann v. Kent*, 60 Ill. 271; *Saladin v. Mitchell*, 45 Ill. 84; *Hayes v. Nashville*, 26 C. C. A. 59, 47 U. S. App. 713, 80 Fed. 641; *Morris v. Wibaux*, 159 Ill. 646, 43 N. E. 837; *Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co.* 81 Fed. 449; *Mulvey v. Gibbons*, 87 Ill. 367; *Gibbons v. Hoag*, 95 Ill. 45; *Jenkins v. Pierce*, 98 Ill. 646; *Cunningham v. Macon & B. R. Co.* 156 U. S. 400, 39 L. ed. 471, 15 Sup. Ct. Rep. 361; *Collins v. Riggs*, 14 Wall. 491, 20 L. ed. 723; *Strauss v. Labsap*, 59 Mo. App. 260; *Weld v. Rees*, 48 Ill. 428; *Jacobs v. Turpin*, 83 Ill. 424; *Wade v. Mofett*, 21 Ill. 110, 74 Am. Dec. 79.

This suit was properly brought and petitioners can have adequate relief only in a court of equity, and for the following reasons:

1. Because the fund in the possession of the managers of the stock exchange is a trust fund which equity is asked to administer.

Story, Bailm. chap. 1, § 2; *Edwards, Bailm.*; 2 Bl. Com. 452; *Jones, Bailm.* 117; *Rapalje*, Law Dict. tit. *Deposit*; *Manhattan Bank v. Walker*, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; *Goodenow v. Snyder*, 3 G. Greene, 599; *Coster v. Murray*, 5 Johns. Ch. 532; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *McOrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Gutch v. Fosdick*, 48 N. J. Eq. 353, 22 Atl. 590; *Levi v. Evans*, 6 C. C. A. 500, 18 U. S. App. 293, 57 Fed. 677; *McCampbell v. Brown*, 48 Fed. 795; *National Park Bank v. Hall*, 30 Ill. App. 17; *Warner v. Martin*, 11 How. 209, 13 L. ed. 667; *Pom. Eq. Jur.* § 158; *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177, 19 Am. Rep. 329.

2. Because it is doubtful if an action at law would lie in the name of the petitioners against the stock exchange.

*Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Dillon v. Connecticut Mut. L. Ins. Co.* 44 Md. 386.

3. Because, if the petitioners could sue the stock exchange at law, the remedy would not be as complete or as effectual as the relief in equity.

*Boyce v. Grundy*, 3 Pet. 215, 7 L. ed. 657; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43; *McConihay v. Wright*, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940.

4. Because the contract of Jamieson &

Company was a single contract for the purchase from Schwartz, Dupee, & Company of 1,150 shares, in which the petitioners were interested only to the extent of 700 shares.

*Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801; *Chapman v. Shattuck*, 8 Ill. 49.

The circuit court of appeals erred in declaring the transactions to be gambling transactions.

*Kirkpatrick v. Bonsall*, 72 Pa. 158; *Smith v. Bouvier*, 70 Pa. 332; *Porter v. Viets*, 1 Biss. 177, Fed. Cas. No. 11,291; *Hentz v. Jewell*, 20 Fed. 593; *Clarke v. Foss*, 7 Biss. 540, Fed. Cas. No. 2,852; *Ward v. Vosburgh*, 31 Fed. 12; *Sawyer v. Taggart*, 14 Bush, 727; *Gregory v. Wendell*, 40 Mich. 432; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Rountree v. Smith*, 108 U. S. 269, 27 L. ed. 722, 2 Sup. Ct. Rep. 630; *Warren v. Scanlan*, 59 Ill. App. 138, 68 Ill. App. 213, 169 Ill. 142, 48 N. E. 410; *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762; *Soby v. People*, 134 Ill. 71, 25 N. E. 109; *Edwards v. Hoeffinghoff*, 38 Fed. 640; *Bangs v. Hornick*, 30 Fed. 97; *Union Nat. Bank v. Carr*, 15 Fed. 438; *Hansen v. Boyd*, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; *Lehman v. Feld*, 37 Fed. 852; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

The intention of the parties in transactions of this kind is a question of fact to be pleaded as a fact, and so found by a jury, or a master, or the trial court.

*Barlett v. Smith*, 13 Fed. 263; *Elliott*, 22 Central Law J. p. 271.

*Mr. John H. Hamline* argued the cause, and, with *Messrs. Frank H. Scott* and *Frank E. Lord*, filed a brief for respondents Foreman and Henrotin *et al.*, composing the governing committee of the Chicago Stock Exchange:

The construction given by the Illinois courts to this statute must be adopted in considering this Illinois contract.

*Melchert v. American U. Teleg. Co.* 11 Fed. 195; *Ward v. Vosburgh*, 31 Fed. 15.

If the contract violates the statute the stock exchange is a gambling house *per se*, and all of its brokers are gamblers.

*Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160.

But the order to Schwartz, Dupee & Company at Chicago by their correspondents Clews & Company in New York, directing them to sell in the Chicago market "for the account," commanded them to make the sale in a certain way. The only way known was to make the sale in the way sales "for the account" were made at that market, which had to be made according to the rules and usages of the Chicago Stock Exchange governing trading "for the account."

*Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Samuels v. Oliver*, 130 Ill. 79, 22 N. E. 499.

In this case the rules and usages of the Chicago Stock Exchange are a part of the contract.

*Thorne v. Prentiss*, 83 Ill. 99.

The presumption as well as the proof is



that Jamieson & Company, members of said exchange, contracted with reference to such rules and usages.

*Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Perin v. Parker*, 126 Ill. 201, 2 L. R. A. 336, 18 N. E. 747.

The language employed by Clews & Company in their order being technical, the court must look into the usages and customs of the trade for its interpretation.

*Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349.

The sale was for future delivery. But time contracts or options, even as to time of delivery, do not violate the Illinois statutes.

*Wolcott v. Heath*, 78 Ill. 433; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243, 8 Sup. Ct. Rep. 221; *Pickering v. Cease*, 79 Ill. 330; *Cole v. Milmine*, 88 Ill. 349; *Pixley v. Boynton*, 79 Ill. 351.

The provisions of §§ 130 and 131 of the Criminal Code of Illinois apply solely to options to buy or sell with no intention to deliver, but with an intention that the transaction shall be settled on differences between contract and market prices.

*Pearce v. Foote*, 113 Ill. 228; *Union Nat. Bank v. Carr*, 15 Fed. 438; *Tenney v. Foote*, 95 Ill. 99, 4 Ill. App. 594.

Such contracts are undoubtedly prohibited by the Illinois statute.

*Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497; *Pope v. Hanke*, 155 Ill. 621, 28 L. R. A. 568, 40 N. E. 839.

But it must always appear that both parties had the intention that there should be no delivery, but merely a settlement of differences.

*Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762; *Soby v. People*, 134 Ill. 71, 25 N. E. 109; *Edwards v. Hoeffinghoff*, 38 Fed. 640; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160.

The burden is on the party claiming the contract to be illegal to show, not that one, but that both parties intended merely a settlement of differences, and no delivery.

*Pixley v. Boynton*, 79 Ill. 351; *Scanlan v. Warren*, 169 Ill. 142, 48 N. E. 410; *Rountree v. Smith*, 108 U. S. 268, 27 L. ed. 722, 4 Sup. Ct. Rep. 160; *Bibb v. Allen*, 149 U. S. 492, 37 L. ed. 824, 13 Sup. Ct. Rep. 950.

It is the duty of the court to uphold the contract unless it appears that it is an invalid one.

Brewer, J., in *Bangs v. Hornick*, 30 Fed. 97.

A contract for stock deliverable in the future is valid though the seller has not the stock, or any means of getting it save to buy it in the market.

*Porter v. Viets*, 1 Biss. 177, Fed. Cas. No. 11,291; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160.

The rules of the exchange forbid option trading, or fictitious contracts, or failures to deliver, and all connections with those engaged in trading in differences, under penalties of suspension or expulsion.

Art. 15, § 1; art. 17, § 1; and art. 29 of 182 U. S.

the Constitution; arts. 4, 17, of the by-laws; § 10 of the clearing house rules.

They show the parties must have contemplated actual delivery. The fact that margins are put up is of no significance.

*Union Nat. Bank v. Carr*, 15 Fed. 438; *Edwards v. Hoeffinghoff*, 38 Fed. 635; *Hansen v. Boyd*, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571.

Nor is the fact material that the party defaulting in the putting up of margins may be sold out under the rules.

*Bibb v. Allen*, 149 U. S. 501, 37 L. ed. 827, 13 Sup. Ct. Rep. 950; *Perin v. Parker*, 126 Ill. 201, 2 L. R. A. 336, 18 N. E. 747.

The substitution of purchasers through the clearing house is in principle no different from "ringing out" trades. This court and the Illinois courts have invariably held that such substitutions do not make the contract a gambling contract.

*Hansen v. Boyd*, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; *Clarke v. Foss*, 7 Biss. 540, Fed. Cas. No. 2,852; *Ward v. Vosburgh*, 31 Fed. 15; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Lehman v. Feld*, 37 Fed. 852.

Clews & Company having ordered the sale made in a particular way, and it having been made in that way, cannot, nor can the ultimate purchaser thereby ascertained, object that the selling principal did not intend this contract should be carried out in that way, or that there was no privity between them. The trading "for the account" has long prevailed on the English stock exchange.

Dos Passos, *Stock Brokers*, pp. 273 *et seq.*

The clearing house is but an extension of the ringing-up system, and is adopted from the London and New York Stock Exchanges. 6 Am. & Eng. Enc. Law, p. 166, 2d ed.

The London Stock Exchange clearing house explained.

Dos Passos, *Stock Brokers*, p. 278, footnote.

The genesis of the stock exchange clearing house and its establishment at Frankfort, Berlin, Hamburg, and London, stated in—8 Political Science Quarterly (June, 1893), p. 252.

The principle of substitution by clearances and the privity of contract resulting therefrom has always been recognized by the Illinois courts.

*Oldershaw v. Knoles*, 4 Ill. App. 63, 6 Ill. App. 325; *Curtis v. Wright*, 40 Ill. App. 491; *Pardridge v. Cutler*, 68 Ill. App. 569; *Riebe v. Hellman*, 69 Ill. App. 19.

And the fact that the ultimate purchaser may have it at a different price matters not, so long as the seller gets his price then or theretofore from his predecessor in the clearing house.

*Oldershaw v. Knoles*, 6 Ill. App. 325.

The "account" or clearing-house system is recognized in—

*Fowler v. New York Gold Exch. Bank*, 67 N. Y. 138; *National City Bank v. New York Gold Exch. Bank*, 101 N. Y. 595, 5 N. E. 463.

This system of trading in the account with substitution of buyers through rules of the

stock exchange has met with the approval of the highest court of England.

*Nickalls v. Merry*, L. R. 7 H. L. 530; cited with approval in *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Bibb v. Allen*, 149 U. S. 490, 37 L. ed. 823, 13 Sup. Ct. Rep. 950; *Masted v. Paine*, L. R. 6 Exch. 132. To the same effect see *Hodgkinson v. Kelly*, L. R. 6 Eq. 496.

On the London Stock Exchange the broker splits up his tickets of purchases or sales, and gives his principals split tickets for their amount of purchases or sales. This does not destroy the privity of contract.

*Sheppard v. Murphy*, 16 Week. Rep. 948; *Masted v. Paine*, L. R. 6 Exch. 132; *Anderson v. Beard* [1900] 2 Q. B. 260; *Grissell v. Bristowe*, L. R. 3 C. P. 112.

But it does give the holder of such ticket, who was ignorant of the usage of the exchange, an opportunity to say such was not his contract.

*Robinson v. Mollett*, L. R. 7 H. L. 802; *Beckhuson v. Hamblet* [1900] 2 Q. B. 19.

But this principle does not apply where both parties to the contract know the business and intend the very thing to be done that is done.

**Mr. Horace Kent Tenney** argued the cause, and, with *Messrs. Samuel P. McConnell, M. Lester Coffeen, Charles F. Harding, and James H. Wilkerson*, filed a brief for respondents Jamieson & Company:

Regarding the contract of August 3, 1896, for the sale by Schwartz, Dupee, & Company to Jamieson & Company of 1,150 shares of stock, as a complete and valid contract, it was not a contract to which Clews & Company were parties. They were parties to the original contracts of sale which were made on their orders, and it is admitted that so far as Clews & Company were concerned those contracts were not canceled or settled by the clearing-house transactions, which only adjusted the matters between the brokers. As the original contract made by Clews & Company remained in force, the so-called substituted contract did not take its place either in favor of or against Clews & Company. They could not be parties to both contracts, and it is admitted that they remained parties to the original contracts.

*Beckhuson v. Hamblet*, L. R. 2 Q. B. Div. 18; *Higgins v. McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Lehman v. Feld*, 37 Fed. 852.

The rules of the stock exchange forbid the closing of a defaulted contract, or the ascertainment of the damages caused by the buyer's default, by a sale conducted by the seller on the street and while the exchange is closed. Such a sale being in violation of the rules, there is no basis shown for a recovery.

The sale on September 22, 1896, which is pleaded in the bill and relied upon in the evidence as the basis of the right to recover and as fixing the amount of recovery, was a fictitious one, violating both the rules of the exchange and the rights of Jamieson & Company to have their liability, if it existed,

determined by a genuine, and not a fictitious, transaction. The act of the petitioner in conducting a fictitious sale was an act of bad faith, which bars the right to a recovery in equity.

1 Pom. Eq. Jur. § 397.

No right is shown to maintain a bill in equity for the petitioners' relief, even conceding that there was a contract between them and Jamieson & Company which the latter violated.

\***Mr. Justice Peckham**, after making the [478] above statement of facts, delivered the opinion of the court:

It is contended that there is an adequate and complete remedy at law for any liability that may arise by reason of the transactions above set forth, and that therefore the bill was properly dismissed and the decree of dismissal should be affirmed by this court.

It is undisputed that the defendants, the governing committee of the stock exchange, have in their hands the sum of \$14,000, the absolute title to which they do not claim. That sum was deposited with them by Schwartz & Company and Jamieson & Company, each depositing one half, for the purpose of thereby securing the performance of the contract entered into by those parties, and which sum was only to be taken from the possession of the governing committee for the purpose of fulfilling the condition upon which its deposit with the committee was made. As that committee had no personal interest in or title to the fund and it was placed in its possession in the trust and confidence that it would see that the purposes of the deposit were fulfilled and the moneys paid out only in accordance with the terms of the trust under which it was deposited, there can be no question that the fund thereby became a trust fund in the possession of the governing committee and the disposition of which in accordance with the trust those members were called upon to secure. The complainants claim that pursuant to the conditions of the trust they are entitled to the money deposited with the committee. It is shown that the money deposited by Schwartz & Company was deposited by them for and in behalf of the complainants, and Schwartz & Company lay no claim to the fund or any portion of it. Complainants demanded from the committee the payment of the whole fund to them on the ground that they were entitled to such payment \*by the terms of the trust. [479] and because of the violation of the contract by Jamieson & Company, to secure which the latter deposited \$7,000 of the fund in question. The committee has refused to pay over any portion of this fund to complainants, although it lays no claim to it, or any portion of it, on its own behalf. There is a dispute in regard to the right of the complainants to any portion of this fund, and a refusal on the part of the committee to pay it over to them. By reason of the facts, the committee occupied, from the time of the deposit of the funds, a fiduciary relation towards the parties depositing it, and it be-



came a trustee of the fund charged with the duty of seeing that it was applied in conformity with the provisions creating it.

Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at § 151, he says: "The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace, not only lands, but chattels, funds of every kind, things in action, and moneys."

All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the *cestui que trust*, and will compel the \*trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he has done in pursuance of the trust, and the distribution of the trust moneys among all the beneficiaries who are entitled to share therein." 1 Pom. Eq. Jur. § 158.

In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged. 1 Pom. Eq. Jur. § 157.

In *Foley v. Hill*, 2 H. L. Cas. 28, a question arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that, as between principal and factor, an equitable jurisdiction attached, because the latter partook of the character of a trustee, and that "so it is with regard to an agent dealing with any property. . . . And 182 U. S.

though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction," and therefore equity has jurisdiction.

In *Marvin v. Brooks*, 94 N. Y. 71, it was held that an agent who had been intrusted with his principal's money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been performed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation, and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases the right to an accounting is well established; but it was held that the existence of a bare agency was not sufficient. It \*must be [481] an agency coupled with some distinct duty on the part of the agent in relation to funds or some specific property.

In 2 Story's Eq. Jur. 12th ed. it is stated, at § 975a, that in general a trustee is suable in equity in regard to any matters touching the trust.

In *Oelrichs v. Spain*, 15 Wall. 211, 228, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43, 44, the court remarked that there being an element of trust in the case, that element, wherever it exists, always confers jurisdiction in equity.

That the governing committee could file a bill of interpleader against the complainants and the other defendants, alleging that each claimed the fund, or some portion thereof, and ask the court to determine which of the parties was entitled to the same, furnishes no reason for excluding the jurisdiction of equity in this case.

It may be somewhat doubtful whether an action against these defendants could be maintained at law, the contract not being originally between Schwartz & Company and Jamieson & Company, but only becoming so by way of substitution under the rules of the clearing house, and the relief sought being different between the two sets of defendants, Jamieson & Company and the members of the governing committee of the stock exchange. The maintenance of this suit enables the whole question between all the parties to be determined therein, and prevents the necessity of any action at law or other proceeding in the courts for the purpose of determining the ultimate and final rights of all the parties to this suit. Such relief cannot be obtained in any one action at law.

Upon all the facts we think that the jurisdiction of the court was plainly established, because under the circumstances the complainants had no adequate and full remedy at law.

We are then brought to the question decided by the circuit court, which held that there was no privity of contract between the complainants and Jamieson & Company. Aside from the general rule that a party sending an order to a broker doing business in an established market or trade, for a transaction in that trade, thereby confers

upon the broker authority to deal according to any well-settled usage in such trade or market (*Bibb v. Allen*, 149 U. S. 481, 489, 37 L. ed. 819, 823, 13 Sup. Ct. Rep. 950), it [482] plainly appears in this case \*from the pleadings that the sales and purchases of stock were in fact made subject to the rules of the exchange, the complainants alleging in their bill that such was the fact, while the defendants Jamieson & Company in their answer make a like claim.

All the transactions regarding the sales and purchases of the various shares of stock mentioned in this case must, therefore, be regarded as having taken place with direct reference and subject to those rules.

The circuit court did not question that upon the facts stated a contract came into existence whereby primarily Schwartz & Company were obliged to sell to Jamieson & Company 700 shares of the stock named at the price of \$222 per share, and it found no difficulty in holding that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit insist upon the enforcement of the contract according to its terms; that under the rules of the exchange each of the brokers bound himself to the other broker and the principals whom the other broker represented to carry out the terms of the contract, but the court held that the evidence disclosed that Schwartz & Company were only clothed with the authority to sell the stock at \$229, and that their principals, the complainants herein, were not bound by a sale at any figure less than that sum, and that neither Schwartz & Company nor any persons with whom that firm had contracted could have compelled the complainants to deliver the stock at a price less than \$229. As the fact appeared that the contract between the respective brokers was for a sale at \$222, the defendants Jamieson & Company, even under the substitution provided for by the rules of the stock exchange, could not hold complainants as principals of the contract for a sale at that price, and the court held that for want of mutuality the complainants are in no position to hold those defendants; that there was no identity of contract between the one the complainants authorized and the one entered into between the brokers, and the fact that the complainants now choose to accept it is of no consequence, the legal fact remaining that they are not so bound, and, not being so bound, [483] \*the defendants Jamieson & Company on their part are not legally bound.

In this case, although the brokers on the exchange acted in their own name, yet in fact each acted for undisclosed principals. In regard to 700 shares Schwartz & Company acted for the complainants, and in regard to 450 shares they acted in behalf of other clients. If the contracts had been for the sale and purchase of these shares at \$229, there would have been no difficulty in the case upon the principle adopted by the circuit court. The bar to a recovery lay in the alleged fact that the sale was without

authority, although really procured by Schwartz & Company while acting as agents of the complainants.

A principal can adopt and ratify an unauthorized act of his agent who in fact is assuming to act in his behalf, although not disclosing his agency to others, and when it is so ratified it is as if the principal had given an original authority to that effect and the ratification relates back to the time of the act which is ratified. He must disavow the act of his agent within a reasonable time after the fact has come to his knowledge, or he will be deemed to have ratified it. Bringing a suit upon the contract of his agent which was unauthorized at the time and in excess of the authority conferred upon the agent is a ratification of the unauthorized act; and it is no answer to the ratification that prior to its taking place the principal is not bound, and hence there is no right on the part of the other party to enforce as against him the unauthorized act of his agent. These principles are well known, and may be found laid down in the following text-books and authorities: Story, Agency, 9th ed. § 90, note 7, §§ 248, 251, and 251a, and note, §§ 258, 259; Livermore, Agency, p. 44; Dunlap's Paley, Agency, 4th Am. ed. \*324, note; *Lucena v. Craufurd*, 1 Taunt. 325, 334, 336; *Routh v. Thompson*, 13 East, 274, 283; *Hagedorn v. Oliverson*, 2 Maule & S. 485; *Fleckner v. United States*, 8 Wheat. 338, 363, 5 L. ed. 631, 637; *Law v. Cross*, 1 Black, 533, 539, 17 L. ed. 185, 188, citing *Hoyt v. Thompson*, 19 N. Y. 207, 218, 219; *Cook v. Tullis*, 18 Wall. 332, 338, 21 L. ed. 933, 936.

Therefore if in fact the sale at \$222 had been unauthorized \*on the part of Schwartz [484] & Company, the subsequent ratification of their unauthorized act by the complainants was the same as a precedent authority to them. The failure of the complainants to repudiate the action of their agents in the sale immediately after it was reported to them would operate as a ratification. They not only failed to repudiate, but actually approved, the action, and notified the defendants Jamieson & Company that the sales made by Schwartz & Company to the extent of 700 shares of stock had been made for them, and that they should hold Jamieson & Company liable upon the contract and for any damage caused by its violation.

It is argued, however, on the part of complainants that there was no unauthorized action by Schwartz & Company, and in proof thereof an explanation is given and an argument made founded thereon in relation to the peculiar facts which attend the sale and purchase of stock on "the account" on the floor of the stock exchange at Chicago. The very term itself imports, as is stated and as the evidence shows, a sale of stock to be delivered at a future time, and under the rules of the exchange that time means the last day of the month in which the sale or purchase is made.

Under these same rules, when an agreement to sell for future delivery is effected, each party places a margin in the hands of



the governing committee for the purpose of securing the performance of the contract, and, as is set forth in the foregoing statement of facts, this sum is kept intact in the hands of the committee until the final closing of the transaction, and upon a sale for "the account" the fluctuation in the price of the stock is provided for by payment into the fund upon the part of the one against whom the price of the stock has turned, and by drawing out of that same fund by the party in whose favor the price was, and so at the delivery day, whatever the price may be, the party selling gets the market price of the stock on that day, and the difference between that and the contract price he has received by payments into the fund in the hands of the governing committee by the other party and his withdrawal of the same sums, making in that way the contract price of the stock. Hence, it is argued, on the part of complainants, that the sale at \$222 [485] was entirely proper, and in accordance with the previous authority given complainants' agents, because the difference between \$229 and \$222 complainants' agents had already received by a draft drawn upon the fund in the hands of the governing committee. This is upon the assumption that there had been a margin put up by the parties to the sales on the July account in accordance with the rules, which had been carried over to the August account, and that into this deposit the money had been paid as the stock dropped from July 25 to August 3, and Schwartz & Company had drawn the same out.

If this plainly appeared in the testimony, the findings or the stipulation of the parties, it would be an answer to the contention that the act of Schwartz & Company in selling at \$222 was unauthorized. It is, however, answered on the part of Jamieson & Company that there is no evidence that this fund had been drawn from and paid in by the respective parties, and hence there is no basis of fact appearing in the record upon which the argument can rest. Counsel allege that the statements on the part of the complainants are at variance with the conceded facts in the case. They say in the first place that the bill itself avers that this deposit was made when the contract of August 3, for 1,150 shares, was entered into, and that the answers of the governing committee and of Jamieson & Company expressly state that the deposit was made on that day. If this fund were not created until August 3, it could not have been drawn from by the agents of complainants in the July previous, and so it would be impossible for the complainants to have received moneys from that fund prior to that date. Although the rules of the stock exchange require the deposit of these margins, and in cases where a sale for "the account" has been changed from one month to the following, the rules and the practice of the exchange require that the deposit on the old account shall be transferred to the new, yet still it is said that the rules or practice requiring such deposit cannot supply the place of evidence of a fact when the pleadings expressly state the opposite.

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It seems to us quite evident, after a perusal of the whole record and from the manner in which the case was tried, that it was assumed that a deposit of the moneys for the first July sales was made and that such deposit remained and went over into the new account of and for August delivery, although such assumed fact may be inconsistent with the allegation in the pleadings in regard to the date of the deposit, which was alleged to be August 3. There is perhaps this technical inconsistency, yet assuming it to be as claimed on the part of counsel for Jamieson & Company, it does not touch the fact that the complainants ratified the action of their agents, Schwartz & Company, in selling at \$222.

Aside from these questions, however, it is claimed on the part of Jamieson & Company that the record shows there never was any privity of contract between these parties, complainants on the one side, and Jamieson & Company on the other, because there were contracts on the part of Schwartz & Company for other dealers in the same stock, and that such contracts were not closed on August 3. Their claim is, even assuming that on August 3 Schwartz & Company contracted to sell to Jamieson & Company 1,150 shares of stock at \$222, deliverable August 31, the record shows that the complainants were not alone the interested parties to that contract. It is averred that 700 shares of the 1,150 shares sold by Schwartz & Company to Jamieson & Company, on August 3, were for the account of the complainants, but it also appears that of the 1,150 shares, 450 were sold for the account of others. These latter shares have, however, been settled for between the respective brokers. We are not concerned with the terms of the settlement or any admission of liabilities resulting therefrom, but the fact of such settlement eliminates all questions in regard to those 450 shares, and leaves the 700 shares remaining, which were the shares sold by Schwartz & Company as agents for the complainants. The fact that there were in this sale of August 3 other shares than the 700, and that in regard to those others some had been sold originally by Schwartz & Company to other and different brokers than Jamieson & Company, will not prevent the contract as to the 700 shares from being enforced by complainants against Jamieson & Company, although but for such settlement there might have been some embarrassment in maintaining a suit against the latter for a [487] portion only of the total shares sold them, while the other portion was represented by different clients of Schwartz & Company. The splitting up of the contract into two or more claims in behalf of different principals of Schwartz & Company and bringing different suits by the different principals against Jamieson & Company, on the single contract, might be in violation of the general rule refusing to recognize such right, but where all other claims have been settled, and there remains but the one demand against the defendants, the objection does not apply, and we see no reason why the complain-



ants may not take advantage of the contract made by their agents and enforce the same against Jamieson & Company.

Selling "for the account" is not an invention of the Chicago Stock Exchange. It has been practised upon the London and the New York and other stock exchanges for many years, and the general rules governing it are much the same on all of them. Thus it is said in *Dos Passos on Stock Brokers & Stock Exchanges*, page 276, as follows:

"It also appears in accordance with the usages of the stock exchange that the broker may, in executing the order of a client, enter into a contract for the specific amount of stock ordered to be bought or sold, or may include such order with others he may have received in a contract for the entire quantity or in quantities at his convenience.

"Neither in stock exchange contracts is there any real appropriation to any particular client of any particular stock in any transaction entered into with the jobber. Each transaction only forms an item in an account with that jobber, or, more correctly, with the house generally—that is to say, specific delivery or acceptance of that amount of stock is not necessarily made; but the transaction is liable to be balanced at any time during that account by a counter transaction by the same broker on behalf of the same or any client, or even on his own behalf, so that the balance only of all purchases and sales of that particular stock made by the broker in the house generally is to be finally accepted or delivered by him, and this through the instrumentality of the clearing house and the system of tickets."

[488] "The rules of the Chicago exchange clearly contemplate and provide for a substitution of names between the selling and the delivery days, and each party is kept secured by the margin originally put up, which is added to and taken from as the stock fluctuates in price from day to day. Hence it may be that the parties buying or selling may by virtue of this rule be liable to different principals represented in one original contract between the brokers. Whatever the rules or practice of the exchange may be, it is of course plain that no principal can be held to the performance of a contract which he never made, authorized, or ratified. The stipulation made between the parties relating to this matter, while not entirely plain, might affect the right to maintain this action but for the fact that all other claims were settled, leaving only the controversy regarding the 700 shares to be disposed of between these parties. Upon the facts before us we think there was sufficient privity of contract between them to sustain this suit.

The view taken by the circuit court of appeals in regard to this case was that the contracts were void as being in violation of the terms of the Illinois statute, §§ 130 and 131, which are set forth in the margin.† It

is a very far-reaching decision, \*and if followed would invalidate 'most transactions of every stock exchange in the country "for the account." We are unable to agree with the opinion of the court on this question.

"The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager and is null and void."

This quotation with the doctrine therein stated is approved in *Irwin v. Williar*, 110 U. S. 499, 508, 28 L. ed. 225, 229, 4 Sup. Ct. Rep. 160, 165.

As a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract. And the fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract. *Hibblewhite v. M'Morine*, 5 Mees & W. 462, Parke, Alderson, and Maule, barons, before whom the case was heard, were unanimously of this opinion.

In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price. *Pearce v. Rice*, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130; *Pickering v. Cease*, 79 Ill. 328. In the latter case it was stated:

\*"Agreements for the future delivery of grain, or any other commodity, are not prohibited by the common law, nor by any statute of this state, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think

†Sec. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false

rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000 or confined in the county jail not ex-



it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts,' in the most objectionable sense? That is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for, the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

And in *Pearce v. Rice*, 142 U. S. 28, 40, 35 L. ed. 925, 930, 12 Sup. Ct. Rep. 130, 135, it was remarked:

"But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Company and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities,—which contracts would not have been illegal (*Pickering v. Cease*, 79 Ill. 328, 330),—but merely to speculate upon the rise and fall in prices, with an explicit understanding, from the outset, that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract."

A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of "differences," rests with the party making the assertion. A defense of the illegality of the contract was pleaded by the defendant in *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646. In speaking of the burden of proof the court (at page 506, N. E. p. 650), said:

[491] "The facts alleged in the defendant's pleas and put in issue by the plaintiff's traverse are the only controverted facts in this \*case, and the *onus probandi* was upon the defendant. If the latter had offered no evidence at all, it would not have been necessary for the plaintiff to offer any, for the jury are always bound to find the facts against the party having the burden of proof, if he offers no evidence in support of the issues."

In *Irwin v. Williar*, 110 U. S. 499-507, 28 L. ed. 225-229, 4 Sup. Ct. Rep. 160, the trial judge in substance charged the jury that the burden of showing that the parties were carrying on a wagering contract and were not engaged in legitimate trade or speculation rests upon the defendant. Contracts for the future delivery of merchandise or

stock are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. The proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences; in other words, a mere wagering contract. This charge was approved by this court, and the principle was again approved in *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

Taking the contracts in this case as evidenced by the various telegrams passing between the complainants and their agents, Schwartz & Company, and having in mind the manner in which the business was in fact transacted, we are unable to find any evidence upon which to base a holding that the contracts came within the statutes of Illinois on the subject of gaming. There was no proof that there was a mutual understanding that the transactions were to be settled by a mere payment of "differences," and that there was to be no delivery, nor, in our judgment could any inference to that effect be legitimately drawn from the undisputed facts. In the first place it is proper to consider the rules of the stock exchange where the business was done. We find that article 17 of the Constitution provides in § 1, "that no fictitious sale shall be made. Any member contravening this section shall upon conviction be suspended by the governing committee." Article 29 prohibits any member of the exchange from being interested in or associated with any organization engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any \*commodity or security[492] without a bona fide purchase or sale of said commodity or security in a regular market or exchange. These two rules provide on their face that no sale for mere collection of differences is allowed; that every sale must be one in good faith for the delivery, either present or future, of the article sold. Sales "for the account" under the rules are made upon the basis of an intended actual delivery of the stock at the time when due. The evidence upon this point is undisputed.

A contract for the mere settlement of differences is a violation of the rules of the organization under which these brokers were doing business. Neither the rules of the exchange nor those of the clearing house set forth in the foregoing statement provide for these wagering contracts. Some of them provide for the course to be pursued

ceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

Sec. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn, or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing won by any gaming or playing at cards, dice, or

any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election, or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be void and of no effect. [1 Starr & C. Anno. Stat. 2d ed. pp. 1295, 1298.]



where a member fails to fulfil his contract. They do not provide as a means for the fulfilment of such contract the payment of "differences," but point out a course which the party claiming the fulfilment may pursue as against the party who violates the contract. Rule 17 treats the party failing to fulfil as a defaulter, and his name as a defaulter is announced. Sections 1 and 2 of article 16 provide for the failure of either party to keep up his margin, and the failure is described as a default. To say that such rules afford strong ground to infer an understanding between the parties doing business subject to them—that their contract was not one of actual sale, but merely one to speculate upon "differences"—is, in our opinion, to presume an illegal contract against its plain terms, and without any sound basis for the presumption. Thus, if an individual agreeing to purchase and pay for certain stock at a future date fails or refuses to perform his contract, the stock is sold under the rule, the price received and the difference between the price at which it sold and the contract price he is held answerable for. That would be his legal liability, in any event, and we cannot agree that the rules made for the case of a violation of contract provide or were intended to provide a means for its fulfilment. In case of a violation, the rules merely afford an expeditious means of ascertaining the amount of the damages. Of course, we do not say that these rules actually prevent [493] gambling on the exchange. It is \*possible, if not probable, that gambling may be and is in fact carried on there, but it must be in violation of and not pursuant to the rules.

Recurring, then, to the terms of these contracts, there is nothing therein which shows that they were gaming contracts, and hence in violation of the Illinois statute. They were plain directions to sell certain named stock for "the account," the meaning of which was that the stock was to be sold for actual delivery on the next delivery day, being the last day of the month. Such a direction presumes the intention to deliver the stock at the time named upon the receipt of the purchase price thereof as agreed upon at the time of the sale. There is no presumption opposed to this view in the absence of any evidence upon which it can rest. The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption, because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed. The subsequent telegrams directing the changing of the delivery time from the July to the August account, after inquiring in regard to the difference upon which such change could be effected, furnish no evidence of any illegal intention in connection either with the original or the changed contracts.

The "difference," as explained by the testimony set out in the foregoing statement, related to the charges to be made for carrying the stock from the July to the August delivery day, and did not relate to the pay-

ment of any difference between the contract price and market price of the stock. A direction to change the 500 shares from the July account to the August account would mean, as Mr. Wilkins, the manager of the stock exchange, testified, that the party who had agreed to sell 500 shares of stock deliverable in July, did not wish to deliver on that day, and the direction to change to the August account meant that the agents were to buy in that number of shares and sell them out again for the August account, keeping "short" the same amount of stock and making the difference in that ease of \$2.50 a share, or \$250 on every 100 shares of stock, for carrying it for another month, and this charge was the interest which \*the party [494] would have to pay to him who was on the other side of the market, and who would carry it to the next delivery day, thirty days thereafter.

There is nothing in the whole transaction from which it can be reasonably said that at the time when the original July order to sell was given there was any intention to do otherwise than make delivery of the stock at the July settlement day, and a delivery must have been then made by the very terms of the contract, as also under the rules of the exchange, unless there might thereafter be a change of that agreement by postponing the delivery to the August account. If there were no such subsequent agreement, then the delivery must have been made in July, but the seller might, in order to make it, enter into another agreement with someone else to take it off his hands upon such terms as might be agreed upon. There is absolutely no evidence that these contracts were entered into pursuant to any understanding whatever that they should be fulfilled by payments of the difference between the contract and the market price at the time set for delivery. To hold otherwise would entirely prevent any dealing in stocks for "the account," including of course a ease where for any reason the delivery day should be changed from the one originally intended to another and a future day.

To uphold the rulings of the circuit court of appeals herein the cases of *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Tenney v. Foote*, 95 Ill. 99; *Pearee v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497; *Soby v. People*, 134 Ill. 66, 25 N. E. 109, have been cited. We have examined them all, and are unable to see that they justify the ruling herein.

These cases hold these various propositions:

(1) That "option contracts" to sell or deliver grain or other commodity, or railroad or other stock, which contracts are intended to be settled by payment of differences at the settling date, are invalid. 79, 83, 113, and 125 Ill. *supra*.

(2) A contract to have or give to himself an option to sell or buy at a future time any grain, etc., subjects the party to fine or imprisonment, and all contracts made in vio-



[495]lation of the statute \*are gambling contracts and void under § 130, Criminal Code, and all notes or securities, part of the consideration of which is money, etc., won by wager upon an unknown or contingent event, as described in § 131 of the Code, are also void. 95 and 113 Ill. *supra*.

(3) An "option contract" to sell or buy at a future time grain or other commodity or stock, etc., is void under the Illinois statute, even though a settlement by differences was not contemplated. 130 Ill. *supra*.

(4) The keeper of a shop or office where dealing is carried on in stock, etc., on margins, without any intention of delivering articles bought or sold, is guilty of an offense under the Illinois act of 1887. 134 Ill. *supra*.

The cases of *Pearce v. Rice*, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130, and *Irvine v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160, are referred to in some of these cases as holding that dealings in differences, where the contract provides therefor, are void.

These Illinois cases, it will be seen upon examination, do not touch the case before us, which is a contract for future delivery, where there is no evidence that such delivery was not contemplated and a settlement by payment of differences only intended. The "option contracts" spoken of in those cases are explained in the cases themselves to mean what is commonly called "puts and calls," where there is no obligation on the part of the person to sell or to buy, and that class of contracts is the class covered by the statute. There is nothing in the evidence in this record that seems to us to afford any reasonable ground for holding that the contract in this case was on its face illegal as in violation of any statute in Illinois, or that, while valid on its face, the contract was really a guise under which to enable the parties to gamble on the differences in the price of stock sold and bought.

The further objection that these contracts having been made with reference to the rules of the exchange, the parties must, in pursuing a remedy, be confined to that which the rules provide, to the exclusion of the jurisdiction of ordinary courts of justice, we do not regard as well taken.

The sales were made subject to the rules [496]referred to, but, so far as regards a remedy for their violation, those rules provide a means by which parties may seek and obtain relief in accordance with their terms. They do not assume to exclude the jurisdiction of the courts, or, in other words, they do not assume to provide an exclusive remedy which the parties must necessarily follow, and which they have no right to refuse to follow without violating such rules, and thereby violating their contract. Any rule which would exclude the jurisdiction of the courts over contracts or transactions such as are here shown would not be enforced in a legal tribunal.

It is also objected that the means taken to obtain a price for the stock after a tender 182 U. S.

thereof had been refused by Jamieson & Company were inadequate for that purpose, if not fraudulent, and that, hence, there is no proof properly before the court as to the value of the stock on August 31, when it was tendered, or September 22, when it was sold; and it is also contended that there was no fair sale, but a mere sham, colorable in itself and fraudulent as against the defendants Jamieson & Company; that the only price of the stocks contemplated in the contracts at the time they were entered into and in case of a violation thereof, was the price to be fixed by the stock exchange by actual sales on the delivery days, and that as the exchange was closed from August 3 until November 5 following, no means existed by which that price could be ascertained.

We think the course pursued by the complainants was a proper one. On August 31, the exchange being closed, Schwartz & Company, acting in behalf of the complainants, tendered to Jamieson & Company 1,150 shares of the stock in question, 700 of which included the shares sold by them for the complainants. This tender was refused. It is objected that the stock did not belong to the complainants when tender thereof was made to Jamieson & Company. That was not material. Their agents, Schwartz & Company, who did own the stock, made tender of it to Jamieson & Company, and demanded the contract price in payment thereof. If that price had been paid and the delivery of the stock made to Jamieson & Company it would have been a good delivery. They would have had the title to the stock as against everyone, Schwartz & Company \*included. It was [497] a matter, therefore, of no importance that the complainants at the time this stock was tendered did not have the legal title to it. Under these circumstances, what could the complainants or their agents, Schwartz & Company, do? A tender of the stock had been made and had been refused. The stock exchange was closed by order of its governing committee, and Jamieson had voted in favor of its closing. Were there no means by which the value of the stock at or about this time could be ascertained while the stock exchange was closed? We think there were, and we also think that the course pursued by the complainants was a proper and appropriate one.

Accordingly, Jamieson & Company were notified that the stock would be sold to the highest bidder at a time and place mentioned, and that they would be held responsible for any loss that might result from their refusal to take and pay for the stock as agreed upon. They were also informed at or about that time that the sales made by Schwartz & Company had been made for complainants as to 700 of such shares. On the day named the stock was put up for sale, and it is not an important fact that it did not belong to the complainants. It was stock over which they had control, and it was offered for sale on the part of the complainants with the approval and assent of its owners, and if it had been bought by any individual at the sale other than the one who

did bid it in such purchaser would have obtained a good title to the stock on payment of the price bid. Wide publicity had been given on the part of the complainants of the time when and the place where this sale would occur, and the highest bid was made by an individual who was a member of the firm of Schwartz & Company, but there were many other people there who had the right, and, as it appears, were urged to bid, and there was neither fraud nor deception in the fact that a bid was made by a member of the firm as stated. The price at which the bidding closed was fixed after a chance for full and open competition upon the part of all who were present, and although the complainants entered into some arrangement with their agents by which the latter produced the stock and offered it for sale on [498] account of and for \*the complainants, yet no injurious effect upon the transaction was thereby caused, and it in no way injured Jamieson & Company. That the bid was a fair indication of what was then regarded as the value of the stock, we think admits of very little question. When the exchange opened in November the stock sold at \$130, and continued near that figure for some time.

Under all the facts in the case we think the complainants were justified in the course they pursued, and that the price at which the stock sold was a fair basis upon which to determine the amount of damages sustained by the complainant by reason of the refusal of Jamieson & Company to fulfil their contract of purchase.

For these reasons *the decrees of the Circuit Court of Appeals and the Circuit Court must be reversed*, and the case remanded to the latter court for such further proceedings therein as are not inconsistent with the opinion of this court. So ordered.

Mr. Justice Harlan dissenting:

I dissent from the opinion and judgment in this case upon the ground stated by the circuit court of appeals, namely, that the transactions involved in this litigation constituted gambling in "differences," in violation of the statute of Illinois.

[499] \*CALHOUN GOLD MINING COMPANY,  
Plff. in Err.,  
v

AJAX GOLD MINING COMPANY.

(See S. C. Reporter's ed. 499-510.)

*Mines—rights of junior location of cross vein—right of way of tunnel—right to blind veins—collateral attack on patent.*

1. Federal statutes must be interpreted by the Federal courts independently of local considerations, and cannot be said to have an es-

tablished meaning, whatever the decisions of other courts may have been, until they are construed by the Supreme Court of the United States.

2. The servitude imposed upon the senior location of a mining claim by U. S. Rev. Stat. § 2336, by giving a right of way to the junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein.
3. Blind veins underneath prior lode claims belong to the surface location under U. S. Rev. Stat. § 2322, and their discovery by running a tunnel, under § 2323, does not give the owner of the tunnel any right to them.
4. The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them.
5. Patents for lode mining claims cannot be collaterally attacked by evidence that at the date of the subsequent location of a tunnel site no ore had been discovered in the lode claims.

[No. 195.]

*Argued March 13, 14, 1901. Decided May 27, 1901.*

IN ERROR to the Supreme Court of the State of Colorado to review a decision affirming a judgment in an action for trespass on mining claims. *Affirmed.*

See same case below, 27 Colo. 1, 50 L. R. A. 209, 59 Pac. 607.

The facts are stated in the opinion.

Mr. W. E. So Relle argued the cause and filed a brief for plaintiff in error:

As between conflicting statutes the latest in date will prevail. So, between conflicting sections of the same statute, the last in the order of arrangement will control.

Bacon's Ab. Stat. D.; Dwarries, 156 N.; *Brown v. Philadelphia County Comrs.* 21 Pa. 37; *Smith v. Moore*, 26 Ill. 392; *Hall v. Equator Min. & Smelting Co.* Fed. Cas. No. 5,931 (C. C. D. Colo. 1879, Moses Hallett, J.).

When a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins.

*Morgenson v. Middlesex Min. & Mill. Co.* 11 Colo. 176, 17 Pac. 513; *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77; *Hall v. Equator Min. & Smelting Co.* Fed. Cas. No. 5,931; *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436; *Coffee v. Emigh*, 15 Colo. 184, 10 L. R. A. 125, 23 Pac. 83; *Oscamp v. Crystal River Min. Co.* 7 C. C. A. 233, 19 U. S. App. 18, 58 Fed. 293; *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 13 C. C. A. 390, 52 U. S. App. 75, 66 Fed. 200.

Ever since the act of May 10, 1872, the Land Department has issued patents upon

NOTE.—*Intersecting, crossing, or uniting veins*—see note to Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (Colo.) 50 L. R. A. 209.

*As to when the United States Supreme Court follows decisions of state courts*—see note to 1200

*Forepaugh v. Delaware, L. & W. R. Co. (Pa.)* 5 L. R. A. 508.

*As to when United States courts do not follow state decisions*—see note to United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490.

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lode mining claims crossing each other, and has expressly recognized the case of *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669.

*Branagan v. Dulaney*, 2 Land Dec. 744; *Black Queen Lode v. Excelsior No. 1 Lode*, 22 Land Dec. 343; *Aspen Consol. Min. Co.* 22 Land Dec. 8; *Rebellion Min. Co.* 1 Land Dec. 542.

The department will not issue a patent upon two disconnected portions of a lode mining claim, unless the same be bound together by a continuous vein owned by the applicant. If the vein be broken, or a portion of it taken away by a prior placer patent, mill site, or agricultural entry, the patent will not issue upon the disconnected portions of the lode claim. The lode claim is considered a legal entity.

*Apple Blossom Placer v. Cora Lee Lode*, 21 Land Dec. 439; *Andromeda Lode*, 13 Land Dec. 147; *Bi-Metallie Min. Co.* 15 Land Dec. 309; *Michael Howard*, 15 Land Dec. 504.

To reverse the rule now would take from us that which we had reason to believe was a vested right in the Victor Consolidated vein.

*Rockhill v. Nelson*, 24 Ind. 424; *Broom*, Legal Maxims, 8th ed. p. 147.

The words "excepting and excluding," in the register's published notice, do not mean abandonment or relinquishment.

*Rebellion Min. Co.* 1 Land Dec. 542; *Black Queen Lode v. Excelsior No. 1 Lode*, 22 Land Dec. 343; *Aspen Consol. Min. Co.* 22 Land Dec. 8.

The tunnel locator at the date of location of his tunnel acquires an inchoate right to all blind veins not previously known to exist, crossing the line of the tunnel.

*Enterprise Min. Co. v. Rico Aspen Consol. Min. Co.* 13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200.

In interpreting the statutes of the United States in relation to the rights of tunnels, such interpretation should be made as to carry into effect the object of those statutes.

*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200, 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762.

Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests.

*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762.

Mr. Joseph C. Helm argued the cause, and, with Messrs. Ernest A. Colburn and Charles H. Dudley, filed a brief for defendant in error:

The junior cross-lode claimant has no rights within the senior conflicting location.

*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510.

Three different interpretations of U. S. Rev. Stat. § 2336, have been suggested, either 182 U. S.

of which harmonizes it with § 2322, leaving the latter intact:

(1) That, in so far as they deal with intersection on the strike, they refer to lodes located prior to the act of Congress of 1872, where the lode discovered was located without surface ground, and the locator preserved his right thereto as against a subsequent overlapping claim.

*Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997; *Watervale Min. Co. v. Leach* (Ariz.) 33 Pac. 418; *Lindley, Mines*, § 560.

(2) That this section throughout deals exclusively with veins crossing or uniting on their dip. Under this view the section may be treated as dealing with locations made before and after May 10, 1872.

(3) That the word "intersection," in § 2336, refers to intersection of locations, and not of veins.

*Pardee v. Murray*, 4 Mont. 279, 2 Pac. 16; *Mor. Min. Rights*, 9th ed. p. 116; *Barringer & Adams, Mines & Mining*, pp. 472, 473.

The former Colorado rule is in conflict with certain Federal court decisions.

*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; see also *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284; *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 613, 15 U. S. App. 456, 61 Fed. 557, 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Del Monte Min. & Mill. Co. v. New York & L. C. Min. Co.* 66 Fed. 212; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540; *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 848.

The locator is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines.

*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

A junior tunnel-site location and tunnel take no vested or other interest in the blind leads apexing within a valid senior conflicting lode location.

*Stratton v. Gold Sovereign Min. & Tunnel Co.* 1 Denver Leg. Adv. 350.

A junior tunnel has no right of way through a senior patented lode location.

*Lindley, Mines*, § 491, p. 603; *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74; *People ex rel. Aspen M. & S. Co. v. Pitkin County Dist. Ct.* 11 Colo. 147, 17 Pac. 298; *Stratton v. Gold Sovereign Min. & Tunnel Co.* 1 Denver Leg. Adv. 350.

A statute authorizing tunnels to be run through private property without the owner's consent is expressly forbidden by the state Constitution of Colorado; hence, if there be no repeal of the clause relied on in said § 3141 by state or congressional legislation, this provision unquestionably fell with the adoption of the state Constitution.

*People ex rel. Aspen M. & S. Co. v. Pitkin County Dist. Ct.* 11 Colo. 147, 17 Pac. 298;

*Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74; *Lindley, Mines*, §§ 248-264.

Patents to mining claims are not subject to collateral attack.

*United States v. Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; *Northern P. R. Co. v. Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 259; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 451, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; *United States v. White*, 17 Fed. 564; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

And the patent itself is, in a collateral attack, conclusive evidence of the performance of all steps and compliance with all requirements preliminary to its issue, including the discovery of mineral.

*Lindley, Mines*, § 777; *Davis v. Wiebbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Kahn v. Old Telegraph Min. Co.* 2 Utah, 174; *Poire v. Wells*, 6 Colo. 406; *Justice Min. Co. v. Lee*, 21 Colo. 260, 40 Pac. 444; *Montana C. R. Co. v. Migeon*, 68 Fed. 811; *Harkrader v. Carroll*, 76 Fed. 474; *Iron Silver Min. Co. v. Campbell*, 17 Colo. 272, 29 Pac. 513; *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225; *Barringer & Adams, Mines & Mining*, pp. 415 *et seq.*; *Clark, Min. L. Dig.* pp. 262, 417, citing *Beard v. Federy*, 3 Wall. 492, 18 L. ed. 92; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548.

[499] \*Mr. Justice McKenna delivered the opinion of the court:

This action was brought in one of the district courts of the state of Colorado by the defendant in error to recover damages from plaintiff in error for certain trespasses on, and to restrain it from removing ore from

[500] ground claimed to be within the \*boundaries of, the mining claims of defendant in error. The answer of plaintiff in error justified the trespasses and asserted a right to the ore by reason of the ownership of another mining claim and the ownership of a certain tunnel site.

The rights of the parties are based on, and their determination hence involves the construction of, the following sections of the Revised Statutes of the United States, empowering the location of mining claims:

"Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the

United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; \*and loca-[501] tions on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work of the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The especial controversy is whether the rights conferred by § 2322 are subject to the right of way expressed in § 2323, and limited by § 2336. Or, in other words, as to the latter section, whether by giving to the oldest or prior location, where veins unite, "all ore or mineral contained within the space of intersection," and "the vein below the point of union," the prior location takes no more, notwithstanding that § 2322 gives to such prior location "the exclusive right of possession and enjoyment of all the surface included within the lines" of the location, "and of all veins, lodes, and ledges throughout their entire depth, the top or apex of



which lies inside of such surface lines extended downward vertically."

The defendant in error denied such effect to §§ 2323 and 2336, and brought this suit, as we have said, against plaintiff in error for damages and to restrain plaintiff in error from removing ore claimed to be within the boundaries of the claims of defendant in error, to which ore defendant in error claimed to be entitled by virtue of § 2322. The judgment of the lower court sustained the claim of the defendant in error, and damages were awarded it, and the plaintiff in error was enjoined from further prosecuting work. An appeal was taken to the supreme court of the state, and the judgment was affirmed. Thereupon this writ of error was allowed.

[502] \*The annexed plat exhibits the relative location of the respective properties of the parties. The Champion location was dropped from the case. There is no controversy as to the validity of the respective locations, none as to the tunnel site or of the steps necessary to preserve it. Indeed, the facts are all stipulated, and that the respective locations are evidenced by patents, the defendant in error being the owner of the Monarch and the Mammoth Pearl, and the plaintiff in error the owner of the Victor Consolidated and the tunnel site. The facts are stated by the supreme court of the state as follows:

"That each of appellee's claims was located prior to either the lode claim or tunnel site of appellant: that the receiver's receipt on each of the claims of appellee issued prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of \$400 removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the re-

ceiver's receipt for that claim; that the portal to the Ithaca tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithaca tunnel site, and blind veins discovered therein underneath the claims of appellee, are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims."

The assignments of error present the following propositions, "which it is stipulated [504] the case involves and to which the decision may be directed:

"First. Whether or not the Ithaca tunnel (the tunnel claimed by plaintiff in error) is entitled to a right of way through defendant in error's lode claims.

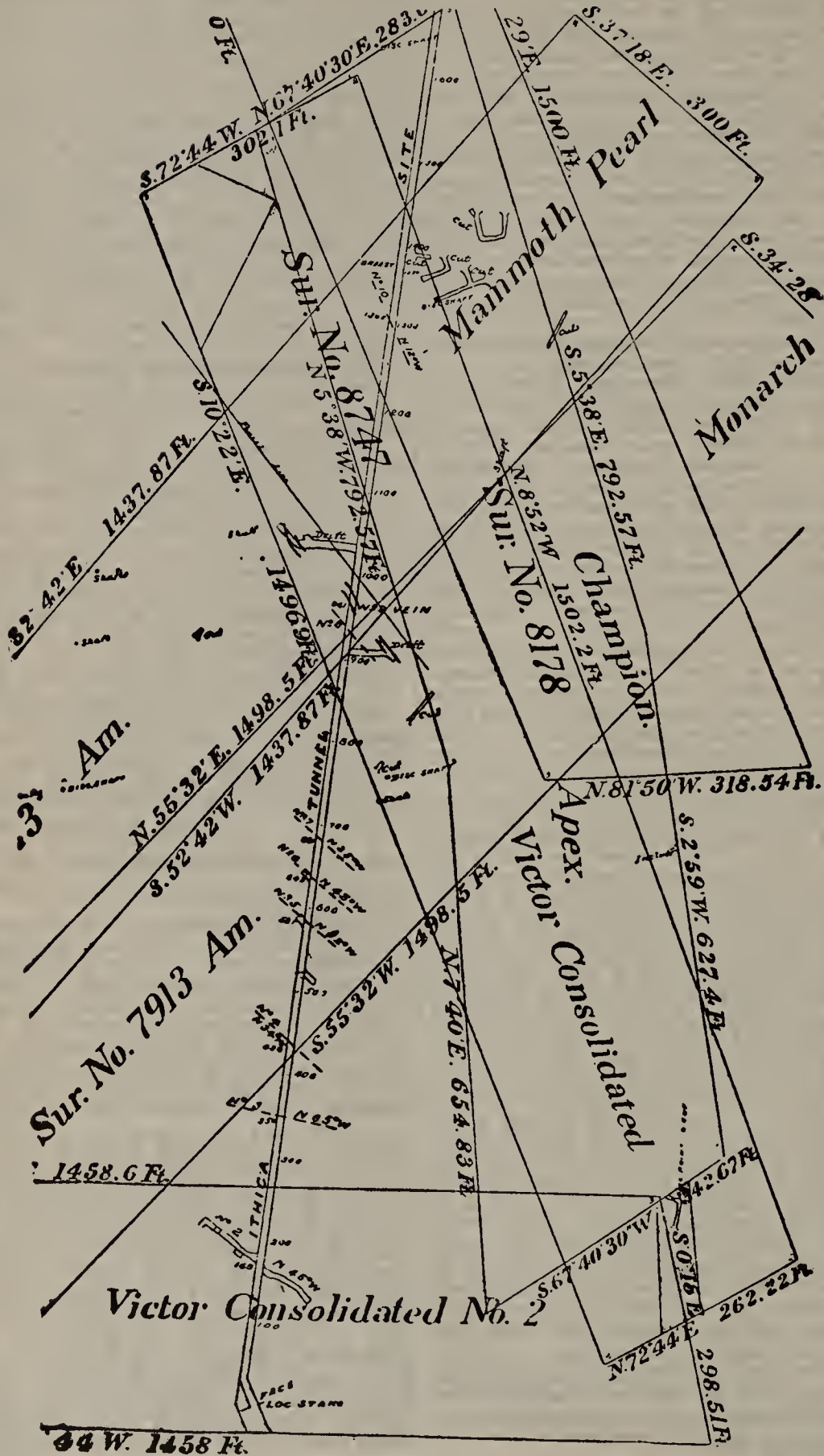
"Second. Whether or not plaintiff in error has acquired by virtue of said tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

"Third. Whether or not plaintiff in error is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across lode claims of defendant in error.

"Fourth. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of defendant in error prior to the location of said tunnel site."

The third proposition involves the relation of §§ 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument, and we therefore give it precedence in the order of discussion. It presents for the first time in this court the rights of a junior location of a cross vein within the side lines of a senior location under § 2336. Prior to the decision by the supreme court of Colorado in the case at bar that court had decided that the junior location was entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. *Branagan v. Dulaney* (1885) 8 Colo. 408, 8 Pac. 669; *Lee v. Stahl* (1886) 9 Colo. 208, 11 Pac. 77; *Morgenson v. Middlesex Min. & Mill. Co.* (1887) 11 Colo. 176, 17 Pac. 513; *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436. In *Coffee v. Emigh* (1890) 15 Colo. 184, 10 L. R. A. 125, 23 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them be-

†See next page.





came a rule of property in the state, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that [505] which it "had \*reason to believe was a vested right in the Victor Consolidated vein."

There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law, not only for Colorado, but for all of the mining states, and, therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should have been given to prior cases, the supreme court of the state was better able to judge than we are. It may be that the repose of titles in the state was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning. The necessity of this is illustrated, if it need illustration, from the different view taken of §§ 2322 and 2336 in California, Arizona, and Montana, from that taken in the prior Colorado cases. The supreme courts respectively of those states and that territory have adjudged a superiority of right to the cross veins to be in the senior location. Manifestly, on account of this difference, if for no other, this court must interpret the sections independently of local considerations. And in doing so we do not find in the sections much ambiguity so far as the issue raised by the record is concerned; indeed, not even much necessity for explanation. Section 2336 does not conflict with § 2322, but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of California, Arizona, and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary to decide on this record. A complete interpretation of the sections [506] would, of course, determine \*between those views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer therefore to reserve our opinion.

There was some contrariety of views in the cases on other points. There was discussion as to whether veins cross on their strike or their dip, and it was held that they could cross on both strike and dip, but as to the exact application of § 2336 to either there was some disagreement.

The supreme court of Arizona said: "Congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally

cross B's lode on the strike, and whether on the dip or not, makes no difference; and § 2336 was designed to define the rights of A and B in the space of intersection." *Water-vale Min. Co. v. Leach*, 33 Pac. 418.

The supreme court of California held in *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997, that the provisions of the section could readily be construed as intending to protect the rights of old ledge locations; and, speaking of veins intersecting on their dip, said: "Moreover, there is strong reason for thinking that such an intersection was the very one in the mind of Congress when it passed § 2336; for in that section, and speaking of the same subject, it says that 'where two or more veins unite, the oldest or prior location shall take the vein below the point of union,' and if the other kind of intersection [on the strike] was in the minds of the legislators at that time they would not have used the word 'below;' for 'below' would not apply at all to a union on the strike of two veins, such as the appellant's rights depend on in the case at bar." But the chief justice of the state, concurring in the result, observed:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the \*state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The supreme court of Colorado concurred in the conclusions of the courts of Arizona and California, and expressed its own view as follows:

"Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322."

See, for the views of the supreme court of Montana, *Pardee v. Murray*, 4 Mont. 234, 2 Pac. 16.

2. The other assignments of error relate to rights claimed by plaintiff in error by the



location of the tunnel site, and present the questions whether such location gave to the plaintiff in error the following rights: Of way through the lode claims of the defendant in error; of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

The plaintiff in error asserts the right of way for its tunnel under § 2323 by implication, and from that implication, and the rule it contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. The section contemplates that tunnels may be run for the development of veins or lodes, for the discovery of mines, gives a right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid.

[508] There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by § 2322. The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can § 2322 be given effect? There are no exceptions to its language. The locators "of any mineral veins, lode, or ledge" are given, not only "an exclusive right of possession and enjoyment" of all the surface included within the lines of their locations, but "of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made. "All veins or lodes having their apices within the plane of the surface lines extended downward are his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations." Barringer & Adams, *Mines & Mining*, page 44.

Under the old law the miner "located the lode. Under the new [the act of 1872] he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein. If he makes such a location, containing the top or apex of his discovered lode, he will be entitled to all other lodes having their tops or apices within their surface boundaries." Lindley, *Mines*, § 71.

And this court said, speaking by Mr. Justice Brewer, in *Campbell v. Ellet*, 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765:

"But the patent is not simply a grant of the vein, for, as stated in the section; 'a patent for any land claimed and located for valuable deposits may be obtained in the following manner.' It must also be noticed that § 2322, in respect to locators, gives

them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes, and ledges, the tops or apices of which are inside such lines. So that a location gives to the locator something more \*than the right to [509] the vein which is the occasion of the location." See also *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

The only condition is that the veins shall apex within the surface lines. It is not competent for us to add any other condition. Blind veins are not excepted, and we cannot except them. They are included in the description "all veins" and belong to the surface location.

3. The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado it is disposed of by their interpretation by the supreme court of Colorado, and, expressing it, the court said:

"It is contended by counsel for appellant that, under § 2338, Rev. Stat. U. S. and § 3141, Mills's Anno. Stat. it is entitled to such right. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a state may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purposes of discovery, and if any of its provisions are still in force,—which appears to be doubted in *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521,—they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act."

4. An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented \*claims of the defendant in error, to wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.

*Judgment affirmed*



## DISTRICT OF COLUMBIA, Appt.,

v.

## STEPHEN TALTY.

(See S. C. Reporter's ed. 510-516.)

*Pleading—amending petition in lieu of one lost—letter as report of referee.*

1. An amended petition based upon a certain contract and its extensions may be filed, instead of attempting to file a substitute for the original petition, where the original, which with all the records in the case has been lost, was based on that contract and its extensions, with others in addition.
2. A letter written by a referee in an action on a claim against the District of Columbia to an assistant attorney in the Department of Justice cannot be received in evidence as a referee's report on the case, when the letter was written by him in pursuance of his employment by the Attorney General of the United States, and not as referee.

[No. 238.]

*Argued April 12, 15, 1901. Decided May 27, 1901.*

**A** PPEAL from a decision of the Court of Claims in favor of a claimant against the District of Columbia. *Affirmed.*

The facts are stated in the opinion.

**Mr. Robert A. Howard** argued the cause, and, with **Assistant Attorney General Pradt**, filed a brief for appellant:

There can be no hesitation as to the proper and necessary course to be pursued by the claimant when it was discovered that no papers were on file in the court, and that none could be found after diligent search. He should have endeavored to substitute a petition for the one lost.

*United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 149; *Glover v. Rainey*, 2 Ala. 727; *Groch v. Stenger*, 65 Ill. 481; *Williams v. Powell*, 9 Port. (Ala.) 493.

What the claimant filed is in no sense an amended petition. An amendment is the correction of an error committed in any process, pleading, or proceeding at law or in equity. An amendment can be allowed only where there is something in the record to amend by.

1 Enc. Pl. & Prac. 462; *Johnson v. Mayrant*, 1 McCord, 484; *Randolph v. Barrett*, 16 Pet. 138, 10 L. ed. 914; *Woodruff v. Dickie*, 31 How. Pr. 164; *Wilson v. Wallace*, 8 Serg. & R. 53; *Newman v. Dodson*, 61 Tex. 91.

The statement of the referee, in which was included an abstract of the report he had made as referee, was evidence to prove the facts that suit was brought on seven contracts and that a set-off was filed.

*Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628; *Etna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810; *Republic F. Ins. Co. v. Weide*, 14 Wall. 375, 20 L. ed. 894; *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908; *Turnbull v. Payson*, 95 U. S. 421, 24 L. ed. 438; *Bank of United States v. Davis*, 4 Cranch C. C. 533, Fed. Cas. No. 915; *Kello* 182 U. S.

*Maget*, 18 N. C. (1 Dev. & B. L.) 414; *Dobson v. Murphy*, 18 N. C. (1 Dev. & B. L.) 586; *Kellogg v. Reese*, 16 N. Y. S. R. 1002, 1 N. Y. Supp. 291; *Turner v. Yates*, 16 How. 14, 14 L. ed. 824; *Allen v. Killinger*, 8 Wall. 480, sub nom. *Murphy v. Killinger*, 19 L. ed. 470; *Newburyport v. Waltham*, 150 Mass. 311, 23 N. E. 46; *Waltham v. Newburyport*, 150 Mass. 569, 23 N. E. 379.

A report of a district officer is secondary testimony, liable to exactly the same objection which the referee and the court made to the report of Donovan. That it is inferior to the latter is not because of its quality as evidence, but because of its inadequateness. It is not an account at all.

*Cushing v. Nantasket Beach R. Co.* 143 Mass. 77, 9 N. E. 22.

The court of claims has promulgated no rules governing procedure before and by referees. Unless, therefore, special instructions are given them, they exercise the functions of masters in chancery under the old system.

*Hoffman, Referees*, 83, 84; *Ketchum v. Clark*, 22 Barb. 319; 2 Daniell, Ch. Pl. & Pr. 1168 et seq.

Where a chancery suit involves matters of account, the action of a master should be had in the inferior court, and the items admitted or rejected should be stated, so that exceptions may be taken to the particular item or class of items; and such a case should be brought before this court on the rulings on the exceptions by the circuit court.

*Ransom v. Winn*, 18 How. 295, 15 L. ed. 388; *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138; *Nims v. Nims*, 20 Fla. 204.

Every suitor when in court must be prompt, eager, and ready in the pursuit of his rights, observant of the means afforded to him for speedy determination of his cause; and if by his supineness he loses the instruments necessary for success, he cannot hope to have the assistance or indulgence of the courts.

*Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Etting v. Marx*, 4 Fed. 673; *United States v. Beebee*, 17 Fed. 36; *Kittle v. Hall*, 29 Fed. 508; *Tazewell v. Saunders*, 13 Gratt. 354; *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519.

**Mr. V. B. Edwards** argued the cause and filed a brief for appellee:

The court of claims is not bound by technical proceedings, and the particular form of the petition does not preclude the claimant from recovering what was fairly shown by the evidence to be due him.

*Neitzey v. United States*, 17 Ct. Cl. 111; *United States v. Burns*, 12 Wall. 246, 20 L. ed. 388; *Morse Arms Mfg. Co. v. United States*, 16 Ct. Cl. 301; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Clark v. United States*, 95 U. S. 542, 24 L. ed. 519.

Appellee is not chargeable with laches.

*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223;

*Townsend v. Vanderwerker*, 160 U. S. 186, 40 L. ed. 388, 16 Sup. Ct. Rep. 258; *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873.

The claimant having done the work, the defendant, having measured it and received a benefit from it, is liable, even if the contracts were void, which they are not, and even if the transaction was positively prohibited by law, the claimant would still be entitled to recover the value of the work done for the defendant.

*Davis v. District of Columbia*, 20 Ct. Cl. 164; *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *Johnson v. United States*, 160 U. S. 553, 40 L. ed. 532, 16 Sup. Ct. Rep. 388.

[510] \*Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the court of claims under the act of Congress approved June 16, 1880 (21 Stat. at L. 284, chap. 243), entitled "An Act to Provide for the Settlement of All Outstanding Claims against the District of Columbia and Conferring Jurisdiction on the Court of Claims to Hear the Same, and for Other Purposes."

The purpose of the action was to recover compensation for work done and materials furnished under certain contracts entered into between the District of Columbia and

[511] appellee. The \*court found that there was due appellee, on March 18, 1876, the sum of \$4,180.44, and entered judgment for that amount on February 20, 1899, from which judgment the District took this appeal.

The original petition was filed on December 15, 1880, issue was joined, and the case referred to a referee. Two reports were made by him, but no trial was had thereon. On the 22d of June, 1897, on motion of claimant (appellee), the District consenting, the case was referred to Frank W. Hackett, Esq., to take and state the account between the parties. On the 28th of July, 1897, the claimant, by leave of the court, filed an amended petition, in which he alleged that he entered into a contract with the board of public works of the District on the 7th of August, 1873, numbered 826, for the improvement of certain streets, and for which he was to receive the prices established and paid by the board for work of similar character. The contract was extended, respectively, on the 17th of September, 1875, and the 3d of December, 1875, to embrace work on other streets. The contract and the extensions filed by the commissioners were referred to. It was alleged that the work was done to the satisfaction of the District, and was duly measured and certified to by the engineers of the District, and that the work done amounted to the sum of \$49,323.54; amount paid thereon, \$49,033.91; leaving due and payable January 15, 1876, the sum of \$289.63. The measurements returned by the commissioners of the District were referred to.

It was also alleged as follows:

"That under the provisions of the new contracts, called extensions, the claimant performed a large amount of work on K street,

between Third and Seventh northeast, which was duly accepted by the District of Columbia, and certified measurements issued at the written contract rates, one measurement for \$10,504.60, which was audited by the board of audit, and one measurement for \$2,570.30. This last measurement was not audited by the board of audit, not having reached said board of audit prior to the abolition of said board and the said measurements, amounting to the sum of \$13,074.90, remain due and unpaid, less the sum of \$9,184.45 paid on account thereof in \*partial measurements, leaving a balance due on the work done under the extension of said contract the sum of \$3,890.45, due and payable March 18, 1876.

"(See measurement of March 18, 1876. Returned by commissioners of the District of Columbia.)

"The claimant therefore demands judgment against the District of Columbia in the sum of four thousand one hundred and eighty dollars and eight cents (\$4,180.08) as a debt against the District of Columbia, due and payable as follows: \$289.63, January 15, 1876, and \$3,890.45, March 18, 1876, and such other sums as your petitioner shall prove to be due to him from the District of Columbia, but which your petitioner cannot at present specifically state, for want of records not in his possession."

There are a number of assignments of error, but, to quote counsel for the District—

"The errors insisted upon by the defendant, the District of Columbia, all arise from, and may be said to be included in, the failure to try the case originally brought, and the impossibility, on account of the loss and destruction of all the records in the case, to state an account between the claimant and the District."

It is therefore also insisted by the District that claimant (appellee) "should have endeavored to substitute a petition for the one lost," and he not having done so, no trial could have been had. It was on this assumption that the District requested the court to find (and error is now assigned because the court did not find) that the original petition was based on other contracts than contract No. 826 and its extensions; that the case was referred to Daniel Donovan, who made two reports, and that all of the papers, including the original petition, contracts (except contract No. 826 and the two extensions thereof), vouchers, and report of referee, have been lost; that Donovan died without making a report under the second reference, and that after the reference to Hackett the petition was amended by leave of the court; that Donovan reported certain excess of payments amounting to \$1,377.03 under contract No. 826, and was made by allowing for work at "board rates," instead of contract rates; that the greater part of the settlement made \*under contract No. 828, and all settlements under the extensions of the contract, were made at "board rates."

It was not error in the court to try the case on the amended petition. It was filed without objection being made, but it would have been no error even if objection had been



made. It finally rested the right of recovery upon contract No. 828 and its extension. That contract and its extensions were relied on in the original petition. There was, therefore, only a limitation of the action, not a change of it. If the District had any rights or defenses on account of the other contracts, such rights and defenses could have been set up or established by evidence. We said in *United States v. Burns*, 12 Wall. 246-254, 20 L. ed. 388-390, that "the court of claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading."

The District further contends that the proof of the claimant was defective, and did not justify the report of the referee and the judgment of the court upon it; and also contends that what is claimed to be a report of Donovan should have been received as evidence. Its rejection was certainly not error. Treating it as a report, it was not acted on in any way; besides, it was in no sense a report. It is claimed to be, it is true, but it was found in a letter written by Donovan, in pursuance of his employment at \$10 per day, by the Attorney General of the United States, to Mr. Brannigan, one of the assistant attorneys of the Department of Justice. In other words, what is claimed to have been found out and reported by Donovan, as attorney against the claim, is urged as evidence against the claim. The paper is as follows:

Washington, D. C., June 25, 1891.

Felix Brannigan, Esq., Assistant Attorney,  
Department of Justice.

Sir: In compliance with your request and verbal instructions, and under my appointment by the Attorney General of the United States of November 11, 1890, I have made a careful, thorough, and searching investigation of all records, vouchers, and other papers pertaining to every of the cases relating to the District of Columbia now pending [514] in the United States \*court of claims under the act of June 16, 1880, and beg to submit the following report as the result of such research:

Stephen Talty }  
vs. } No. 335. Referred  
The District of Columbia } list (p. 36).

This case involved the examination and stating of accounts under seven separate and distinct contracts. It was referred to me as referee by the court of claims, and was reported under a rule of said court, heretofore referred to in Murray's case No. 90.

Said report shows that claimant is entitled to recover from the defendant under his several contracts the sum of..... \$1,814 79

It further shows that claimant is indebted to defendant, by reason of overpayment by the board of audit, in the amount of 989 71

Thus leaving a net balance due claimant. .... \$825 08

Attached to said report and forming part thereof is the following set-off:

File No. 22. 61.5 square yards of cobblestone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents per yard in rate. Excess, 7 cents per yard on 61.5 yards.....	\$4 30
8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, the contract rate. Excess, 10 cents per yard on 8,237.98 yards....	823 79
784.20 cubic yards rock excavation, allowed at \$1 per yard in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard on 784.20 yards.....	548 94

Total..... \$1,377 03

A more thorough and exhaustive examination of the records which constitute my former report in this case convinces me that the counterclaim therein reported is both erroneous and unjust, for the reason that M street northwest, wherein the alleged excessive allowances were made claimant, was in fact, at the time \*he did the work, an old graveled street, and [515] also that rock was encountered in part of it. It also appears that nearly the whole of the work was done under the Commissioners of the District of Columbia, and that the prices certified by the engineer and paid Talty were what are commonly known as "board rates," and that said allowances were not made under any mistake of fact, but that they were the prices universally paid to other contractors doing similar work at the time.

I am therefore of the opinion that my former report should be amended by striking out the set-off therein stated, and finding a balance due Talty of \$825.08, with interest from March 1, 1876. All of which is respectfully submitted.

(Signed) Dan Donovan.

Correct copy. A. McKenzie,  
Acting Auditor, District of Columbia.

The objections to the reports of the referee are untenable. It is impossible, however, to quote the reports without unduly extending this opinion. It is enough to say they were stated to have been founded upon depositions of witnesses and "original sheets of measurements taken from the field book of the engineer measuring the work." They exhibited the measurements and the quantity of material in tabulated form. Other papers were used and figures taken from original books in the possession of the District. The referee reported:

"It was agreed at the hearing that the papers heretofore filed in this case have disappeared. Search in the office of the attorney for the District, and at the house of Mr. Donovan, former referee, has failed to discover anything of these papers. It is not charged that their disappearance is due to any fault of the claimant.

"In these circumstances the referee is sat-

isified to rely upon the memoranda in the sheets just referred to."

The report also set out contract No. 828 and its extension, and an itemized account of the work done and materials furnished, certified by the assistant engineer of the District.

[516] It is not necessary to set out at length the objections to the report and those to the rulings of the court in refusing certain findings. We have examined and considered them and are of the opinion that there was no error in the rulings of the court, and the judgment is affirmed.

ANDREW H. RUSSELL and William R. Livermore, *Appts.*,  
v.

UNITED STATES.

(See S. C. Reporter's ed. 516-536.)

*Claims—jurisdiction—implied contract to pay for infringement of patent.*

An implied contract to pay a patentee for an infringement of his patent by the United States, on which a claim can be brought within the jurisdiction of the court of claims, does not arise from the fact that he presented his claim of infringement by a gun adopted by the War Department, not only to the Chief of Ordnance, who replied that the Ordnance Department could not determine the matter, and denied him a hearing on the subject, but also to the Commissioner of Patents, who replied that the courts only could determine questions of infringement, and that the government took a bond of indemnity from the owner of the infringing gun.

[No. 242.]

*Argued April 16, 1901. Decided May 27, 1901.*

**A**PPEAL from a judgment of the Court of Claims sustaining a demurrer to a petition on an implied contract to pay for infringement of a patent. *Affirmed.*

Statement by Mr. Justice **McKenna**:

This is an action for \$100,000, brought in the court of claims by the appellants, upon an implied contract, asserted to have arisen from the use by the United States of Krag-Jorgensen rifles, which rifles contained, it is claimed, certain features, which were the invention of Russell, one of the appellants. The United States demurred to the petition, and the demurrer was sustained.

The facts as presented by the petition are as follows: That on or about August 3, 1880, letters patent No. 230,823, for certain new and useful improvements in firearms, were granted to Russell, and that he and Livermore are now the owners of such invention.

NOTE.—As to what claims constitute valid demands against the state—see note to *Northwestern & P. Hypotheek Bank v. State* (Wash.) 42 L. R. A. 33.

1210

That pursuant to an advertisement by a board of officers convened under the act of Congress, approved February 4, 1881, to select a magazine rifle for the service of the United States, Russell submitted to said board an operative magazine rifle \*made in accordance with his letters patent, and on or about December 16, 1890, submitted to another board of officers, convened for like purpose, the same rifle. The officers made reports on the rifle, which reports, it is alleged, may be found in certain congressional documents designated by number and of the session of Congress of whose records they constitute a part.

On the 15th of September, 1892, a second board recommended the adoption of the magazine rifle presented to it by the Krag-Jorgensen Gevaerkompagni of Christiania, Norway, and the rifle was provisionally adopted by the War Department for the use of the United States Army. The rifle is termed in the petition "army rifle."

The petition recites a correspondence between Russell and the Chief of Ordnance of the United States Army, giving its substance, which may be omitted, as the letters are hereafter set out in full.

It is also alleged that on June 7, 1893, the Krag-Jorgensen Gevaerkompagni and the United States, represented by Brigadier General D. W. Flagler, United States Army, Chief of Ordnance, under the direction and by the authority of the Secretary of War, entered into a contract, whereby that company granted to the United States the right to manufacture an unlimited number of said "army rifles." As much of the contract as we consider important is hereinafter set out.

That the United States did proceed to manufacture said "army rifles," and introduce them for use in the United States Army, and since January 1, 1894, commenced to account, and has ever since accounted, to the Krag-Jorgensen Company for royalties, at the rate named in the contract, and paid certain sums on account thereof. The company failed to furnish an indemnifying bond, but the United States, with consent of the company, withheld a certain amount of the royalties, which aggregated on or about June 16, 1895, the sum of \$25,000. The company then gave a bond with sureties, and the said sum was paid to it. The bond was conditioned as follows:

"That whereas the Krag-Jorgensen Gevaerkompagni of Christiania, Norway, has, on the seventh day of June, 1893, entered into a contract with the United States, represented by Brigadier General D. W. Flagler, Chief of Ordnance, for \*granting unto the United States full rights to manufacture an unlimited number of the Krag-Jorgensen magazine firearms, for the military service of the United States, under the American patents Nos. 429,811, of June, 1890, and 492,212, of February 21, 1893, granted to O. W. J. Krag and E. Jorgensen, during the lifetime of the said patents, and by the said contract covenanted to indemnify the United States, and all persons acting under them, for all liability on account of any patent rights

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granted by the United States which may affect the right to manufacture therein contracted for, and further covenanted and agreed to furnish, before the payment of any royalties by the United States, a good and sufficient bond in the penal sum of twenty-five thousand dollars, to protect and defend the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of said arms, and to pay all judgments that may be obtained against the United States for the same:

"Now, therefore, if the said Krag-Jorgensen Gevaerkompagni shall and will in all respects indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which may affect the right to manufacture granted by said contract, and shall and will fully protect and defend the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of said arms, and pay all judgments that may be obtained against the United States, or any officer or agent thereof for the same, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

It is alleged that the United States manufactured and used upwards of 75,000 "army rifles" containing Russell's invention, and derived a profit thereby of \$1 on each rifle.

The petition concluded as follows:

"By reason of the foregoing facts the claimants say:

"That neither the said contract, entered into by the United States and the Krag-Jorgensen Gevaerkompagni (Exhibit L) nor the said bond of indemnity delivered by the Krag-Jorgensen Gevaerkompagni to the United States, did provide the claimants with a remedy against the said Krag-Jorgensen [519]Gevaerkompagni \*for the use made by the United States of the claimants' said patent invention in accordance with the first alternative proposed by the Ordnance Department in its said letter to the claimant Russell, bearing date November 18, 1892 (Exhibit B).

"That there is to be implied from the use by the United States of the claimants' said patented invention, as hereinbefore related, a contract, whereby the United States agreed to pay to the claimants reasonable compensation for the same, and whereby the amount of such compensation was to be ascertained by means of a suit to be brought by the claimants in this court, in accordance with the second alternative proposed in the said letter (Exhibit B), and that the sum of \$100,000 would be reasonable compensation for the said use, and that the United States has failed to pay the claimants the said sum of \$100,000, or any sum or sums whatsoever for or on account of the said use, although duly requested thereunto.

"The claimants are the only persons owning or interested in the claim above set forth, and no assignment or transfer of the said claim or of any part thereof or interest  
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therein has been made. The claimants are justly entitled to receive and recover from the United States the sum of one hundred thousand dollars (\$100,000), after allowing all just credits and offsets. The claimants have always borne true allegiance to the government of the United States, and have not in way aided, abetted, or given encouragement to rebellion against the said government, and they believe the facts hereinabove stated to be true.

"Wherefore the claimants pray for judgment against the United States in the sum of one hundred thousand dollars (\$100,000), and for such further relief as this honorable court may be entitled to grant, both at law and in equity, in the premises."

The following is the correspondence:

Exhibit A.  
(Copy.)

Washington, D. C., November 16, 1892.  
To the Chief of Ordnance, U. S. Army.  
Sir:—

In the interest of Major Wm. R. Livermore, U. S. Army, \*and myself, I have the honor to invite attention to claims 22, 28, and 29 in U. S. patent No. 230,823, owned by us, as we believe their provisions to be infringed in the construction of the Krag-Jorgensen magazine gun lately adopted by the War Department, the points of resemblance being in the connection between the magazine and the receiver.

In considering the allowance to inventors, we would request that our claims for these vital points of construction be regarded.

Very respectfully,

Your obedient servant,  
(Signed) A. H. Russell,  
Capt. of Ordnance, U. S. Army.

Exhibit B.  
5839.

Ordnance Office, War Department,  
Washington, November 18, 1892.  
Capt. A. H. Russell, Ordnance Department,  
U. S. A., cor. 15th St. and N. Y. Ave.,  
Washington, D. C.

Sir:—

In reference to your letter of the 16th instant claiming the use of your patent right in the Krag-Jorgensen gun, lately adopted by this department for trial, which has been received and placed on file, I am instructed by the Chief of Ordnance to inform you that the business arrangements with the Krag-Jorgensen Company for the manufacture of this arm have not yet been completed.

On the one hand, that company may agree to indemnify the United States on account of any patent rights granted by the United States which may affect the manufacture of the guns, in which case your recourse would be to communicate directly with the company.

On the other hand, should the government proceed to manufacture the arms without such arrangement, your course will be to bring a suit against the government in the

court of claims after manufacture has progressed.

Respectfully,  
(Signed) C. W. Whipple,  
Capt. Ord. Dept., U. S. A.

[521]

\*Exhibit C.

Washington, D. C., December 9, 1892.  
To the Chief of Ordnance, U. S. Army.  
Sir:—

In reference to my letter to the Chief of Ordnance of November 16, 1892, and to the answer of November 18th from the Ordnance Office in reply thereto, concerning the claims 22, 28, and 29 in the U. S. patent to me, No. 230,823 (a copy of the specifications on which was inclosed in my letter), I desire to say that I could practically have no remedy for infringement of my patent against the Krag-Jorgensen Company, as they have not, that I am aware of, any property in this country; and also that I presume it would be more satisfactory to the United States, as it certainly would be to me, to have whatever may be justly due to me on my patents allowed without litigation.

I therefore hope that the Ordnance Office will bear my letter of November 16th, and this letter, in mind, and allow me a hearing before any business arrangement with the Krag-Jorgensen Company is closed.

Very respectfully,  
Your obedient servant,  
(Signed) A. H. Russell,  
Capt. of Ordnance, U. S. Army.

Exhibit D.

Ordnance Office, War Department,  
Washington, December 19, 1892.  
Capt. A. H. Russell, World's Columbian Exposition, Chicago, Ill.

Sir:—

Referring to your letters of the 16th ult. and the 9th inst., on the subject of infringement of your patent in the manufacture of the Krag-Jorgensen magazine firearm, I am instructed by the Chief of Ordnance to inform you that in a letter received from the Commissioner of Patents dated 15th inst. he states that the invention of H. I. Krag and Erik Jorgensen for improvement in machine firearms has been examined and the invention has been found patentable in view of the state of the art, but that other applications

[522]

are pending which appear to conflict in subject-matter; therefore the application of Krag and Jorgensen will be withheld from issue until that question is settled definitely.

I am also instructed to inform you that in a letter to the Commissioner of Patents, dated 16th inst., the Chief of Ordnance transmitted to him copies of your above-mentioned letters of 16th ult. and 9th inst.

Should you desire further presentation of your patent, it is suggested that you communicate direct with the Commissioner of Patents.

Respectfully,  
(Signed) Charles Shaler,  
Capt. Ord. Dept., U. S. A.

Exhibit E.

1429 New York Ave.,  
Washington, D. C., February 6, 1893.  
To the Commissioner of Patents.  
Sir:—

In an official communication from the Chief of Ordnance, U. S. A., dated December 19, 1892, it is suggested that I "communicate direct with the Commissioner of Patents" in regard to the following matter.

I presented to the Ordnance Office the claim that the gun recommended for adoption by the U. S. Army, known as the Krag-Jorgensen gun, infringed claims 22, 28, and 29 of my patent No. 230,823, dated August 3, 1880, and I ask that the government do justice by me in case of using such device.

The Chief of Ordnance states that there were claims now pending in the Patent Office, and referred me to you, with the information that copies of my letters had been sent you December 16, 1892.

Copies of these letters are inclosed, with copies of replies from the Ordnance Office.

I have the honor to inquire what further action should be taken by me.

Very respectfully,  
(Signed) A. H. Russell.

\*Exhibit F.

Department of the Interior,  
United States Patent Office,  
Washington, D. C., February 14, 1893.  
Capt. A. H. Russell, U. S. A., 1429 New York avenue, Washington, D. C.

[523]

Sir:—

I have your letter of the 6th instant, and in reply you are advised that it is not seen how the Patent Office has any jurisdiction in the matter concerning which you write. Questions of infringement can be determined only by the courts.

Very respectfully,  
(Signed) W. E. Simonds,  
12,509 Div. A—1893. Commissioner.

Exhibit G.

Chicago, Ill., June 30, 1893.  
To the Chief of Ordnance, U. S. Army,  
Washington, D. C.

Sir:—

In reference to correspondence regarding infringement of my patent No. 230,823 by the manufacture of the Krag-Jorgensen magazine rifle recommended by the magazine gun board, I have the honor to state that I communicated direct with the Commissioner of Patents, as suggested in the letter of December 19, 1892, from the Ordnance Office, and was told that the Patent Office had no jurisdiction. The patent infringed is one of long standing, and no claim is made that the Krag-Jorgensen patents infringe, but it is claimed that the construction of the gun embodying those patents does infringe my patent of 1880.

I therefore respectfully renew the request contained in my letter of December 9, 1892, that the Ordnance Office will "allow me a hearing before any business arrangement

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with the Krag-Jorgensen Company is closed."

Very respectfully,  
Your obedient servant,  
(Signed) A. H. Russell,  
Capt. of Ord., U. S. Army.

#### Exhibit H.

(1st indorsement.)

Ordnance Office, Washington, July 7, 1893.

[524] Respectfully returned to Capt. A. H. Russell, Government \*Building, Jackson Park, Chicago, Ill., with information that a statement of this case should be made in writing for file at this office, and for future reference, as the case stated cannot be determined by the Ordnance Office.

The agreement with the Krag-Jorgensen people is such that they are required to guarantee the United States against all damages for infringement.

(Signed) Charles Shaler,  
Acting Chief of Ordnance.

#### Exhibit I.

Chicago, Ill., November 22, 1893.

To the Chief of Ordnance, U. S. Army,  
Washington, D. C.

Sir:—

In response to your communication of July 7, 1893, in the 1st indorsement on my letter of June 30, 1893, Ordnance Office files 3515 of 1893, I hereby respectfully state my position with regard to the Krag-Jorgensen rifle construction recently adopted for the U. S. Army, and now in process of manufacture at the Springfield Armory.

I do not claim to be the inventor of all the mechanism of said gun. There are probably several important and meritorious inventions involved. The grant of a patent by the Patent Office on some features, however, does not authorize the making or using of other features covered by other patentees, as I am informed, and as seems a reasonable construction of law.

The specific features used in said gun and claimed by me, and believed to be covered by my U. S. patent No. 230,823 of August 3, 1880, are embraced in the 22d, 28th and possibly in the 29th claims of said patent. A free description of the general features of my invention as used in the Krag-Jorgensen gun would be "a magazine feeding into the side of the receiver under a bridge, with the entrance way under the bridge narrowed at the rear of the receiver, so as to permit but a slight projection of the side of the cartridge into the receiver when the bolt is drawn back, but with a wider opening further forward, so that as the cartridge moves forward impelled by the bolt, it will find a full-width passage under the bridge, through which passes into the receiver."

[525] \*This bridge and magazine opening is described in my patent, referred to, page 6, lines 100 *et seq.*, as follows:

"In filling the chamber of the magazine the gate is forced downward as the cartridges are filled in, leaving ample space to insert cartridges between the top edge of the magazine wall and a bridge or top part, M, 182 U. S. U. S., Book 45.

and thus supply the magazine. When relieved of the downward pressure the gate ascends far enough to prevent egress of cartridges in any other way than sidewise from the magazine mouth into the receiver B' beneath the bridge.

"The bridge M is of peculiar formation on its under and inner surface, and is at one side of the longitudinal center of the barrel and breech-bolt housing. (See particularly Figs. 9, 10, 11, 12, 13 and 14, where is represented the manner of curving or recessing the bridge so as to admit cartridges to the receiver and guide and control their movements as supplied to the receiver from the magazine mouth, and thence conducted to the firing chamber by the thrust of the breech bolt A'.)

"Supposing the breech bolt to be retracted and about to be advanced, the operation of supplying and seating a cartridge from the magazine is as follows, reference being had to the last referred to figures and to Figs. 3, 4, and 6, ignoring for the present the hinged gate N: The topmost cartridge is elevated by the pusher against the bridge, so that its flange projects partially, but very slightly, into the path of travel of the breech-bolt head (see dotted lines, Fig. 11), and in which position it is prevented from accidental inward movement by a slight ridge or swell, *n* (see Figs. 4 and 11), at the rear portion of the edge or wall of the opening in the receiver bottom, with which the magazine communicates, and by a similar ridge or downward swell, *n'*, on the bridge.

"The point or nose of the cartridge is guided past the spring *l* and into the firing chamber *b* by the flaring way or incline *m* as the bolt advances.

"Before the cartridge has been moved forward far enough by the advance of the bolt to jam or bind crosswise, the flange will have been moved to a point where the two ridges *n n'* begin to slope respectively downward and inward gradually to \*the plane of the [526] bottom or lowest part of the receiver, and upward and inward, thus allowing the flange to pass toward its place in the receiver. The bridge is also cut away on a curve or incline *m'*, forward and inward from its lower edge to *m'*, so that as the front of the cartridge is entering the chamber the rear is being gradually brought into line therewith.

"About the time the flange has been advanced to the point indicated by *m'*, Fig. 9, the curved recess or incline *m'* of the inner and under side of the bridge, which had previously served to gradually admit the inward passage of the flange, and which at this point terminates in a swell or ridge similar to *n'*, now serves to prevent its escape or outward movement and to direct it into the proper position to be pushed home and firmly seated by the bolt, as already described. . . . The bridge M is shown as formed with or attached to the magazine. It may, however, obviously be formed with the shoe or breech of the gun partly over and at one side of the receiver chamber."

In the main, this description applies to the Krag-Jorgensen gun quite as well as to my own gun, and my opinion is confirmed by that of experts that this part of my construction has been adopted in that arm.

I am informed that my rights under my patent depend on the claims therein, and my belief is sustained by expert opinion that the Krag-Jorgensen gun under construction at Springfield infringes the 22d claim of my patent, which reads as follows:

"22. The combination of the shoe chamber or receiver, the bridge at the side and top of the receiver, and the magazine chamber having an inlet to receive the cartridges inserted downward outside and beneath the bridge, and a mouth to conduct them beneath the bridge into and at the side of the receiver, substantially as hereinbefore set forth."

Taking the elements of this claim separately, it will be seen that the Krag-Jorgensen gun has "the shoe or receiver." All bolt guns and many others have it. The Krag gun is, however, one of a few to have "the bridge at the side and top of the receiver." It also has "the magazine chamber having an inlet to receive the cartridges inserted downward outside and beneath the bridge." It is true that the Krag-Jorgensen gun [527] shows the \*loading opening in a different place from that illustrated in my patent, but my claim is not limited as to the exact location of the loading opening, and the whole tenor of my patent is against the theory that I am limited in this claim to the precise construction shown in my drawing. Further, I am informed that the rule of law is that a patent claim, if valid, covers its mechanical equivalents—that is, other devices operating in a similar way to a like result, which is certainly the case in this instance. My claim further specifies "a mouth by which to conduct them" (the cartridges) "beneath the bridge into and at the side of the receiver, substantially as hereinbefore set forth." This language, like the rest of the claim, applies quite as well to the Krag-Jorgensen gun as to the one invented and constructed by me.

It thus seems demonstrable that the Krag-Jorgensen gun, having adopted part of my invention, has also adopted that part covered by claim 22.

Claim 28 in my specified patent is as follows:

"28. The combination, substantially as hereinbefore set forth, of the reciprocating breech bolt, the shoe chamber or receiver, the magazine chamber having a mouth, as described, the cartridge-supplying mechanism, and the bridge M, having the ridge or swell *n'*, and otherwise curved or recessed, substantially in the manner and for the purpose set forth."

The Krag-Jorgensen gun has "the reciprocating breech bolt, the shoe chamber or receiver, the magazine chamber having a mouth;" it has "cartridge-supplying mechanism" and "the bridge having the ridge

or swell" below the main part of the bridge and extending forward precisely in the same manner and for the same purpose as the swell *n'* of my patent, and is otherwise curved or recessed substantially in the manner set forth in my patent. I therefore feel warranted in the belief that my claim 28 covers the Krag-Jorgensen construction, and is infringed thereby.

Claim 29 of my patent is as follows:

"29. The bridge M, located relatively to the receiver and mouth of the magazine essentially as shown and described, and having the rear ridge *n'*, and the curved or inclined surfaces *m'* \*and *m'* substantially as and for [528] the purpose hereinbefore set forth."

The construction of the Krag-Jorgensen gun substantially conforms to the terms of this claim also, yet I am not quite certain that the bridge in that gun has a projection the equivalent of that described as *m'* in my patent. I presume this question can only be determined by careful expert examination.

I therefore base my claim for compensation on the infringement of my claims 22 and 28, and the probable infringement of claim 29, in my said patent No. 230,823, of August 3, 1880, by the Krag-Jorgensen construction.

I am not fully informed as to the terms of the contract between the United States and the owners of the Krag-Jorgensen patent. Assuming that the owners of said patent are in ignorance of my rights in the premises, I respectfully request that a copy of this communication may be sent to said parties, and a duplicate of this paper is forwarded for that purpose, with an extra copy of my patent to go with the duplicate. I further request that I may be furnished with the name and address of the responsible parties representing the Krag-Jorgensen interest.

I am aware that in the event of a suit in equity, the alleged infringing parties have a statutory right to challenge the validity of my patent, and, to avoid litigation, I am willing to go further than to make a mere statement of the prima facie case as above, and show to infringing parties or their experts that my claims are well within my rights, provided I am met by these parties in a fair spirit, and with a desire to make a just compensation when my title to the property is shown.

My first official notice to the Ordnance Department of this infringement is dated November 16, 1892 (Ordnance Office file 5830 of 1892), but a gun presenting the special features here mentioned was submitted by me to the board on magazine guns, convened by General Orders 31, H. Q. A., March 21, 1881, and it is described in the report of that board. It is now in my possession subject to examination.

Very respectfully,

Your obedient servant,

(Signed) A. H. Russell.



[529]

•Exhibit K.  
(Copy.)

Ordnance Office, War Department,  
Washington, December 1, 1893.  
Capt. A. H. Russell, Ordnance Department,  
U. S. A., Government Building, Jack-  
son Park, Chicago, Ill.

Sir:—

I am instructed by the Chief of Ordnance to acknowledge the receipt of your letter of the 22d inst., and to inform you that the terms of the contract between the United States and the Krag-Jorgensen Company contain a clause to the following effect:

"The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for."

You have requested that a copy of your communication and a copy of your patent should be forwarded by this office to the company, and for that purpose you have forwarded duplicates of your letter and of the patent specifications. It is considered best that you should forward these communications direct; they are, therefore, returned to you for the purpose. The address of the contracting company is "The Krag-Jorgensen Gewehr Kompagnie, Christiania, Norway." The other papers, inclosures to Ordnance Office file 3515, containing letter and copies of patent specifications, are filed in this office for future reference.

Your attention is again invited to the statement of the first indorsement on that file, which states that the case "cannot be determined by the Ordnance Department."

Respectfully,

(Signed) Charles Shaler,  
Capt., Ord. Dept., U. S. A.

The parts of the contract between the United States and the Krag-Jorgensen Company which are relevant to the question presented in this case, are as follows:

[530] "It is further stipulated and agreed that before any royalties are paid by the United States, the Krag-Jorgensen Gevarkompagni shall furnish a good and sufficient bond in the penal sum of twenty-five thousand dollars (\$25,000.00), to protect and defend \*the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of these arms, and to pay all judgments that may be obtained against the United States for the same.

"2d. All the -- herein contracted for shall be delivered by the said party of the first part.

"3d. The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right of manufacture herein contracted for."

Mr. James H. Hayden argued the cause, and, with Mr. Joseph K. McCammon, filed a brief for appellants:

In many cases where the ultimate facts  
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were practically identical with those under discussion, this court and the court of claims have held that the claimant was entitled to recover as upon an implied contract.

*Butler v. United States*, 23 Ct. Cl. 335; *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 257, 15 Sup. Ct. Rep. 190, 26 Ct. Cl. 48; *McKeever v. United States*, 14 Ct. Cl. 396; *Kelton v. United States*, 32 Ct. Cl. 314; *United States v. Burns*, 12 Wall. 246, 20 L. ed. 388; *Cammeys v. Newton*, 94 U. S. 225, 24 L. ed. 72; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104.

Mr. Charles C. Binney argued the cause, and, with Assistant Attorney General Pradt, filed a brief for appellee:

The United States is not liable to a suit for an infringement of a patent, that being an action sounding in tort.

*Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 143.

Congress has limited the jurisdiction of the court of claims to cases arising out of contracts, expressed or implied,—contracts to which the United States is a party in the same sense that an individual might be, and to which the ordinary principles of contracts must and should apply.

*Smoot's Case*, 15 Wall. 36, sub nom. *United States v. Smoot*, 21 L. ed. 107.

There was no point in the whole transaction from its commencement to its close where the minds of the parties met, or where there was anything in the semblance of an agreement.

*Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *Coston v. United States*, 33 Ct. Cl. 438.

\*Mr. Justice McKenna delivered the opinion of the court: [530]

It is conceded that a contract must be established to entitle appellants to recover, and it is contended that one is established by the correspondence between the Ordnance Department and Russell in regard to the use of the "army rifle," which, it is claimed, contained features of Russell's invention. That is, not an express contract is claimed, but an implied contract is claimed. This court has held that under the act of March 3, 1887 (24 Stat. at L. 505, chap. 359), defining claims of which the court of claims had jurisdiction, that the court had no jurisdiction of demands against the United States founded on torts. *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan Fire-arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420. In other words, to give the court of claims jurisdiction the demand sued on must be founded on a convention between the parties,—“a coming together of minds.” That there was such “coming together of minds” is asserted in the case at bar, and *United States v.*

**531]** *Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104, is cited to sustain the assertion. That case was considered and \*commented on in *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85, and it was said to be "an action to recover for the authorized use of a patent by the government, and these observations in the opinion are pertinent: 'This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. The first sentence in the original opinion of the court below strikes the keynote of the argument on this point. It is as follows: "The claimant in this case invited the government to adopt his patented infantry equipments, and the government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the government did was done with the consent of the patentee and under his implied license." We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon.'"

The facts of the case fully supported the remarks of the court. The petitioner *Palmer* was the inventor, patentee, and owner of improvement of infantry equipments. They were submitted to a board of officers appointed to consider and report upon the subject of proper equipment for infantry soldiers. The board recommended *Palmer's* invention. The recommendation was approved by the General of the Army and the Secretary of War, and the invention was manufactured by the government and used.

*M'Keever v. United States*, 14 Ct. Cl. 396, affirmed on appeal by this court, rested on the same facts as the *Palmer Case*, the only difference being *M'Keever's* invention was a cartridge box. There was a recommendation by the board, and the manufacture and use of the cartridge box by the government.

But there is a wide difference between the facts in those cases and the facts in the case at bar. The rifle of the petitioners was not adopted by the board; the *Krag-Jorgensen* rifle was. The contention is, however, that the latter rifle contained some of the features of petitioners' invention, and that by adopting it the Ordnance Department conceded that fact and the rights of petitioners to compensation. We are unable to  
**[532]** draw \*that conclusion from the correspondence, conceding the power of the Ordnance Department to make the concessions.

The first letter of Captain Russell "invites attention to claims 22, 28, and 29" of his patent, and expresses a belief that "the *Krag-Jorgensen* magazine gun lately adopted by the War Department" infringed them "in the connection between the magazine and the receiver." The letter concluded as follows: "In considering the allowance for inventors we would request that our claims for these vital points of construction be regarded." A somewhat vague request. However, the

letter was replied to (November 18), and he was told that "the business arrangements with the *Krag-Jorgensen* Company for the manufacture of this arm have not yet been completed," and it is represented to him that the company may agree to indemnify the United States, in which case his "recourse would be to communicate directly with the company." Or if the government should proceed to manufacture the arms without such arrangement, his course would be "to bring a suit against the government in the court of claims after manufacture has progressed." Of what and on account of what was he to communicate to the *Krag-Jorgensen* Company, and on account of what was he to bring suit against the government? On account of an implied contract which had arisen or would arise between him and the United States? Certainly not, but on account of an infringement of his invention which might arise. And this was his interpretation, for he writes on the 9th of December that he "could practically have no remedy for infringement of any patent against the *Krag-Jorgensen* Company, as they have not, that I am aware of, any property in this country [the United States]." He requested a hearing before "any business arrangement with the *Krag-Jorgensen* Company" should be closed.

In reply to that letter he was told by the Ordnance Department that his letters had been referred to the Commissioner of Patents, and that the Commissioner "states that the invention of H. I. Krag and Erik Jorgensen for improvement in magazine firearms has been examined, and the invention has been found patentable." He is then requested, in "further presentation" of his patent, to "communicate direct with the Commissioner \*of Patents." He did so, and **[533]** was informed that it was not seen how the Patent Office had any jurisdiction in the matter. "Questions of infringement," he was told, "can be determined only by the courts." (Letter February 14, 1893.) Waiting until June 30, he informs the Ordnance Department of the reply of the Commissioner of Patents, claimed again the *Krag-Jorgensen* to be an infringement of his patent, and repeated the request of December 9, 1892, that the Ordnance Office allow him "a hearing before any business arrangement with the *Krag-Jorgensen* Company" be closed. On July 7 that letter was returned to Captain Russell with the indorsement, "that a statement of the case should be made in writing for file at this office, and for future reference, as the case stated cannot be determined by the Ordnance Office. The agreement with the *Krag-Jorgensen* people is such that they are required to guarantee the United States against all damages for infringement."

In answer to this letter Captain Russell's letter of November 22, 1893 (Ex. I), was written. It need not be reproduced at length. It described his invention and wherein the *Krag-Jorgensen* rifle infringed that invention, and stated that he based his claim "for compensation on the infringe-



ment" of his claims 22 and 28 "and the probable infringement of claim 29" of his patent No. 230,823, of August 3, 1880, "by the Krag-Jorgensen construction." The letter concluded as follows:

"I am not fully informed as to the terms of the contract between the United States and the owners of the Krag-Jorgensen patent. Assuming that the owners of said patent are in ignorance of my rights in the premises, I respectfully request that a copy of this communication may be sent to said parties, and a duplicate of this paper is forwarded for that purpose, with an extra copy of my patent to go with the duplicate. I further request that I may be furnished with the name and address of the responsible parties representing the Krag-Jorgensen interest.

"I am aware that in the event of a suit in equity the alleged infringing parties have a statutory right to challenge the validity of my patent, and, to avoid litigation, I am willing to go further than to make a mere statement of the *prima facie* case as above, and show to infringing parties or their ex-  
[534]perts that \*my claims are well within my rights, provided I am met by these parties in a fair spirit and with a desire to make just compensation when my title to the property is shown.

"My first official notice to the Ordnance Department of this infringement is dated November 16, 1892 (Ordnance Office file 5839 of 1892), but a gun presenting the special features here mentioned was submitted by me to the board on magazine guns, convened by General Orders 31, H. Q. A., March 21, 1881, and it is described in the report of that board. It is now in my possession subject to examination."

He received the following reply, which seems decisive against the contention of petitioners that there was a concession of their patented rights and implied contract to compensate petitioners:

"I am instructed by the Chief of Ordnance to acknowledge the receipt of your letter of the 22d instant, and to inform you that the terms of the contract between the United States and the Krag-Jorgensen Company contain a clause to the following effect:

"The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for."

"You have requested that a copy of your communication and a copy of your patent should be forwarded by this office to the company, and for that purpose you have forwarded duplicates of your letter and of the patent specifications. It is considered best that you should forward these communications direct; they are, therefore, returned to you for the purpose.

"The address of the contracting party is  
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"The Krag-Jorgensen Geivehr-Kompagnie, Christiania, Norway.' The other papers, inclosures to Ordnance Office file 3515, containing letter and copies of patent specifications, are filed in this office for future reference.

"Your attention is again invited to the statement of the first indorsement on that file, which states that the case 'cannot be determined by the Ordnance Department.'"

Not only is the foregoing letter closing the correspondence decisive against petitioners, but we can discern nothing which \*tends[535] to support their contention and claim. It was not deemed necessary even to grant his request for a hearing. His rifle was not adopted; another was. There was no concession of his rights. He was told twice that his case could not be determined by the Ordnance Department. There was probably, however, no thought of an arbitrary invasion of his rights. The Ordnance Office sought the opinion of the Commissioner of Patents, and was informed that the Krag-Jorgensen improvement in machine firearms had been examined, and the invention had been found patentable in view of the state of the art. The patent of petitioners was part of the state of the art. The opinion of the Commissioner, of course, was not necessarily conclusive. As he himself said, "Questions of infringement belong to the courts." And because such questions are for the courts the Ordnance Office, no doubt, took indemnity from the Krag-Jorgensen Company, not in concession of petitioners' claim, but for protection against it, if protection should be necessary, and whether it would be or not the Ordnance Office very naturally resolved not to determine. The prudence which takes a bond against a claim cannot be said to constitute or raise a contract in favor of the claim—cannot be said to have intended to create the liability which was meant to be forestalled. Indeed, the Ordnance Office twice wrote Captain Russell that his case could not be determined by it. No contract therefore based on the action of that office can be claimed. If petitioners have suffered injury it has been through the infringement of their patent, not by a breach of contract, and for the redress of an infringement the court of claims has no jurisdiction. This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in an action sounding in tort this court has declared, as we have seen.

*Judgment affirmed.*

Mr. Justice Harlan did not participate in the case, and \*Mr. Justice Shiras, Mr.[536] Justice White, and Mr. Justice Peckham dissented.

C. J. LANTRY, *Plff. in Err.*,  
v.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri.

(See *B. C. Reporter's ed.* 536-555.)

*National banks—liability of stockholders—defense of fraud in inducing purchase of stock—receiver's liability for damages.*

1. Fraudulent representations by which a person is induced to become a stockholder of a national bank constitute no defense in an action at law by a receiver of the bank to enforce the statutory liability of the stockholders, as the defense is of an equitable nature, and must be asserted, if at all, in equity.
2. The illegality of a purchase by a national bank of its own stock does not relieve one who subsequently buys it from the bank from liability as a stockholder.
3. A receiver of a national bank is not liable for damages sustained by a person on account of the fraud practised upon him by the bank and its officers in inducing him to purchase stock.

[No. 180.]

*Argued March 11, 1901. Decided May 27, 1901.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment sustaining a demurrer to an answer and cross petition of defendant in an action by a receiver of a national bank to enforce a liability of stockholders. *Affirmed.*

See same case below, 38 C. C. A. 510, 97 Fed. 865.

The facts are stated in the opinion.

Mr. C. N. Sterry argued the cause, and, with Messrs. Eugene Hagen and I. E. Lambert, filed a brief for plaintiff in error:

That this attempted purchase of a portion of its own capital stock by the bank for a purpose admittedly in violation of the statute was void, and not merely voidable, seems no longer to be an open question in this court, under the principles determined by it in the cases of—

*Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; see also *Schofield v. Goodrich Bros. Bkg. Co.* 39 C. C. A. 76, 98 Fed. 271.

The certificates which were transferred to the bank upon its attempted purchase of these 800 shares of stock did not vest in the bank either the possession of the stock or the title to a single one of the shares represented by such certificates.

Cook, Stock & Stockholders, 2d ed. ¶ 10; 2 Thomp. Corp. § 2348; *Pacific Nat. Bank*

NOTE.—As to who are liable as shareholders in national banks—see note to *Beal v. Essex Sav. Bank*, 15 C. C. A. 130.

On the individual liability of stockholders for corporate debts—see notes to *United States v. Stanford*, 40 L. ed. U. S. 751; *Hatch v. Dana*, 25 L. ed. U. S. 885.

*v. Eaton*, 141 U. S. 227, 35 L. ed. 702, 11 Sup. Ct. Rep. 984; *Hammond & Co. v. Hastings*, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 223, 26 L. ed. 1042; *Burrows v. Niblack*, 28 C. C. A. 130, 53 U. S. App. 712, 84 Fed. 111.

The stockholders from whom these 800 shares of the bank's capital stock was attempted to be purchased by the bank remained, after the transfer of the certificates to the bank or its employees, just as much the owners of the stock attempted to be transferred as they were prior to such attempted transfer.

*Pauly v. State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 286, 7 Sup. Ct. Rep. 47; *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274.

The two certificates issued to Hood and Lantry, purporting to convey 100 and 200 shares of the capital stock of this bank, were each for an actual overissue of stock, and hence did not make either Hood or Lantry a shareholder in this bank.

Cook, Stock & Stockholders, 4th ed. ¶ 292; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Laredo Improv. Co. v. Stevenson*, 13 C. C. A. 661, 32 U. S. App. 97, 66 Fed. 633; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885; *Tschumi v. Hills*, 6 Kan. App. 549, 51 Pac. 619; *Stephens v. Follett*, 43 Fed. 842.

In holding that only the government had the right to inquire into such transactions, although prohibited by the statute and by public policy, the court below overlooked the principles laid down in the recent decisions.

*McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Schofield v. Goodrich Bros. Bkg. Co.* 39 C. C. A. 76, 98 Fed. 271.

That the doctrine of estoppel as applied by the court below has no application to one holding overissued shares of stock is, as it seems to us, thoroughly settled.

*Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Laredo Improv. Co. v. Stevenson*, 13 C. C. A. 661, 32 U. S. App. 97, 66 Fed. 633; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071; *Kellerman v. Maier*, 116 Cal. 416, 48

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*Pac.* 377; *Christenson v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768; *Winters v. Armstrong*, 37 Fed. 509; *Hayden v. Charter Oak Driving Park*, 63 Conn. 142, 27 Atl. 232; *Page v. Austin*, 10 Can. Sup. Ct. Rep. 132; *Clark v. Turner*, 73 Ca. 1; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Veeder v. Mudgett*, 95 N. Y. 295; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

The tender to the receiver, and the demand upon him, accomplished a rescission *in pais*.

*Bigelow, Frauds*, 75, 415.

Although the bank as a corporation still existed, it was rendered incapable of acting in any manner relative to any of its assets by the appointment of the receiver.

*Hammond v. Pennock*, 61 N. Y. 145; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Masson v. Bovet*, 1 Denio, 69, 43 Am. Dec. 651.

The receiver upon his appointment became the representative both of the creditors and of the bank, and the only representative of the bank.

*Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Robinson v. Dickey*, 14 Tex. Civ. App. 70, 36 S. W. 499.

That each of the plaintiffs in error had a claim good as against the bank as for money had and received must be conceded.

*Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

That such a claim was entitled to be established as a claim which was entitled to participation in the distribution of the assets must also be conceded.

*Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439.

Being claims against the bank, the plaintiffs in error could, if they chose, bring suit directly against the receiver to establish the same as claims entitled to share in all distribution.

*Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Denton v. Baker*, 24 C. C. A. 476, 48 U. S. App. 235, 79 Fed. 189; *Speckart v. German Nat. Bank*, 85 Fed. 12.

While it is clear that these claims grew out of an implied contract, yet if they grew out of a tort there is no reason existing why they should not be paid *pro rata* with all other claims, or be used as a setoff to the extent that they are united to participate in the assets in an action of this character. While, of course, the establishment of these claims could only determine their right to receive the *pro rata* share in the distribution, yet to that extent they should be allowed as a setoff.

*Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; *Scott*

*v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Central Appalachian Co. v. Buchanan*, 33 C. C. A. 598, 62 U. S. App. 195, 90 Fed. 454.

Mr. William C. Cochran argued the cause, and, with Messrs. J. McD. Trimble and W. H. Wallace, filed a brief for defendant in error:

In an action at law brought by the receiver of a national bank to recover the amount of a stockholder's liability, the stockholder cannot interpose the equitable defense that he was induced by the fraudulent misrepresentation of the bank's officers to purchase the stock.

*Northern P. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323; *Scott v. Armstrong*, 146 U. S. 512, 36 L. ed. 1063, 13 Sup. Ct. Rep. 148; *Montejo v. Owen*, 17 Blatchf. 324, Fed. Cas. No. 9,722; *Sheafe v. Larimer*, 79 Fed. 921; *Hill v. Northern P. R. Co.* 104 Fed. 754; see also *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859; *LaMothe Mfg. Co. v. National Tube Works Co.* 15 Blatchf. 432, Fed. Cas. No. 8,033; *Parsons v. Denis*, 2 McCrary, 359, 7 Fed. 317; *Doe ex dem. Myrick v. Roe*, 31 Fed. 97; *Buller v. Sidell*, 43 Fed. 116.

It is not a defense to such an action that the stock held by the defendant was purchased by the bank from original stockholders, contrary to the statute, and then sold and transferred to defendant.

*Re Reciprocity Bank*, 22 N. Y. 9; *Belknap v. Adams*, 49 La. Ann. 1350, 22 So. 382; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 53 Hun, 52, 5 N. Y. Supp. 937, 127 N. Y. 252, 27 N. E. 831.

The object of the statutes prohibiting banks from purchasing and holding their own stock is to prevent the extinction of stock once regularly issued, and the withdrawal of that much capital.

*First Nat. Bank v. Lanier*, 11 Wall. 374, 20 L. ed. 173; *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778.

When the bank has resold the stock to a bona fide purchaser, and has received the money for it as in the case at bar, the capital is restored, and the object of the statute is fully satisfied. In such case no one but the government has a right to complain. The title of the purchaser is valid as against all the world. The original holder has received his consideration for it, and cannot reclaim it. The creditors of the bank are not defrauded, because the capital has been restored. The purchasers cannot complain because they have received valid stock for which they bargained.

*First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778; *Union Nat. Bank v. Matthews*, 98 U. S. 626, 25 L. ed. 189; *National Bank v. Whitney*, 103 U. S. 101, 26 L. ed. 444; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, sub nom. *Reynolds v. First Nat. Bank*, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; see also *Fortier v. New Orleans Nat. Bank*, 112 U. S.

439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *Smith v. Sheeley*, 12 Wall. 358, 20 L. ed. 430; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 642, 24 L. ed. 649.

The case is analogous to those in which deeds from corporations or aliens prohibited by law from purchasing and holding real estate, or from holding beyond a certain time, have been held to give a good title to bona fide purchasers, defeasible only by the state, if at all.

*Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Runyan v. Coster*, 14 Pet. 122, 10 L. ed. 382; *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.* 32 Fed. 22; *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544; *Tarpey v. Deseret Salt Co.* 5 Utah, 494, 17 Pac. 631; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Land v. Coffman*, 50 Mo. 243.

Whether or not defendant has a right of action for damages against the bank after its failure for the fraudulent misrepresentation of its officers, he cannot set off the amount of his claim against his stockholder's liability, or recover judgment in a suit to which the bank itself is not a party.

*Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572; *Houldsworth v. Glasgow Bank & Liquidators*, L. R. 5 App. Cas. 317; *Sheafe v. Larimer*, 79 Fed. 921; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Hobart v. Gould*, 8 Fed. 57; *Wingate v. Orchard*, 21 C. C. A. 315, 44 U. S. App. 522, 75 Fed. 241; *Bausman v. Kinnear*, 24 C. C. A. 473, 48 U. S. App. 312, 79 Fed. 172; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 5 L. R. A. 649, 43 N. W. 290; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 870; *Buchanan v. Meisser*, 105 Ill. 638.

[537] \*Mr. Justice Harlan delivered the opinion of the court:

This action was brought by the receiver of the Missouri National Bank of Kansas City, Missouri, under § 5151 of the Revised Statutes, providing that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

The case was determined in the circuit court upon demurrer to the answer and cross petition of the defendant Lantry, and the action of the court in sustaining the demurrer and giving judgment for the plaintiff was affirmed in the circuit court of ap-

peals, Judge Thayer delivering the opinion of the court. 38 C. C. A. 510, 97 Fed. 865. Judge Sanborn dissented for the reasons set forth in his dissenting opinion in *Scott v. Latimer*, 33 C. C. A. 1, 14-20, 60 U. S. App. 720, 743-751, 89 Fed. 843, 857-862, which was the case recently decided by this court under the title of *Scott v. Devesee*, 181 U. S. 202, ante, 825, 21 Sup. Ct. Rep. 585.

The petition set forth the appointment by the Comptroller of the Currency on the 3d day of December, 1896, of the plaintiff Wallace as receiver of the bank. It alleged that at the time of the bank's failure the defendant was the owner and holder of 200 shares of its stock of the par value of \$100 each; that on the 30th of July, 1897, it appearing to the satisfaction of the Comptroller that it was necessary to enforce the individual liability of stockholders, as prescribed by §§ 5151 and 5234 of the Revised Statutes of the United States, that officer made an assessment upon shareholders for \$250,000, to be paid by them ratably on or before the 30th of August, 1897; and that he had made demand upon stockholders for \$100 \*upon each [538] share of capital stock held and owned by them respectively at the time of the failure of the bank.

The defendant made two separate defenses. In setting out the first defense he denied that he was then or had ever been the owner of the 200 shares of the stock referred to in the petition otherwise than as set forth by him.

The case made by the answer of the defendant was substantially as follows:

A short time prior to April 18th, 1896, D. V. Rieger, president of the bank, and who had been such from its organization, solicited the defendant and one Calvin Hood to purchase some shares of the stock of the bank and become stockholders. He persistently urged upon them that it was the desire of the bank to have them own its stock and their names connected with it, as they were men of means and had a large business acquaintance in the state of Kansas, and their connection with the bank would be of benefit to it by attracting and securing a large amount of Kansas business otherwise not obtainable.

In the preliminary negotiations for the purchase of the stock Rieger represented that the bank was in a sound, healthy financial condition, free from debts, earning large profits, and paying dividends, and that he was ready and willing to submit to them a detailed statement showing its financial condition.

In consequence of his statements the defendant and Hood called upon Rieger at the banking house of the bank with a view of investigating its condition.

During such preliminary negotiations Rieger continued to act as president of and for the bank, and all statements made by him during the negotiations were made in his capacity as president of the bank, with its knowledge, consent, and authority.

The defendant and Hood informed Rieger that they had been induced by him to investigate the condition of the bank with a view



of purchasing some of its shares, and they called on him for a full and complete history and detailed account of its business and financial condition. He at once promised to submit to them a faithful statement and history of the bank from its organization, and [539] agreed to submit such statement to \*any expert bank examiner they might select, if they desired him to do so.

The defendant, together with Hood, then entered upon such investigation which covered a period of several weeks,—Rieger representing at the time that the bank was originally organized with a capital stock of \$500,000, all of which had been actually paid for by the subscribers thereto, and the money deposited as required by law; that some time in July, 1893, on account of the extreme stringency in money matters and panics, the bank suspended, but upon full investigation by the Comptroller of the Currency, and a full report of the national bank examiner submitted to that officer, it was permitted to resume business; that the Comptroller required the bank to reduce its capital stock to the extent of \$250,000, to cover any loss it might have sustained previous to that time; and that this left outstanding the sum of \$250,000 of the capital stock, all of which had been actually issued and paid for by the shareholders of the bank at that time.

Rieger submitted to the defendant a report by the Comptroller in support of his statements, which was in words and figures as follows: "This bank [referring to the Missouri National Bank of Kansas City] suspended on the 17th inst., because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed, and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent, and should be permitted to resume."

He also submitted to defendant a bulletin issued by the Comptroller, dated July 28th, 1893, which was in words as follows: "The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

He represented to the defendant that the statements contained in the above report [540] and bulletin were absolutely true and \*correct, and that the bank had been frequently examined after it resumed business in July, 1893, by bank examiners and experts, who uniformly and truthfully reported the bank in good, healthy, and prosperous condition, and entirely free from bad loans or unsecured paper; that all the paper held by the bank was fresh, clean paper and well secured, and that the interest on its securities had been promptly paid and there was not among its assets a single item or piece of paper that had not been secured or kept

alive as provided by the banking laws of the United States. A list of the securities and assets of the bank was submitted to the defendant by Rieger, he stating that each and every item on the list was worth its face value and was fully secured, and that the bank was and had been since its organization doing a large and profitable business, accumulating a large surplus, and paying an annual dividend of 6 per cent to the stockholders.

After defendant received the above statements from Rieger he secured the services of two expert bank examiners, to whom Rieger made the same statements and representations about the assets and condition of the bank, thereby inducing them to believe such statements to be true and to so report to the defendant. Relying upon such representations, defendant agreed with Rieger, as president, to purchase certain shares of its capital stock, which the latter represented was the property of the bank, and which he represented had been theretofore acquired in a lawful way, and paid cash therefor, receiving from him "a certificate of stock dated the 18th day of April, 1896, and numbered 611, and purporting to be issued by the bank and under its seal as of that date, and that this certificate represented the 200 shares of stock which the defendant supposed he was purchasing, being the same stock mentioned and described in plaintiff's petition, for this defendant never at any time nor upon any occasion purchased or attempted to purchase any other stock of said bank for himself, and never at any time received for himself any certificate of stock purporting to be a certificate for stock of said bank other than the said certificate numbered 611." The bank received the money so paid by the defendant for the stock, namely, the sum of \$20,000, and the same was for the use and benefit of the bank.

\*The defendant continued to be the holder [541] of such certificate of stock, without the knowledge or the means of knowing that the bank was insolvent, until on or about the 2d day of December, 1896. From the time of its delivery to him the bank was apparently doing a very large and prosperous business, having a daily average of about \$1,500,000 deposits, and apparently, on an average, in good bills receivable, about \$1,300,000. But owing to the vast number of books and the complicated system of bookkeeping kept by the bank, and the artful manner in which its insolvency was and had been secreted by its officers, no one except the officers having knowledge of its condition could or would have supposed from any investigation made within any reasonable limit of time that the bank was insolvent, or that any bills receivable were fictitious, fraudulent, or dead paper, or that any of the representations made by the president of the bank were false and untrue, or that it was the purchaser of a large amount of its own stock.

On or about December 2d, 1896, there were rumors of the insolvency of the bank. Immediately after learning of such rumors the defendant began to make the most diligent ef-



forts to ascertain the cause thereof, and to ascertain its actual condition. During such investigation, which was only a day prior to the bank's suspension, its president, cashier, and other officers persistently insisted that it was in a good, healthy financial condition, and was perfectly solvent, as they had represented it to be. But the defendant was unable to ascertain at that time any information showing the real and actual condition of the bank beyond the representations of its officers.

On the 3d of December, 1896, the receiver of the bank appointed by the Comptroller of the Currency took the actual and exclusive control and possession of the bank and its assets, books, papers, and records, and excluded everyone, including the officers of the bank and the defendant, from the right or opportunity of making any inspection of such books, records, papers, or assets. Although repeatedly requested to give to the defendant and his associates an opportunity of making a careful and complete investigation of the affairs and condition of the bank after the same had passed into the possession [542] of the plaintiff as \*such receiver, the latter persistently refused and denied such request, and after the bank was placed in the hands of the receiver the defendant called upon him and demanded access to the books, papers, and documents of the bank, there being no other source from which he could ascertain the real history of the bank and its business transactions or its real condition. He frequently called upon the receiver and asked him for information as to its real history and actual conditions, but the only information he could get from that officer was that the bank was solvent, and under his management would pay all of its debts, liabilities, and obligations, without making any assessment or call upon the stockholders. The receiver continued to make the statement that the bank was in a solvent condition up to the time the order of assessment was issued by the Comptroller as alleged in the petition. By reason of the statements and representations made by the receiver the defendant was led to believe, and did believe, that the bank was solvent and would pay all its obligations, and that its embarrassments were due to the complication of business matters, and would only be temporary.

The defendant also alleged in his answer that on or about September 1st, 1897, upon repeated requests, the Comptroller gave to defendant and his associate Hood permission to inspect the assets, books, and records of the bank, and to secure all information possible as to its actual condition, and also permission to see the reports of the examinations made under the direction of the Comptroller and the receiver; and that thereupon, for the first time after the appointment of the receiver, the defendant was permitted to and did make a careful and thorough examination into the actual condition and affairs of the bank; that as a result of that investigation defendant for the first time ascertained the actual condition of

the bank and its affairs, and for the first time learned that the representations made by Rieger about its condition were knowingly false, fraudulent, and untrue, and were made by him as president of the bank, with full knowledge of the bank and the directors and the managers thereof that they were false, fraudulent, and untrue, and for the purpose of inducing the defendant and Hood to invest in the capital stock of the bank;

\*That at no time after its organization in [543]

1891 was the bank solvent or able to meet its debts; that no part of its original capital stock was ever actually paid for, as required by the banking laws, nor was any part of the reduced capital stock of \$250,000 ever paid for; that the stock had in many instances been issued to irresponsible parties and worthless notes taken therefor; that at the time the bank was represented by Rieger to be in good, sound financial condition it had on hand and included as part of its good assets fraudulent, fictitious, and worthless paper greatly in excess of its capital stock; that there was at the time, fraudulently concealed and covered up in paper represented to be good, \$50,000 of Rieger's personal indebtedness, absolutely worthless; and that the bank never from its organization earned a dividend, but had paid out on dividends over \$70,000 in order to conceal and cover up its actual condition; that Rieger, when he made the above representations, knew the stock to be absolutely worthless, and that the capital stock had never been properly issued or paid for; that a large portion of the stock was claimed to be owned by the bank, and that the bank had on hand notes and papers that were fraudulent, fictitious, and worthless in a greater amount than its entire capital stock; and that with full knowledge of its absolutely insolvent condition he represented the bank to be in good condition in order to induce defendant to purchase the 200 shares of the capital stock and defraud him of the \$20,000; that at the time of such purchase the defendant believed the statements made to him to be absolutely true in every particular, and was governed by them in such belief; but that such stock was not at any time of any value whatever;

That by reason of the facts above stated and set forth no consideration was ever received by the defendant from the bank for the payment of the \$20,000 at the time of the purchase of said stock;

That immediately after the investigation permitted by the Comptroller, and on or about the 27th of October, 1897, he called at the banking house of the bank, where its affairs were being adjusted by the receiver; but, finding only the receiver in possession and custody of the bank, its assets, books, records, \*and affairs, and being unable to find [544] any officer of the bank, he tendered to the receiver said certificate of stock numbered 611, above referred to, for cancelation, notifying and informing him that because of the fraud and deceit that had been practised upon him he disaffirmed the contract of purchase or pretended purchase of stock, and demanded



that the receiver receive the certificate, cancel it, and repay to the defendant the sum of \$20,000 paid by him as above stated, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount; but such tender and demand the receiver refused to accept or accede to; and,

That from the time the bank went into the hands of the receiver until the filing of the answer, there had not been any officer of the bank living or residing in Missouri upon whom any service of summons or other process could be had in any suit that might have been commenced against the bank in Missouri, save and except only the receiver as representing the bank; and that since December 3d, 1896, the bank had no usual place of business whatever in Missouri, where process could be left or served upon any person conducting the bank's business, save and except as process might be served upon the plaintiff as such receiver.

For a second and further defense the defendant alleged that prior to and during the negotiations with him and Hood, the president, cashier, and other officers of the bank, knowing well its insolvency, purchased, or pretended to purchase, from stockholders, or alleged stockholders, with the funds of the bank, shares of its outstanding capital stock, in order to prevent exposure by the stockholders owning such shares of its actual condition and the threatened throwing of such shares on the market at prices that would advertise the bank's insolvency; that, in order to prevent an open and apparent violation of law, as well as to deceive the public and the Comptroller of the Currency and his associates and employees, the officers of the bank engaged in this transaction and in transactions of buying or attempting to buy such shares of its own stock so outstanding, would cause the certificates of stock purchased or pretended to be purchased from the parties holding the same to be indorsed [545] \*by those to whom the certificates were issued, either in blank or in the names of the president, cashier, or some one of the clerks or other parties connected with the bank, and would then procure a delivery of such indorsed certificate, paying for the same with money belonging to the bank, or by surrendering notes held by it against such parties for such stock, or by payment of money and surrender of notes; that then, to account for the funds so used, the parties to whom the certificates would be assigned or whom the bank pretended were the owners of them, would make a promissory note or notes to the bank for the amount of money used in the purchase of such stock, such note or notes being payable to the bank and unsecured except as the certificates of stock were issued to secure the same; that all stock purchased or attempted to be purchased by the officers of the bank was paid for out of its funds and notes taken from its officers, agents, and servants to the bank to represent the funds so used; That each and every one of the persons engaged in this transaction and who executed

any or all of the notes referred to was at the time and ever since had been absolutely and hopelessly insolvent, to the full knowledge of every officer of the bank engaged in these transactions; that such pretended or attempted purchase of shares of stock was made by the bank directly with the owners or holders thereof and with the people in whose names the stock stood, to the knowledge of each one of the persons owning or holding the stock or in whose name it stood, and that none of the transactions concerning the negotiations for the pretended purchase of stock was made to or with the owners, holders, or the persons in whose names it stood by any employees in whose names the certificates were taken or to whom the certificates were delivered in blank, except in the case of the president and cashier, who in such negotiations and pretended purchases were, to the knowledge of those with whom they dealt, acting for and on account and in the name of the bank;

That in some instances, and perhaps all, the certificates of stock surrendered to the bank were canceled, and new certificates issued to irresponsible persons, who were to hold the \*same for the use and benefit of the [546] bank; that owing to the fact that the entire history of these transactions, so far as it appeared in writing, was and is contained in the books, records, and papers of the bank in the sole custody of the receiver, the defendant was unable to give a more detailed statement and history of the transactions, or to state from whom all the purchases were made, or to whom certificates were assigned, or by whom held, or to whom they might have been transferred;

That none of said stock was taken or purchased or procured by the bank to prevent any losses or loss upon debts previously contracted in good faith or purchased in any way authorized by law, but the same was purchased by the bank with its funds for the purpose of preventing the stock from being sold in open market, and to prevent any investigation being made as to the actual condition of the bank by the parties owning the same; that none of the parties to whom new certificates of stock were issued have paid anything for it, nor did they pay or cause to be paid the notes executed to the bank, nor did they intend to pay the notes when they were executed, because they were executed with the fraudulent purpose of concealing the stock purchased by the bank;

That at the time of the negotiations for the purchase of said stock, and at the purchase thereof, the bank had purchased with its funds, in the manner set forth, about \$80,000 of the \$250,000 of the reduced capital stock of the bank;

That during said negotiations with the president and other officers of the bank by the defendant and Hood, and at the time of the purchase of said stock, the president and other officers of the bank represented to them that all of its capital stock had been subscribed for and issued to actual purchasers in good faith, and was then held and owned by such parties as stockholders of the bank,



except an amount of the capital stock which the bank then had on hand which had been taken in by it to prevent a loss on indebtedness previously contracted in good faith, and had been so taken without violating the banking laws of the United States; that defendant, believing those statements, purchased of the bank 200 shares of its capital [547] stock \*of the par value of \$20,000, which sum he paid therefor, and a certificate was issued to him by the bank; and,

That at the time of the purchase or attempted purchase by him of said stock for which the certificate was issued, the president and other officers of the bank, in order to have its books show correctly the amount of the outstanding stock, caused some or all of the parties who held certificates of stock in their names that had been purchased for and on account of the bank, to surrender to the bank enough of such certificates for cancellation, so that the certificate issued to the defendant could be issued therefor and in the place thereof, and immediately upon the surrender of such certificates to the officers of the bank, and without the knowledge of the defendant, the certificates were canceled by the bank to an amount sufficient to enable it to issue the certificate so received by defendant; and that the parties who held said stock never at any time received the purchase money paid by the defendant for it, but the same was retained and kept by the bank. Wherefore defendant demanded that the action be dismissed.

The defendant also filed a cross petition and counterclaim, incorporating therein by reference all the allegations of his first and second defense. He alleged that by reason of the facts stated and the fraud and deceit practised upon him by the bank and its officers, he had been damaged in the sum of \$20,000, with interest from April 18th, 1896. He further alleged that he had presented such claim to the receiver for allowance as a claim against the bank, and that the same had been rejected and refused by the receiver. He therefore prayed judgment against the bank for the above sum, with interest, and asked that the same be paid ratably by the receiver out of the assets and funds of the bank in his control and possession.

We have given a full statement of the averments of the defendant's pleadings because in an attempt to condense them something might be omitted that was deemed by the plaintiff in error essential to his case, and because the questions presented for consideration may be regarded as important.

Assuming that the defendant became a [548] shareholder in consequence \*of the fraudulent representations of the bank's officers, as set forth in the answer and cross petition or counterclaim, two principal questions are presented for determination: 1. Whether such representations, relied upon by the defendant, constituted a defense in the present action brought by the receiver only for the purpose of enforcing the individual liability imposed by § 5151 of the Revised Statutes upon the shareholders of national bank-

ing associations. 2. Can the defendant, because of the frauds of the bank whereby he was induced to become a purchaser of its stock, have a judgment against the receiver on the counterclaim in this action for the money paid by him for stock, to be satisfied out of the bank's assets and funds in his control and possession?

The present action is beyond question one at law. Its object is to enforce a liability created by statute for the benefit of creditors who have demands against the bank of which the plaintiff is receiver. The defendant stood upon the books of the bank as a shareholder at the time it was placed in the hands of the receiver and he was accorded the privileges appertaining to that position. He claims exemption from the responsibility attaching to him, under the statute, as a shareholder, upon the ground that in consequence of the frauds practised upon him he was entitled to disaffirm, and that he had upon due notice to the receiver disaffirmed, the contract under which he purchased the stock in question. He seeks to have the certificate received by him treated as canceled. Clearly such a defense is of an equitable nature, and could not be recognized and sustained except in some proceeding to which the bank, at least, was a party. If the defendant was entitled, under the facts stated, to a rescission of his contract of purchase, and to a cancellation of his stock certificate, and consequently to be relieved from all responsibility as a shareholder of the bank, he could obtain such a relief only by a suit in equity to which the bank and the receiver were parties.

The defendant alleges that he tendered to the receiver the certificate of stock received by him for cancellation, notifying and informing the latter that, because of the fraud and deceit practised upon him by which he was induced to purchase, or \*attempt to pur- [549] chase, the stock represented by the certificate, he disaffirmed the contract of purchase, or pretended purchase, of the stock, and demanded that the receiver receive the certificate and cancel it and repay the sum of \$20,000 paid by him, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount, which tender and demand the receiver refused to accept or accede to. Such tender was an idle ceremony, and added nothing to the rights of the defendant; for the receiver had no power to accept or cancel the certificate or to relieve the defendant from the responsibility attaching to him as one appearing upon the books of the bank as a shareholder and to whom had been accorded by the bank the privileges of a shareholder. His duty was to take charge of the assets of the bank and to enforce such assessment upon shareholders as was made by the Comptroller in virtue of the statute.

Nor could the bank, after its suspension and the appointment of a receiver, have assumed to discharge the defendant from any liability attaching to him as a shareholder. Upon the failure of the bank the rights of creditors attached, and could not be affected



by anything that the bank or its officers might, after such failure, have done or omitted to do. In *Earle v. Pennsylvania*, 178 U. S. 449, 455, 44 L. ed. 1146, 1149, 20 Sup. Ct. Rep. 915, we held that when a national bank suspends and is placed in the hands of a receiver the entire control and administration of its assets are committed to the receiver and the Comptroller, subject to whatever rights of priority, if any, may have been previously acquired by proceedings lawfully instituted against the bank before its suspension. So that the only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought, by interposing an equitable defense, to defeat this action at law brought by the receiver under the statute. That cannot be done, because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted. So, also, "if the defendant," this court has said, "have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity." *Northern P. R. Co. v. Paine*, 119 U. S. 561, 563, 30 L. ed. 513, 514, 7 Sup. Ct. Rep. 324. See also *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859; *Thompson v. Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Scott v. Armstrong*, 146 U. S. 499, 512, 36 L. ed. 1059, 1063, 13 Sup. Ct. Rep. 148.

We must not be understood as expressing any opinion upon the question whether the defendant could have been discharged from liability as a shareholder if the facts stated in his answer by way of defense had been established in a separate suit in equity. Whether a decree based upon the facts set forth in the answer, even if established in a suit in equity, brought against the bank and the receiver after the appointment of a receiver, would be consistent with sound principle or with the statute regulating the affairs of national banks and securing the rights of creditors, is a question upon which we do not now express an opinion. We mean at this time only to adjudge that the facts set forth in the answer present grounds of relief which cannot be made available by way of defense in this action at law, and if sufficient to protect the defendant against the liability attaching to him as a shareholder, must be alleged and proved in a suit in equity to which the bank and the receiver are made parties.

Some of the observations made in *Scott v. Deweese*, 181 U. S. 202, ante, 822, 21 Sup. Ct. Rep. 585, are quite applicable to the present case. That was an action at law to enforce the individual liability imposed by § 5151 of the Revised Statutes. The defendant in that case sought to escape such liability upon the ground, in part, that he had

been induced by false representations of the bank's officers to accept a certificate for a certain amount of its increased capital stock. No suit had been instituted to cancel the certificate or to rescind the subscription of stock. The court said: "The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed, not only for their protection, but to give confidence to all dealing with national banks in respect of their contracts, debts, and \*engagements, as well as to stockholders [551] generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of § 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position." Whether the defendant in that case could have been relieved from liability as a shareholder and had his subscription of stock canceled, if he had in good faith and in due time before the suspension of the bank instituted proceedings to obtain relief, was not decided.

The defendant, however, contends that the present suit is not embraced by the rule just announced, because, he insists, the purchase by the bank of its stock—which he was induced thereafter by its fraud to purchase from it—was not simply voidable, but was absolutely void; consequently, the sale to him of such stock was void, and he did not, by his purchase and by taking a certificate of stock, become a shareholder within the meaning of § 5151.

It is true that the statute declares that no national bank shall be the purchaser or holder of any of its own shares of capital stock. Rev. Stat. § 5201. But will a violation of this provision by the bank relieve from liability one who holds a certificate of its stock and enjoys the right of a shareholder?

The statute forbids a national bank to lend money upon real estate as security. Rev. Stat. § 5137. Nevertheless, this court has frequently held that the borrower cannot escape liability for the repayment of the money so borrowed, nor dispute the right of the bank to enforce the security taken in violation of the statute; that it was for the government, and not for the borrower, to complain of the bank's departure from the rule prescribed by statute. *Scott v. Deweese*, 181 U. S. 202, ante, 822, 21 Sup. Ct. Rep. 585, and authorities there cited.

In *First Nat. Bank v. Stewart*, 107 U. S. 676, 677, 27 L. ed. 592, 2 Sup. Ct. Rep. 778, it appeared that a bank had loaned money on the security of its shares of stock held by the borrower. The debt not having been paid, the bank sold the stock and applied the proceeds to the payment of an equal amount of the debt. The stockholder then sued the bank to recover the value of the stock, relying on § 5201 of the Revised Statutes forbidding a national bank to make any loan or



discount on the security of the shares of its own capital stock. The trial court held that as the statute forbade the bank to accept its own shares of stock as security for money loaned, the plaintiff was entitled to recover. The judgment was reversed by this court, which held that the statute imposed no penalty, either on the bank or borrower, if a loan was made in violation of its provisions; and that if the prohibition could be urged against the validity of the transaction by any one except the government, it could only be done while the security was subsisting in the hands of the bank.

So in *Scott v. Deweese*, above cited, which involved a construction of § 5205, providing that no increase of a bank's capital stock shall be valid until the whole amount of such increase shall have been paid in, and until the Comptroller certifies that the amount of the increase has been duly paid in as part of the capital of the association. This court said: "The statute does not, in terms, make void a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. . . . That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller, and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital had been paid in, was a matter between it and the government, under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by § 5151."

[553] In view of these decisions it cannot be held that the purchase by the bank of its own shares of stock was void. It was of course a matter of which the government by its officers could take cognizance; and it may be that it was a matter of which stockholders, having an interest in the proper administration of the affairs of the bank, could complain in a proceeding instituted by them to restrain the bank from violating the statute. But when the violation of the statute has occurred, it is not a matter of which a shareholder can complain in order that he may be relieved from the liability attaching to him as a shareholder and which the receiver seeks to enforce under the orders of the Comptroller. In the present case Judge Thayer, delivering the opinion of the circuit court of appeals, well said: "In considering the second defense which was interposed by the defendant, it is important to bear in mind that the 200 shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons, and had been reacquired by the bank by purchasing it from such other persons, to prevent them from throwing it on the market at ruinous prices. It is nec-

essary to infer from the averments of the answer that this stock had once passed the scrutiny of the Comptroller and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. The purchase of this stock by the bank under the circumstances disclosed by the answer was doubtless *ultra vires*, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage; but in point of fact, by the sale of the stock to the defendant, that portion of its capital which had been dissipated by the purchase was restored by the resale, and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired, and to that extent "repaid the wrong which might other-[554] wise have been done to the bank's creditors." 38 C. C. A. 510, 514, 97 Fed. 865, 868.

It only remains to inquire whether, in any view of the case, the cross petition or counterclaim can be sustained. We think not. The receiver sued in this case for the benefit of creditors who, it must be assumed upon this record, knew nothing of the circumstances under which the defendant became a shareholder. They trusted the bank and those who appeared on the list of shareholders required to be kept by § 5210 of the Revised Statutes, which list, that section declares, "shall be subject to the inspection of all the shareholders and creditors of the association." Referring to that section this court, in *Pauly v. State Loan & T. Co.* 165 U. S. 606, 621, 41 L. ed. 844, 850, 17 Sup. Ct. Rep. 471, said: "Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as state authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts, and engagements." *Pullman v. Upton*, 96 U. S. 328, 330, 331, 24 L. ed. 818, 819; *Germania Nat. Bank v. Case*, 99 U. S. 628, 631, 25 L. ed. 448, 449. "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out in the books of the association as true owner, may be treated as the owner and therefore liable to assessments when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank



fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value."

We perceive no ground whatever upon which the defendant can have a judgment upon his cross petition or counterclaim against the receiver. That officer had nothing to do with the fraudulent transactions of the bank prior to its suspension. His duty was to take charge of its assets, and have [555] them administered \*according to the rights of parties existing at the time of such suspension. Whether, if the defendant claimed a judgment against the bank or its officers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock assessment until all the contract obligations of the bank had been met, was not decided by the circuit court of appeals. That question was wisely reserved for decision when it should arise and become necessary to be decided. It was deemed by that court only necessary to adjudicate that the receiver was entitled to a judgment against the defendant, and that the latter was not entitled in this action to a judgment against the receiver on account of frauds committed by the bank or its officers. In that view we concur.

Perceiving no error of law in the record, the judgment below is affirmed.

CALVIN HOOD, *Plff. in Err.*,  
v.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri.

(See S. C. Reporter's ed. 555, 556.)

This case follows the decision in *Lantry v. Wallace*, ante, 1218.

[No. 179.]

Argued March 11, 1901. Decided May 27, 1901.

**I**N ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment sustaining a demurrer to an answer and cross petition. *Affirmed*.

See same case below, 38 C. C. A. 692, 97 Fed. 983.

Mr. C. N. Sterry argued the cause, and with Messrs. Eugene Hagen and I. E. Lambert, filed a brief for plaintiff in error.

Mr. William C. Cochran argued the cause, and, with Messrs. J. McD. Trimble and W. H. Wallace, filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Lantry v. Wallace*, ante, 1218.

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Mr. Justice Harlan delivered the opinion of the court:

The pleadings in this case are the same as in *Lantry v. Wallace*, just decided, 182 U. S. 536, ante, 1218, 21 Sup. Ct. Rep. 878. The demurrer to the answer and cross petition of Hood was sustained in an elaborate opinion by Judge Philips, holding the circuit court. 89 Fed. 11. The \*judgment in that court [556] was affirmed in the circuit court of appeals. *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865.

For the reasons stated in the opinion just rendered in *Lantry's Case*, the judgment in this case is affirmed.

COMMERCIAL NATIONAL BANK OF OGDEN, *Plff. in Err.*,  
v.

ALMA D. CHAMBERS, as Treasurer of Weber County, Utah.

(See S. C. Reporter's ed. 556-562.)

*Taxes—national banks—value of real estate in other states.*

1. A construction of a state statute by a state court, on the question of deductions for purposes of taxation, is binding on the Supreme Court of the United States.
2. The term "moneyed capital," as employed in U. S. Rev. Stat. § 5219, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come in competition with the business of national banks.
3. The refusal to deduct the value of real estate owned in other states by a national bank, from the value of its shares of stock, does not make an unlawful discrimination against such banks under U. S. Rev. Stat. § 5219, or deny them the equal protection of the laws, where such a deduction is not authorized by the laws of the state in valuing shares of stock of other corporations.

[No. 270.]

NOTE.—As to construction and effect of state laws and constitutions and state decisions in regard to same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

That the United States Supreme Court will not review decisions of state courts construing state statutes, unless specially authorized—see note to *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

As to effect of decisions of state courts in Federal courts—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

On state taxation of national banks—see *McHenry v. Downer* (Cal.) 45 L. R. A. 737, and note.

As to equality of rights and privileges—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

*Argued and Submitted April 26, 1901. Decided May 27, 1901.*

**I**N ERROR to the Supreme Court of the State of Utah to review a decision reversing a judgment in favor of a national banking association in an action to enjoin the collection of taxes. *Affirmed.*

See same case below, 21 Utah, 324, 61 Pac. 560.

Statement by Mr. Justice **White**:

The plaintiff in error is a national banking association, doing business at Ogden City, Weber county, Utah. The action below was brought by the bank to enjoin the collection of the alleged illegal portion of certain taxes levied against its shareholders for the year 1898.

Certain provisions of the Constitution and laws of Utah which are claimed to be pertinent to the controversy are excerpted in the margin.†

[557] \*The substance of the complaint was that although the assessor in valuing the shares

[558] of stock of the bank deducted the \*proportionate amount of the assessed value of the real estate of complainant situated in the state of Utah, he neglected and refused to deduct the value of real estate owned by the bank situated without such state, and also refused to allow to certain nonresident stock-

holders deductions from the valuations of their shares of stock to the amount of their bona fide debts, though allowing deductions of that kind in favor of resident shareholders. Having tendered to the defendant what it claimed to be the lawful amount of the tax due from it, the bank brought this action to enjoin any attempt to collect the full amount of the tax as laid, and to compel acceptance of the sum which had been tendered. The trial court decided in favor of the bank. On appeal, however, the supreme court of the state held that the bank was not entitled to the relief prayed, and reversed the judgment in its favor with costs. Error was prosecuted to the judgment of reversal, and the cause is now in this court for review. 21 Utah, 324, 61 Pac. 560.

Mr. **Abbot R. Heywood** submitted the cause for plaintiff in error.

Mr. **James N. Kimball** argued the cause, and, with Mr. *George Halverson*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

\*Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court: [559]

It is urged that "by the action of the taxing officer and the supreme court of Utah

†Provisions of the Constitution of Utah relied on by plaintiff in error (Rev. Stat. Utah 1898, p. 61):

"Article XIII. Sec. 2. [What property taxable. Definitions. Revenue.]—All property in the state, not exempt under the laws of the United States or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal, and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation, represented by such stocks, has been taxed. . . .

"Sec. 3. [Legislature to provide uniform tax. Exemptions.]—The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: *Provided*, That a deduction of debts from credits may be authorized. . . ."

Provisions of the Revised Statutes of Utah relied on by plaintiff in error (Rev. Stat. Utah 1898, pp. 579, 581):

"2506. All taxable property must be assessed at its full cash value. . . ."

"2507. Bank stock. Verified statement.—The stockholders in every bank or banking association organized under the authority of this state or of the United States must be assessed and taxed on the value of their shares of stock therein in the county, town, city, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares

of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor, showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each.

"2508. Id. Deductions.—In the assessment of the shares of stock mentioned in the next preceding section each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

"2509. Id.—In making such assessment there must also be deducted from the value of such shares such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association.

"2518. What debts deductible from credits.—In making up the amount of credits which any person is required to list he will be entitled to deduct from the gross amount of such credits the amount of all bona fide debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, must be considered a debt within the intent of this section; and no person is entitled to a deduction on account of an obligation of any kind given to an insurance company



the shareholders of the Commercial National Bank of Ogden were treated contrary to the provisions of § 5219 of the Revised Statutes of the United States; and, further, that they were denied the equal protection of the laws." Subsidiarily, it is contended, first, that the assessor erroneously refused to deduct the bona fide debts of nonresident shareholders from the value of their shares of stock, contrary to the provisions of the laws of Utah and the requirements of said § 5219 of the Revised Statutes of the United States (excerpted in the margin†), and, second, that the bank was entitled to a deduction from the assessed valuation of the stock, not only of the value of its real estate situated in Utah, but the value of real estate situated outside of the limits of the state.

We will first consider the contention respecting the failure to deduct bona fide debts from the value of the stock of nonresident

for the premium of insurance, nor on account of any unpaid subscription to any institution or society, nor on account of a subscription to or instalment payable on the capital stock of any company or corporation; and no liability of any person or persons, company or corporation, as surety for another, must be deducted; and no other liability of any person or persons, company or corporation, on any bond or undertaking, must be deducted; and no deduction must be made in any case unless the party claiming such deduction discloses to the assessor, under oath, the name or names of the persons to whom such party is indebted, and the amount of such indebtedness to each, and also that such indebtedness is not barred by the statute of limitations, or, in case such indebtedness is so barred, acknowledges such indebtedness in writing, duly subscribed. No debt is to be deducted unless the statement shows the amount of such debt, as stated under oath in the aggregate. Whenever one member of a firm or one of the proper officers of a corporation has made a statement showing the property of the firm or corporation, another member of the firm or another officer need not include such property in the statement made by him; but this statement must show the name of the person or officer who made the statement in which such property is included. The fact that such statement is not required, or that a person has not made such statement under oath, or otherwise, does not relieve the property from taxation."

†Section 5219, Revised Statutes of the United States:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

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shareholders. The supreme court of Utah, referring to the provisions of the Constitution of Utah noted in the margin of the statement of facts preceding this opinion, held that as the Constitution of the state distinguished between stock and credits, and authorized only a deduction of debts from credits, shares of stock were not credits, and both resident and nonresident shareholders were not entitled to deduct bona fide indebtedness from the value of their shares of stock. This construction of the statute is binding on this court. *First Nat. Bank v. Ayers*, 160 U. S. 660, 664, 40 L. ed. 573, 574, 16 Sup. Ct. Rep. 412; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 444, 41 L. ed. 1069, 1072, 17 Sup. Ct. Rep. 629. The claim of the benefit of the provisions of § 5219 of the Revised Statutes of the United States is unavailing, for the reason that there was neither averment nor proof of facts taking the case out of the operation of recent decisions of this court. Those decisions held that the term "moneyed capital," as employed in § 5219 of the Revised Statutes, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of national banks, and that it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated. *First Nat. Bank v. Chapman*, 173 U. S. 205, 219, 43 L. ed. 669, 674, 19 Sup. Ct. Rep. 407, and cases cited.

There is obviously no merit in the further contention that reversible error was committed because of the refusal to deduct from the value of the shares of stock of the bank the assessed value of real estate owned by the bank, situate in other states than Utah. There was no proof that such a deduction was authorized by the laws of Utah in valuing shares of stock of other than national banking associations. On the contrary, the supreme court of Utah, from an examination of the several constitutional and statutory provisions respecting the subject of taxation in Utah, concluded that the only deductions which were authorized in the assessment of the shares of stock of national banks or other corporations organized and doing business in the state, were deductions from the value of the shares of the value of real estate situate in Utah. Manifestly, the purpose was to prevent double taxation by the state, a tax on the real estate as such, and a further tax thereon by a tax on the stock to the extent that such real estate entered into the value of the stock. As the national banking law, however, permits the taxation of shares of stock of a national bank in the state where the bank is domiciled, the state of domicile is, of course, entitled to collect taxes upon the full value of such shares of stock. While real estate of a bank situated outside of the state of domicile is taxed in the state of its situs, yet the value of such real estate necessarily enters into and is considered in estimating the value of the shares of stock; and to deduct the value of the real



estate would, to the extent of such deduction, reduce the real value of the shares, without a compensatory equivalent. These views and those expressed by the supreme court of Utah accord with the doctrine enunciated in *Dwight v. Boston*, 12 Allen, 316, 323, 90 Am. Dec. 149; and *American Coal Co. v. Allegany County Comrs.* 59 Md. 185, 193. In the latter case the principle was thus expressed (p. 194):

"The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the state, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this state."

[562] \*As the shares of stock were taxed as other similar property in Utah, and no discrimination was occasioned, we can perceive no ground for concluding that the refusal to deduct the value of the real estate in question constituted either a violation of § 5219, Revised Statutes, or a denial of the equal protection of the laws.

*Judgment affirmed.*

*Ex parte* ORANGE FULLER, Assignee of Manny G. Butler, and Robert E. Butler, Composing the Firm of Butler Brothers, Petitioner.†

(See S. C. Reporter's ed. 562-576.)

*Appeal—grant of new trial by lower court.*

A new trial may be granted for newly discovered evidence in an action at law, by the United States court in the Indian territory after a final decision of the case in the Supreme Court of the United States, under the authority of the Arkansas statute (Mansf. Dig. chap. 119, § 5155), which is made applicable to the United States court of the Indian territory by the act of Congress of May 2, 1890, since that section relates to new trials for grounds disclosed after the term, and requires the grounds to be set forth in the petition which shall issue against the adverse party,

†This case by the Official Reporter is entitled *Fuller v. United States*. By analogy to the *Queen Case*, 182 U. S. 456, ante, 1180, 21 Sup. Ct. Rep. 876, it would seem to be properly entitled *United States ex rel. Fuller v. Clayton*.

NOTE.—On new trials in Federal courts—see notes to *O'Connell v. Reed*, 5 C. C. A. 605; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 385.

and makes a proceeding under that section in form a new and independent suit.

[No. 7, Original.]

*Argued and Submitted April 15, 1901. Decided May 27, 1901.*

APPLICATION for mandamus to the judge of the United States court in the Indian territory to set aside an order granting a new trial, and to execute the mandate of the United States Supreme Court. *Rule discharged.*

The facts are stated in the opinion.

Messrs. **Harrison O. Shepard** and **William T. Hutchings** submitted the cause for petitioner. *Mr. Richard B. Shepard* was with them on the brief:

Had this been a suit in equity, and had the defendant below followed the ordinary practice in such cases and filed his bill of review, setting up proper new matter for a new hearing, it would still have been in the position that it is now, for the bill of review could not be entertained unless leave to file the same had been obtained from this court, in which the case was then pending.

*Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, sub nom. *Dubuque & P. R. Co. v. Litchfield*, 17 L. ed. 514; *Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Durant v. Essex Co.* 101 U. S. 555, sub nom. *Durant v. Storrow*, 25 L. ed. 961.

The reply might be, however, that under such a practice it would still not be too late to ask permission of this court to file such a bill in the lower court. A bill of review, however, can be filed only to reverse or modify a decree in chancery, and not for the purpose of obtaining new trial in suits at law for after-discovered testimony,—especially when no fraud was practised by the successful party.

2 Beach, Modern Eq. Pr. § 852; 1 Foster, Fed. Pr. § 354.

Where, as in this case, the point was well known to the attorney, the permission is always obtained at the final hearing, and the proper practice is to insert it in the decree and mandate issued by the appellate court.

*Watson v. Stevens*, 3 C. C. A. 411, 5 U. S. App. 215, 53 Fed. 31.

The remedy provided by Mansf. Dig. § 5155,—a part of the pleading and practice act in force in this territory,—is exclusive in suits at law. We are bound by the construction put by the supreme court of Arkansas upon that statute before it was put in force in this jurisdiction.

*Sanger v. Flow*, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; *Appolos v. Brady*, 1 C. C. A. 299, 4 U. S. App. 209, 49 Fed. 401; *McClellan v. Pyeatt*, 1 C. C. A. 613, 4 U. S. App. 319, 50 Fed. 686; *Rainwater Boogher Hat. Co. v. Malcolm*, 2 C. C. A. 476, 10 U. S. App. 249, 51 Fed. 734; *Hogg v. Emerson*, 6 How. 483, 12 L. ed. 524; *Stutsman County v. Wallace*, 142 U. S. 295, 35 L. ed. 1019, 12 Sup. Ct. Rep. 227.



In actions at law the plaintiff in error must dismiss his appeal before he can proceed under Mansf. Dig. chap. 119, § 5155, and in suits in equity he must first get leave from the appellate court for permission to file his bill of review.

*Jacks v. Adair*, 33 Ark. 166; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578.

Under the Federal practice the docketing of the case in the appellate court removes it from all control or supervision on the part of the court below.

*Citizens' Bank v. Farwell*, 6 C. C. A. 30, 12 U. S. App. 419, 56 Fed. 539; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 35, 37 L. ed. 987, 14 Sup. Ct. Rep. 4; *Kimberly v. Arms*, 40 Fed. 548.

Newly discovered evidence which is largely cumulative, and to a very large degree intended to impair the credibility of former witnesses in the trial in the cause, is insufficient to warrant a new trial, whether sought by bill of review or otherwise.

*Southard v. Russell*, 16 How. 549, 14 L. ed. 1052.

Mr. James Hagerman argued the cause, and, with Messrs. Clifford L. Jackson and Joseph M. Bryson, filed a brief for respondent:

Under a statute very similar to the Arkansas statute, this court has held that the trial court could grant a new trial notwithstanding the mandate of this court has been issued affirming the judgment of the trial court.

*Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. ed. 507.

And similar statutes have been uniformly construed by the state courts as giving the parties the right to file their petition for a new trial in the lower court without leave from the appellate court which may have affirmed the judgment.

*Cook v. Smith*, 58 Iowa, 607, 12 N. W. 617; *Henry v. Allen*, 147 N. Y. 346, 41 N. E. 694; *Voisin v. Commercial Mut. Ins. Co.* 56 Hun, 215, 9 N. Y. Supp. 267, Aff'd in 123 N. Y. 120, 9 L. R. A. 612, 25 N. E. 325; *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274; *Vernier v. Knauth*, 7 App. Div. 57, 39 N. Y. Supp. 784; *Smith v. Matthews*, 21 Misc. 150, 47 N. Y. Supp. 96; *Stokes v. Stokes*, 34 N. Y. Supp. 423, 54 N. Y. Supp. 319; *Nugent v. Metropolitan Street R. Co.* 46 App. Div. 105, 61 N. Y. Supp. 476; *Naglee v. Spencer*, 60 Cal. 10; *Rayner v. Jones*, 90 Cal. 78, 27 Pac. 24; see also *Carpentier v. Williamson*, 25 Cal. 167; *Chase v. Evoy*, 58 Cal. 352; *McDonald v. McConkey*, 57 Cal. 326; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753, 40 N. W. 298; *Scott v. Scott*, 82 Ky. 328; *Louisville & N. R. Co. v. Whitley County Ct.* 100 Ky. 413, 38 S. W. 678; *Moore v. Coates*, 35 Ohio St. 185; *State ex rel. Turner v. Ozaukee County Circuit Ct.* 71 Wis. 595, 38 N. W. 192; *Com. v. McElhaney*, 111 Mass. 439.

The three-year period of time mentioned in the Arkansas statute within which petitions for new trial may be filed, runs from the date of rendition of the judgment in the trial court, and not from the rendition

of the judgment in the supreme court in cases appealed to it.

*Jacks v. Adair*, 33 Ark. 161.

The statute in question extended to cases at law a new remedy and in derogation of the common-law principle that the judgments of the circuit court at law cannot be altered by the same court after the close of the term, except by bill in chancery in a direct attack for fraud, and does not change the rule in equity as to bills of review.

*Ibid.*

The ordinary motion for new trial at term time rests in the sound discretion of the court, and is not subject to review.

*Armstrong v. State*, 54 Ark. 364, 15 S. W. 1036; 14 Enc. Pl. & Pr. tit. *New Trial*; *Artman v. West Point Mfg. Co.* 16 Neb. 572, 20 N. W. 873; *Hines v. Driver*, 89 Ind. 339.

But an appeal lies from the judgment or order on a petition for new trial under the statute in question.

14 Enc. Pl. & Pr. tit. *New Trial*; *Iler v. Darnell*, 5 Neb. 192; *Axtell v. Warden*, 7 Neb. 186; *Kruger v. Adams & F. Harvester Co.* 9 Neb. 526, 4 N. W. 252; *Johnson v. Parrotte*, 34 Neb. 26, 51 N. W. 290; *Hines v. Driver*, 89 Ind. 339; *Sanders v. Loy*, 45 Ind. 229; *Harvey v. Fink*, 111 Ind. 254, 12 N. E. 39; *Hill v. Roach*, 72 Ind. 58; *Soper v. Medberry*, 24 Kan. 135; *Gottlieb Bros. v. Jasper*, 27 Kan. 773; *Conroy v. Perry*, 26 Kan. 473; *Sexton v. Lamb*, 27 Kan. 432; *Duffitt v. Crozier*, 30 Kan. 150, 1 Pac. 69.

The same distinction is made between motions for new trials at term time and petitions therefor after term time,—the latter being an independent action.

*First Nat. Bank v. Murdough*, 40 Iowa, 26.

The practice in equity in Arkansas, and in nearly all the other state courts, is not as stated by the opposing counsel. The prevailing practice is for the trial court, and not the appellate court, to grant leave to file bills of review on grounds of newly discovered evidence.

*Webster v. Diamond*, 36 Ark. 538; *Jacks v. Adair*, 33 Ark. 161; 3 Am. & Eng. Enc. Pl. & Pr. 574.

It is true that in the Federal courts the practice, founded on dictum in *Southard v. Russell*, 16 How. 547, 14 L. ed. 1053, has generally been the reverse. That dictum was apparently based on a misapprehension of the English rule.

*Putnam Clark*, 35 N. J. Eq. 145; *Story*, Eq. Pl. 418; *Mit. & Tyler*, Eq. Pl. & Pr. 781; *Adams*, Eq. 416.

And while the Federal courts have generally followed the dictum, it has only been in form.

*Seymour v. White County*, 34 C. C. A. 240, 92 Fed. 115; *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 865.

In *Ricker v. Powell*, 100 U. S. 104, 25 L. ed. 527, the circuit court of the United States for the southern district of Illinois entertained an application for leave to file a bill of review in that court, notwithstanding

ing its decree had been affirmed in this court.

Permission given the trial court to grant a new trial on newly discovered evidence after term does not amount to an appeal from the decision of this court.

*Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632.

In order to give full effect to U. S. Rev. Stat. § 1088, the court of claims must have power to grant a new trial notwithstanding its former judgment or the affirmance thereof, for it explicitly provides that a new trial may be granted at any time within three years after final judgment.

*Belknap v. United States*, 150 U. S. 590, 37 L. ed. 1192, 14 Sup. Ct. Rep. 183.

When the court of claims grants a new trial under the act of Congress in question and while an appeal therefrom is pending in this court, the judgment is vacated and the court of claims resumes control of the case and the parties.

*United States v. Young*, 94 U. S. 258, 24 L. ed. 153.

There is no time limitation upon this court as to its power to now grant the respondent the privilege to grant a new trial.

*Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 911.

[563] \*Mr. Justice Harlan delivered the opinion of the court:

Orange Fuller, assignee of Butler Brothers, brought an action on the 23d day of January, 1892, in the United States court in the Indian territory against the Missouri, Kansas, & Texas Railway Company, to recover the damages alleged to have been sustained in consequence of the negligence of the defendant resulting in the destruction of certain property of Butler Brothers by fire.

On the 1st day of May, 1894, the venue of the case was changed to the second judicial division of the territory, now the central district, and the result of a trial before the court and a jury was a verdict and judgment in favor of the plaintiff for \$8,500.

The judgment was superseded, and the cause was taken to the United States circuit court of appeals for the eighth circuit, where the record was filed April 3d, 1895. In that court the judgment was affirmed on the 30th day of December, 1895. 18 C. C. A. 641, 36 U. S. App. 456, 72 Fed. 467.

The judgment of affirmance was superseded, and the case was brought to this court upon writ of error sued out by the railway company, the transcript of record being filed here on March 10th, 1896. In this court the judgment of the circuit court of appeals was affirmed January 3d, 1898. 168 U. S. 707, 42 L. ed. 1215, 18 Sup. Ct. Rep. 944. Our mandate was issued March 3d, 1898, and filed in the United States court in the Indian territory on July 22d, 1898.

On the 20th day of April, 1896, while the case was pending in this court, the railway company filed in the United States court in the Indian territory a petition for rehearing upon the ground of newly discovered evi-

dence. Subsequently, at different dates, amended petitions were filed by the company for a new trial. To those amended petitions answers were made, and it was objected that the court was without jurisdiction or authority to grant a new trial, and that it could not consider the alleged newly discovered evidence.

\*On the 15th of January, 1900, after the[564] filing in the court of original jurisdiction of the mandate of this court, Judge Clayton of that court granted the application of the railway company and made an order for a new trial.

It should be here stated that in that court there were other cases of a like character with the present case,—all growing out of the fire on account of which the present action was brought. One of those cases was *Missouri, K. & T. R. Co. v. Wilder*. In that case the United States court of appeals for the Indian territory adjudged that the plaintiff was not entitled to recover. 53 S. W. 490.

In the order granting a new trial in the present case it was stated: "Now at this day comes the above-named defendant, and in support of the fourth amended petition for a new trial in this case files certified copy of opinion of the United States court of appeals for the Indian territory, in the case of *Missouri, K. & T. R. Co. v. Wilder*; and the court having fully considered the said amended petition for a new trial in this case, which was heretofore continued by agreement between counsel to this, the December, 1899, term of this court, together with the evidence thereon and the briefs of counsel filed both in support of and in opposition to said amended petition for new trial; and the court, having been fully advised in the premises find that the original petition for new trial was filed on the 20th day of April, 1896, in accordance with § 5155 of Mansfield's Digest of the Statutes of Arkansas, extended over the Indian territory by act of Congress, May 2d, 1890; and that summons was duly issued and served upon the plaintiff as required by said statute; and that the said plaintiff has duly entered his appearance in these proceedings, and filed answer to the original petition for new trial, as well as to the different amendments thereto, as such amendments have been based upon such additional evidence as the defendant alleges was discovered subsequent to the filing of the original petition for new trial and amended petitions for new trial respectively; and the court further finds that the evidence fully sustains the said petition for new trial, and that under the statute hereinbefore referred to, \*and in[565] view of the opinion of the United States court of appeals for the Indian territory in the case of the *Missouri, K. & T. R. Co. v. Wilder*, a companion case to this, that said petition should be sustained. Wherefore the court orders that the said petition be sustained and a new trial be granted."

After setting out the above, the return made by Judge Clayton to the rule herein continued: "Respondent would respectfully



further show that it appeared upon the hearing of the petition for new trial in the *Orange Fuller Case* that the defendant railway company had used all possible diligence to discover the actual origin of the fire upon which that suit was founded, prior to the time of the trial of that case, and that it was to a large extent prevented from so doing by the strong influence which the plaintiffs in said case exerted over the minds of the people in the community where the fire occurred, and also by the actions of one of the plaintiffs, who, it was shown, urged several of the witnesses to conceal what information they had with reference to the origin of the fire; and that after the trial of the *Orange Fuller Case* in the district court the said railway company continued its efforts to discover the real origin of the fire, and as the result of its efforts it produced reliable new witnesses who proved by newly discovered and strong circumstantial evidence that the fire was set out through accident by one Dole Baugh and also proved by the admission of the said Dole Baugh, made while the fire was burning, that he had so set it out; and it was this evidence which largely induced the United States court of appeals for the Indian territory to render the opinion of reversal heretofore cited in the said *Wilder Case*, as well as induce the plaintiffs in the companion cases to dismiss their cases; and that not only the judges of the district court and the United States court of appeals for the Indian territory, but the plaintiffs in the above suits, became satisfied that these suits were all matters of great injustice and wrong, and satisfied this respondent that the original judgment in the *Orange Fuller Case* was also a great injustice and wrongfully obtained, and had the actual truth been fully known, and not purposely concealed, that the judgment in the [566] *Orange Fuller Case* would not have been affirmed by the United States circuit court of appeals for the eighth circuit or this honorable court; and your respondent further realized that a greater injustice and wrong would be done by permitting the plaintiffs in this said *Orange Fuller Case* to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light."

The present proceeding is an application for leave to file a petition for a mandamus commanding the judge of the United States court in the Indian territory to set aside the above order of January 15th, 1900, granting a new trial, and to execute the mandate of this court.

The question presented is whether the court of original jurisdiction had authority upon newly discovered evidence to grant to the railway company a new trial after the final decision in this court.

By the act of Congress of May 2d, 1890, providing a temporary government for the territory of Oklahoma, and enlarging the jurisdiction of the United States court in 182 U. S.

the Indian territory, and for other purposes, it was declared:

"§ 31. That certain general laws of the state of Arkansas in force at the close of the session of the general assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating . . . to pleadings and practice, chapter 119." 26 Stat. at L. 81, 94, chap. 182.

In Mansfield's Digest of the Statutes of Arkansas, chap. 119, will be found the following sections under the head of "Pleadings and Practice:"

"§ 5151. A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a \*new trial granted, on the [567] application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: . . . Second. Misconduct of the jury or prevailing party. . . . Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

"§ 5153. The application for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause mentioned in subdivision 7 of § 5151, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

"§ 5154. The application must be made by motion, upon written grounds, filed at the time of making the motion. The grounds mentioned in the 2d, 3d, and 7th subdivisions of § 5151 must be sustained by affidavits showing their truth, and may be controverted by affidavits.

"§ 5155. Where grounds for new trial are discovered after the term by which the verdict or decision was rendered, the application may be made by petition filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court. The evidence may either be by depositions or by witnesses examined in court. But no such application shall be made more than three years after the final judgment was rendered."

Many of the cases cited by the petitioner have no application to the present proceeding. They relate to suits in equity and to the power of the court of original jurisdiction in an equity suit to prevent or stay the



execution of the mandate of an appellate court. There can be no doubt as to what is the rule recognized in cases of that kind in the courts of the United States or in courts established by its authority.

In *Southard v. Russell*, 16 How. 547, 571, 14 L. ed. 1052, 1062, it was said: "Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits." So, in *United States v. Knight*, 1 Black, 488, 489, *sub nom. United States v. Moorehead*, 17 L. ed. 80: "The defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered." In *Re Sanford Fork & Tool Co.* 160 U. S. 247, 255, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291, 293, the court said: "When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. ed. 1167, 1169; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." See also *Re Potts*, 166 U. S. 263, 267, 268, 41 L. ed. 994, 996, 17 Sup. Ct. Rep. 520.

The action against the railway company was one at law, and whether the court in the Indian territory had authority to grant the new trial of which complaint is made depends upon the Arkansas statute, which, by the act of Congress, was made a law of the Indian territory. Sections 5153 and 5154 evidently refer to the ordinary motion or application for a new trial made during the term at which the verdict of the jury or the decision of the court is rendered. Section 5155 relates to new trials for grounds disclosed after the term, and requires such grounds to be set forth in a petition, summons upon which shall issue against the adverse party. A proceeding under that section is, in form, a new, independent suit, al-

though the statute requires the application to be summarily decided by the court.

These statutory provisions apply to actions at law, not suits in equity. This view is supported by the decision of the supreme court of Arkansas in *Jacks v. Adair* (1878) 33 Ark. 161, 167. Referring to the statute giving authority to grant a new trial after the term upon the ground of newly discovered evidence, that court said: "The correct view of the statute in question seems to be this: That it extends to cases at law a new remedy, without taking away any which existed in equity, but as to the latter being cumulative, where any difference might exist. It is noticeable that the word 'decrees' is not used, which is the apt and ordinary designation of final orders in equity; and there are other indications in the language and context of the provisions in question, that they were primarily intended for cases at law, and for new trials of facts found by a jury, or a court sitting as such."†

We perceive no reason to doubt that the action of the court of original jurisdiction was justified by the statute. So that the only question remaining is whether it was competent for Congress to confer upon such court, established under the authority of the United States, the power to grant a new trial in an action at law upon grounds discovered after the expiration of the term at which the verdict or decision was rendered. Some light is thrown upon this question by the cases in this and in other courts.

*Ex parte Russell*, 13 Wall. 664, 668, 20 L. ed. 632, 634, was an action in the court of claims to recover compensation for the seizure and use by the United States military authorities of certain steamers belonging to the claimant. The case involved the construction and effect of the 2d section of the act of June 25th, 1868, \*which provided that the court of claims, "at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law." [15 Stat. at L. 75, chap. 71.] In the court of claims an application for a new trial was made by the United States when the case was pending in this court. The former court dismissed the application for want of jurisdiction, on the ground, in part, that after it was made the mandate of this court affirming the original judgment against the United States was filed in the court of claims. From that order an appeal was allowed to

†That case was based upon §§ 4688, 4690, 4691, and 4692, *Gantt's Digest* (1874), which are the same as the above sections in *Mansfield's Digest*.



this court, and one of the questions presented was whether the court of claims should have dismissed the application for a new trial for want of jurisdiction. This court observed that the court of claims erred in dismissing the application, and after referring to the causes which probably induced the passage of the act of June 25th, 1868, said: "But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the court of claims itself, and the giving to parties the privilege of suing the government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit. The section in question was undoubtedly intended to give the government an advantage which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the court of claims, on behalf of the United States, at any time while a suit is pending before, or on appeal from, said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the

[571] \*court that the government has been defrauded or wronged. . . . It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practised upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud. We are of opinion, therefore, that the court of claims had jurisdiction to grant a new trial, notwithstanding the filing of the mandate of this court." Chief Justice Chase and Mr. Justice Clifford dissented from the opinion because, in their judgment, "the act of Congress did not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate from the court." In *Ex parte United States*, 16 Wall. 699, 703, 21 L. ed. 507, 509, the above case was again before this court, and a peremptory mandamus was awarded requiring the court of claims to hear and determine the application for a new trial.

In *United States v. Young*, 94 U. S. 258, 260, 24 L. ed. 153, it appeared that a new trial was granted by the court of claims, in a suit at law, while an appeal was pending here from the original judgment. This court said: "The court of claims, by granting a new trial, has resumed control of the cause and the parties. This it had the right to do. Such a power may be somewhat anomalous, but it is expressly given; and every person when he submits himself to the jurisdiction of that court for the prosecution of his claim subjects himself to its operation. The proceedings under which the new trial was

obtained are now a part of the record below, and, after judgment is finally rendered, may be brought here by appeal for review."

In *Belknap v. United States*, 150 U. S. 588, 590, 591, 37 L. ed. 1191, 1192, 14 Sup. Ct. Rep. 183, 184, the court observed that while ordinarily the court of claims would be without power to grant a new trial at a term subsequent to that at which the original judgment was rendered, it had such power under § 1088 of the Revised Statutes,—which is the same in substance as the 2d section of the above act of June 25th, 1868. The court said: "In order to give full effect \*to this statute the court of claims must [572] have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years."

In Iowa there is a statute giving the court power to grant a new trial on grounds discovered after a verdict or decision is rendered—the petition for the new trial to be filed not later than one year after final judgment, and the case made by it tried as other cases. In *Cook v. Smith*, 58 Iowa, 607, 608, 12 N. W. 617, the supreme court of that state said: "The right to apply for, and the power of the court to entertain, jurisdiction of the application during the time limited in the statute, are absolute and unconditional. There is no such inconsistency between the two proceedings as to require the one to be abated because the other is pending. It may be both should not be actively prosecuted at the same time, for the determination of one may render a decision in the other unnecessary. Upon application this would no doubt be controlled by the courts. Suppose the ground upon which a new trial was asked was not discovered until after the appeal was taken, on the last day allowed therefor. would such appeal deprive the court of the power to entertain jurisdiction of a petition for a new trial? Clearly not, we think, for during the time limited in the statute the power of the court and the right of the party are unconditional. There are cases where neither party is satisfied with the judgment below. Would an appeal by one party oust the court of the power to entertain and grant a new trial on the application of the other party? We think not."

In a case arising under a statute similar to the one in Arkansas, the supreme court of California said: "The appeal from the judgment did not divest the trial court of jurisdiction to hear and determine the motion for a new trial." *Naglee v. Spencer*, 60 Cal. 10. In *Rayner v. Jones*, 90 Cal. 78, 81, 27 Pac. 24, 25, the same court said: "A notice of motion for a new trial was served and filed in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below \*had [573] lost jurisdiction to determine it. This view of the matter is untenable, and the court

should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal." See also *Carpentier v. Williamson*, 25 Cal. 154, 167; *McDonald v. McConkey*, 57 Cal. 325; *Chase v. Evoy*, 58 Cal. 348; *Soott v. Scott*, 82 Ky. 328; *Duffitt v. Crozier*, 30 Kan. 150, 1 Pac. 69; *Hines v. Driver*, 89 Ind. 339; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753, 40 N. W. 298.

The same principles have been recognized in criminal cases. In *State ex rel. Turner v. Ozaukee County Circuit Court*, 71 Wis. 595, 38 N. W. 334, which was a criminal case, an application was made for a new trial after the affirmance of the original judgment. In that state it was provided by statute that "the circuit court may at the term in which the trial of any indictment or information shall be had, or within one year thereafter, and in either case before or after judgment, on the petition or motion in writing of the defendant, grant a new trial for any cause for which, by law, a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court may direct." [Wis. Rev. Stat. § 4719.] The supreme court of Wisconsin said: "It appears that a proper motion was made within one year from the judgment, upon the grounds addressed to the discretion of the circuit court, and a new trial was undoubtedly granted under the special authority conferred by the above statute; and the question now is, Had the court power to grant it? We can only consider the question of the power or jurisdiction of the court in the matter, not whether it exercised that power wisely or granted the motion on insufficient grounds; for the court may have erred, but error does not affect its jurisdiction. This statute was probably borrowed from Massachusetts. See Mass. Pub. Stat. 1882, chap. 214, § 28; *Com. v. Peck*, 1 Met. 428; *Com. v. McElhancy*, 111 Mass. 439; *Com. v. Scott*, 123 Mass. 418. Also Terr. Stat. Wis. 1839, p. 377, § 6; Rev. Stat. 1849, chap. 149, § 6; Rev. Stat. 1858, chap. 180, § 6. We do not well see upon what grounds the power of the court to grant the new trial can be denied if the provision is valid. The fact that the judgment has been affirmed by [574] this court furnishes no sufficient \*reason for denying that power. It is said by the affirmance of the judgment it became a finality, a final determination of the cause and sentence of the law. That view certainly would be correct had not the legislature conferred this special authority to grant a new trial upon a proper cause shown. On affirmance of a judgment in a civil case no new trial could be granted unless the statute authorized it. Only where the statute does authorize it can a new trial after affirmance be granted, either in a civil or criminal cause. In actions of ejectment the circuit court can grant a new trial even after affirmance by this court, and this by virtue of a statute upon the subject. *Haseltine v. Simpson*, 61 Wis. 427, 21 N. W. 299, 302. 1236

Consequently we can perceive no sufficient grounds or reasons for denying the validity of the statute to grant a new trial after judgment has been affirmed in this court, any more in a criminal than in a civil cause."

In *Com. v. McElhancy*, 111 Mass. 439, 441, 443, which was an indictment for murder, an application was made by petition for a new trial on the ground of newly discovered evidence. The question was raised by the commonwealth whether the application could be entertained after the accused had been sentenced to death and the executive warrant for execution thereof issued. The question depended upon § 7 of the General Statutes of Massachusetts, chap. 173, providing that "the supreme judicial court and superior court may, at the term in which the trial of any indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on such terms or conditions as the court shall direct." The supreme judicial court of Massachusetts said: "At the time of the passage of the General Statutes, therefore, this court had no original criminal jurisdiction, except of capital cases; and in these cases sentence has always been passed within a very short time after the trial and conviction, and a copy of the record of the conviction and sentence forthwith transmitted to the governor, in accordance with the Revised Statutes, chap. 139, § 11, and the General Statutes, chap. 174, § 24; \*and yet the [575] General Statutes, chap. 173, § 7, in terms authorize a petition for a new trial to be presented to this court at any time within one year after the trial. The unavoidable conclusion is that so long as that year has not elapsed, and the sentence has not been carried into execution, the court is authorized to entertain a petition for a new trial."

In no one of the above cases, nor indeed in any case to which our attention has been called, was there any suggestion of the want of power in the legislature to authorize the granting of a new trial in an action at law upon evidence discovered after the term at which the verdict or decision was rendered. So far as the power of Congress is concerned we cannot conceive that legislation of that character in respect of cases at law, as distinguished from cases in equity, infringes upon any right secured by the Constitution of the United States.

In the case now before us it appears that the operation of the original judgment was suspended by a supersedeas. But the statute, reasonably construed, does not declare that the right to apply for a new trial upon newly discovered evidence after the term shall be any the less when the original judgment is superseded. Nor does it declare that a new trial of an action at law shall not be applied for or granted while the case is pending in the appellate court. It is true that, in the absence of legislation to the contrary, neither the filing of a petition for



new trial nor the granting of a new trial by the court of original jurisdiction, after the term and upon newly discovered evidence, interferes with the power of the appellate court to proceed with the hearing and determination of the case upon the record before it. But the operation and effect of its final judgment may be ultimately controlled by the disposition made by the court of original jurisdiction of an application for a new trial made in conformity with a statute. If this be regarded as an anomalous rule of procedure in actions at law, it is sufficient to say that Congress, in its wisdom and in order to promote the ends of justice, saw proper to prescribe it; and we know of no reason to question the authority it has exercised upon this subject. All embarrassment in the present case was avoided by the fact that the new trial of which petitioner complains [576] was not granted while the original case was in this court, nor until after our mandate had been filed in the court of original jurisdiction.

Our conclusions are: (1) That the statute of Arkansas in question, which was made by Congress the law of the Indian territory, is to be held applicable only to actions and proceedings at law in the courts of that territory, as distinguished from suits or proceedings in equity; (2) that an application under that statute, within the time prescribed, for a new trial in an action at law, upon grounds discovered after the term at which the verdict or decision was rendered, was a matter of right, and did not require the leave of any court,—the application constituting, on appeal, a new action, in which summons or process would regularly issue against the adverse party, and which must be heard and determined by the court upon evidence adduced by the parties.

It results that the court of original jurisdiction acted within the authority conferred upon it, and the rule for a *mandamus* compelling it to set aside the order granting a new trial must be discharged.

It is so ordered.

DISTRICT OF COLUMBIA, *Plff. in Err.*,  
v.  
HOSEA B. MOULTON.

(See S. C. Reporter's ed. 576-583.)

*Trial—question of negligence—highways—steam roller on street—notice.*

1. The question of negligence or no negligence is one of law for the court, where but one in-

NOTE.—On the province of the court and jury in determining the question of negligence—see notes to *Roux v. Bldgett & D. Lumber Co.* (Mich.) 13 L. R. A. 728; *Emry v. Raleigh & G. R. Co.* (N. C.) 15 L. R. A. 332.

As to when a verdict may be directed by the court—see note to *Grand Chute v. Winegar*, 21 L. ed. U. S. 174.

As to liability of municipality for injuries caused by horse becoming frightened at object in the highway—see *Bowen v. Boston* (Mass.) 15 L. R. A. 365, and note.  
182 U. S.

ference can reasonably be drawn from the evidence.

2. Leaving a steam roller close to the curb on the street where it is in use, for two days after it is broken, without any change in its appearance to enhance the danger of frightening animals, except by putting over it the usual canvas cover to protect it from the weather, does not present a case of negligence for the jury, when a horse becomes frightened by its presence in the street.
3. No other notice to travelers of the presence of a steam roller on a street is needed than a view of the roller itself, when it can be seen in ample time to avoid it.

[No. 224.]

*Argued April 9, 10, 1901. Decided May 27, 1901.*

IN ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment for plaintiff in an action for negligence. *Reversed.*

See same case below, 15 App. D. C. 363.

Statement by Mr. Justice White:

\*This action was begun by the defendant in [577] error in the supreme court of the District of Columbia. In substance he asserted in his declaration a right to recover from the District of Columbia a specified sum, upon the ground that by its negligence, on November 26, 1896, he had sustained serious personal injury. The negligence averred consisted in this,—that for a space of two days prior to and including the date named the District had negligently and knowingly left upon a public highway known as Park street a large steam roller, which was calculated to frighten horses of ordinary gentleness; and while plaintiff was driving along said street, with due care, in a carriage drawn by a horse of that disposition, the animal was frightened and rendered unmanageable by the steam roller, and in the struggles of the horse one of the wheels of the carriage was broken, plaintiff was thrown out upon the ground with great force, and he sustained the injuries for which recovery was asked. Defendant filed a plea of the general issue.

The evidence most favorable to the contention of the plaintiff tended to show the following: Park street is a public highway in the northwest section of the city of Washington, commencing at Fourteenth street and running westwardly. For several days prior to the accident in question a steam roller had been used in connection with the work of resurfacing Park street with macadam. This roller was of the kind usually employed in constructing macadamized gravel roads. It had three wheels, the tread of the rear wheel being about 8 feet, which was its extreme width. The machine was about 8 feet long and about 5 or 6 feet high. The smoke-stack was a little higher than the other part of the machine. While the roller was in use, on the forenoon of the day before the accident hereinafter referred to, it "broke down." The nature of the injury to the roller does not appear, otherwise than as it may be inferred, from the fact that the roller

was subsequently removed by horse power, that the machinery was simply disabled. On becoming out of order, the roller was placed close to the south curb of Park street, from 20 to 50 feet west of Pine street—a street 50 feet in width—and distant about 900 feet westwardly from Fourteenth street. Over [578] the roller was placed a canvas cover. The roadway proper, at the point where the roller was stationed, was about 28 feet wide, and there was ample room for the passage of vehicles between the roller and the north-erly side of Park street.

About 3 o'clock on the afternoon of November 26, 1896 (Thanksgiving Day), plaintiff drove into Park street from Fourteenth street, and, as he did so, saw the steam roller. The horse he was driving was one which the plaintiff had owned for several years, was regarded as of an ordinarily gentle disposition, and had several times been driven safely past steam rollers when they were in actual operation. Plaintiff guided his horse, intending to pass by the roller in the space to the right thereof, but on approaching Pine street the horse became restive from the flapping of the canvas cover on the roller, or from some other cause, and when about opposite the middle of Pine street became unmanageable, reared, and upset the vehicle, throwing out and injuring the plaintiff. The evidence also tended to show that other horses in passing the roller had exhibited fear.

The case was tried to a jury, and resulted in a verdict for the plaintiff. On appeal the judgment was affirmed by the court of appeals of the District. 15 App. D. C. 363.

Mr. Andrew B. Duvall argued the cause, and, with Mr. Clarence A. Brandenburg, filed a brief for plaintiff in error:

A city has the right to use any proper implement, even run by steam, for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, it is not liable for damages occasioned by a horse becoming frightened thereat.

*Sparr v. St. Louis*, 4 Mo. App. 572; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522.

The steam roller was not *per se* an object calculated to frighten horses of ordinary gentleness. A box freight car standing still at a highway crossing has been held as matter of law, not of itself a frightful object to horses of ordinary gentleness.

*Gilbert v. Flint & P. M. R. Co.* 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868.

It has been held that a large vehicle used as a daguerrean saloon, standing partly within the limits of a highway, but outside of and several feet from the traveled path, is not a defect in the highway, which will entitle a traveler to recover against a town damages for the injuries sustained by him, if his horse while driven by himself is frightened thereby, and becomes unmanageable, and runs for some distance and upon an embankment, so that the carriage is

broken and he himself thrown upon the ground and injured.

*Keith v. Easton*, 2 Allen, 552.

The body of a common riding wagon turned up on edge at the side of the road cannot be regarded as so likely to frighten horses as to render the town liable for damages done by a horse frightened at it, in case it is permitted to remain there. Horses are accustomed to pass such buggies many times daily when traveling the highways, and to see them at home.

*Nichols v. Athens*, 66 Me. 402; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325.

The liability, if any, arises out of the fact that the obstructions are permitted to be there for an unlawful purpose.

*Cairncross v. Pewaukee*, 78 Wis. 66, 10 L. R. A. 473, 47 N. W. 13.

A stream of water thrown into a street by a fireman is not a defect within the meaning of the highway law.

*Edgerly v. Concord*, 59 N. H. 78.

The liability would attach if the objects were calculated to frighten ordinary, gentle, and well-trained horses.

*Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496.

If the horse of a traveler becomes frightened at an object in the highway, which is an obstruction and defect therein, and by reason of such fright, without coming in contact with it, runs away and overturns the carriage at a place where there is no defect, the city or town is not liable for injury so sustained by the traveler.

*Cook v. Charlestown*, 98 Mass. 80; *Cook v. Montague*, 115 Mass. 571; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 338, 21 N. W. 873; *Cain v. Ohio Valley Teleph. Co.* 20 Ky. L. Rep. 855, 47 S. W. 754; *Fulton County Comrs. v. Rickel*, 106 Ind. 501, 7 N. E. 220.

City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public; and where at the point of the accident the street was abundantly wide and well repaired to enable persons with the exercise of ordinary care to avoid the injury the city will not be responsible merely because of the existence of a defect in the untraveled portion of the street.

*Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Brown v. Glasgow*, 57 Mo. 156; *Kingsbury v. Dedham*, 13 Allen, 186, 90 Am. Dec. 191; *Perkins v. Fayette*, 68 Me. 152; *Carpenter, J.*, dis. op. in *Young v. New Haven*, 39 Conn. 442; *Adams, Ch. J.*, dis. op. in *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706.

The only restriction upon the exercise of the municipal authority over the streets in making public improvements therein is that the work shall be done in a proper and reasonably careful manner to avoid injury, and that the means and instruments employed in doing the work shall be reasonably adapted to the accomplishment of the undertaking, and not be of an unnecessarily dangerous character.



*District of Columbia v. Ashton*, 14 App. D. C. 571.

One cannot assume a position of danger, and then complain of injury from negligence which could cause no injury except to one in that dangerous position.

*Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125.

Plaintiff is guilty of contributory negligence which prevents him from recovering, where he has knowledge of the dangerous condition of a street, and pursues his course thereon in preference to taking another street, which he could do with safety, although with inconvenience.

*District of Columbia v. Brewer*, 7 App. D. C. 113.

The plaintiff can no more recover in this case than one who, knowing the defective condition of a sidewalk, ventures upon it without taking the precaution necessary to prevent a fall.

*Aurora v. Brown*, 12 Ill. App. 122; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853; *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Black v. Manistee*, 107 Mich. 60, 64 N. W. 868; *Grandorf v. Detroit Citizens' Street R. Co.* 113 Mich. 496, 71 N. W. 844.

Reasonable time for occupation of the street by the roller was a question of law.

*Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Nunez v. Dautel*, 19 Wall. 560, 22 L. ed. 161; 19 Am. & Eng. Enc. Law, 640.

Actual knowledge on the part of the plaintiff of the presence of the roller in Park street rendered unnecessary any warning, sign, or barricade; and the court erred in holding that the municipality was liable unless it had "someone to give warning of this roller by night and by day."

*Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999.

**Messrs. A. S. Worthington and Charles L. Frailey** argued the cause and filed a brief for defendant in error:

When a municipal corporation permits an object naturally calculated to frighten horses of ordinary gentleness to remain within the limits of a highway maintained by that corporation, for an unreasonable length of time, and an accident happens by reason of the fright of a horse at such object, the town or city is liable in an action for damages therefor, even though the object be so far removed from the traveled path as to avoid the danger of collision with it, the plaintiff in such case being, of course, in the exercise of due care.

*Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518; *Chicago* 182 U. S.

*v. Hoy*, 75 Ill. 530; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *North Manheim Twp. v. Arnold*, 119 Pa. 389, 13 Atl. 444; *Ayer v. Norwich*, 39 Conn. 377, 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; *Young v. New Haven*, 39 Conn. 435; *Bartlett v. Hooksett*, 48 N. H. 18; 2 Dill. Mun. Corp. § 1011, and note; 2 Beach, Pub. Corp. § 1513, and cases cited.

The unreasonableness of the length of time which the district allowed the roller to remain in Park street was a question which the jury were to determine under all the circumstances before they could determine the negligence of the plaintiff in error.

*Young v. New Haven*, 39 Conn. 435; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396.

Persons in sudden emergencies, and called to act under peculiar circumstances, are not held to exercise the same degree of caution as in other cases.

*Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 436.

The Massachusetts rule is not in accord with the great weight of authority. Even in some of the New England states, where actions of this kind are statutory, as in Massachusetts, the rule that unless there is actual contact between the vehicle and the defect in the highway, and injuries resulting therefrom, no action will lie, announced by that state, is not followed.

*Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Ayer v. Norwich*, 39 Conn. 377, 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Bartlett v. Hooksett*, 48 N. H. 18.

\*Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

That the District of Columbia is not an insurer of the safety of travelers upon its streets is, of course, unquestioned. This being so, we think the lower courts erred in upholding the liability of the District for the injuries sustained by the plaintiff, under the circumstances disclosed in the record.

The steam roller in question had been brought to the place where the accident occurred, for a lawful purpose, viz., that of performing a duty enjoined upon the district to keep in repair the streets subject to its control. The use of an appliance such as a steam roller was a necessary means to a lawful end,—a means essential to the performance of a duty imposed by law. It must therefore follow that if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*. *Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999; *Morton v. Frankfort*, 55 Me. 46; *Cairncross v. Pewaukee*, 78 Wis. 66, 10 L. R. A. 473, 47 N. W. 13, commenting upon and explaining *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407. Conceding that the roller was an



object calculated to frighten horses of ordinary gentleness, yet, at the most, the liability of the municipality for negligently permitting such objects to remain within the limits of a highway, if it exists, must primarily be dependent upon the fact that they are unlawfully upon the highway.

The sole negligence complained of in the declaration was averred to consist in keeping the steam roller in question on Park street for the space of two days, so as to be a public nuisance and dangerous to travelers passing along said street with their carriages and horses. There was no allegation that the roller, in consequence of its being disabled, presented such a changed appearance that the danger of its frightening an animal was enhanced. Nor was there any averment that the negligence was committed in the use of the canvas covering, and no proof was offered on the trial tending to show that such a cover was not the means usually employed to protect steam rollers from the weather when they were lawfully on the street and for the time being not in use.

Where but one inference can reasonably be drawn from the evidence the question of negligence or no negligence is one of law for the court. *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 384, 43 L. ed. 1014, 1016, 19 Sup. Ct. Rep. 763; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193. It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn therefrom, that the determination of the fact of negligence should be submitted to a jury. *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 348, 42 L. ed. 491, 497, 18 Sup. Ct. Rep. 68. The question which [580] here arises, then, is, "Did the evidence justify the trial court in permitting the jury to determine whether or not in allowing the disabled roller to remain at the place referred to, under the circumstances stated, the District negligently and unlawfully obstructed the highway?"

We shall assume that the period when the steam roller became unserviceable while in use on Park street was the forenoon of the day prior to the accident, as claimed by the plaintiff. The right, however, to use a steam roller upon a public street for the purpose of the repair of such street we think necessarily includes the right to retain the roller upon the street until a reasonable time after the necessity for the use of the machine has terminated, in the meantime exercising due care in the deposit of the machine when not in use, and giving due notice and warning to the public of the presence of such machine if travel upon the street is permitted. We can perceive no difference in principle between using and keeping a steam roller on the streets until the completion of a particular work, and the maintaining a lawful excavation, such as for the construction of a sewer or of an underground road, and the use of an engine, derrick, etc., in connection with the hoisting of earth from an excavation. The appliances used in connection with such excavations, even though calculated to frighten horses of ordinary gentle-

ness not familiar with such objects, undoubtedly may be retained at the place where needed until the necessity therefor has ceased; and the circumstance that such appliances become temporarily disabled cannot, in reason, be held to affect the right of the municipal authorities to keep such machinery on the works until, in the ordinary course of events and in the exercise of a reasonable discretion, it is found convenient either to there make the needed repairs or to remove the appliances elsewhere for that purpose. Now, the only inference warranted by the record is that when the steam roller in question got out of order it was being used upon the street, and the necessity for its further use continued to exist. Had the machine not broken down, or had needed repairs been made to it at the place where the roller was deposited, it might lawfully have been allowed to remain upon the street while its further use was required, and until it was reasonably convenient to remove it. Under \*such a state of facts as has been detailed [581] there was nothing, either in the circumstance of the disabling of the machine or in the detention, warranting the inference that the right to leave the roller upon the street over a legal holiday did not exist, and that an illegal use of the highway had originated. It follows that the facts in evidence respecting the keeping of the roller on Park street during the period referred to did not justify the submission to the jury of the question whether the District was negligent in so keeping the machine, as it could not reasonably have been inferred that the employees of the District were negligent in failing to remove the machine before the occurrence of the accident.

As respects the notice owing to the plaintiff of the presence of the roller, we agree with the opinion of the supreme judicial court of Maine in *Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999, that where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view of the obstruction itself in time to avoid it without injury amounts to notice. In other words, as stated by the Maine court, "no one needs notice of what he already knows," and "knowledge of the danger is equivalent to prior notice." 91 Me. 296, 39 Atl. 1000. That the plaintiff had notice of the presence of the roller on Park street in ample time to have avoided it is undisputed. When he turned from Fourteenth street into Park street it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the District to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—that



the District was under no obligation to restrain the plaintiff from attempting to pass, either by closing Park street or by other means. The District was not bound to presume that it would be necessarily hazardous to attempt to drive past the roller, stationary \*and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. The District, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would inevitably do so. It was bound to give sufficient warning to drivers of the presence of the roller in time to enable them to avoid passing it, if desired. The District, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being lawfully on the street, the District was not bound to guard against the consequences of a voluntary attempt to drive by this roller. Certainly, if a driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the District ought not to be charged with notice that the attempt would be dangerous either to life or to limb.

The foregoing observations sufficiently indicate the errors committed by the trial court in the instructions given to the jury and in the refusal to give requested instructions, to which exceptions were noted. It suffices to say in conclusion that the trial court erred in refusing to instruct the jury, as requested, that upon the whole evidence in the case their verdict should be for the District. As said by this court, speaking through Mr. Justice Blatchford, in *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 618, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125, 1127:

"It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Schuylkill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 20 L. ed. 867; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494."

The judgment of the Court of Appeals of the District of Columbia is reversed, with instructions to that court to reverse the judgment of the Supreme Court of the District of Columbia, and to grant a new trial.

182 U. S.

LEWIS JACOBS, *Plff. in Err.*,  
v.

DORA MARKS.

(See S. C. Reporter's ed. 583-595.)

*Error to state court—Federal question—faith and credit to foreign judgment—explaining entry of discontinuance.*

1. A Federal question which will sustain a writ of error to a state court from the Supreme Court of the United States is presented by assignments of error to refusals of the courts below to give full faith and credit to the judicial records and proceedings of a court of another state.
2. Evidence that the entry of discontinuance of an action in a court of another state was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with, is competent in a later action by the same plaintiff to support a replication to a plea that plaintiff had received full satisfaction and payment of the claim.
3. Full faith and credit to a judgment of another state, consisting of an entry stating that, the cause having been settled, it is discontinued by consent, without costs to either party, is not denied by admitting evidence that the discontinuance was not intended as a satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with.

[No. 410.]

*Submitted January 7, 1901. Decided May 27, 1901.*

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment in an action of deceit. *Affirmed.*

See same case below, 183 Ill. 533, 56 N. E. 154.

Statement by Mr. Justice Shiras:

In June, 1896, Dora Marks brought an action in the circuit court of Cook county, Illinois, against Lewis Jacobs, for false representations and deceit whereby the plaintiff had been induced to become a member of a corporation known as the Chicago Furniture & Lumber Company of Escanaba, Michigan, composed of said Jacobs and one Nathan Neufeldt, and to pay into such concern the

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to full faith and credit to be given to state records and judicial proceedings—see *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79, and note; *Cumington v. Belchertown* (Mass.) 4 L. R. A. 131, and note; *Rand v. Hanson* (Mass.) 12 L. R. A. 574, and note. And see notes to *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; and *Mills v. Duryee*, 3 L. ed. U. S. 411.

sum of \$5,000. The plaintiff sought to recover in this action the money so expended by her, alleging that the shares of stock so taken by her in said company were worthless.

The defendant filed a demurrer to the declaration, which was overruled, and thereupon he filed a plea of not guilty, and also several special pleas, in which he set up, in substance, that the \*plaintiff, on or about December 4, 1893, instituted an action in the circuit court of Delta county, Michigan, against the Chicago Furniture & Lumber Company, to recover the sum claimed in the present suit; that service was duly had upon said company, which entered its appearance, and said court acquired jurisdiction of the parties to said cause and the subject-matter thereof; that afterwards the said parties came to a settlement of said cause; that on July 25, 1894, the said court entered the following order: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party;" and that the said plaintiff had, therefore, received full satisfaction of the claim upon which the present suit is based. These special pleas were traversed, and the trial resulted in a verdict in favor of the plaintiff for \$4,000. At the trial of the present case the plaintiff put in evidence a written agreement between the Chicago Furniture & Lumber Company and Dora Marks, in the following terms:

"Articles of agreement made and entered into this 14th of July, A. D. 1894, by and between the Chicago Furniture & Lumber Company, a corporation, of the city of Escanaba, Delta county, Michigan, parties of the first part, and Dora Marks, of Denver, Colorado, party of the second part. Party of the first part agrees to purchase the twenty thousand dollars' (\$20,000) worth of stock of the said Chicago Furniture & Lumber Company, which the party of the second part holds, for the sum of \$4,000, to be paid for as follows: \$1,000 to Mead & Jennings, attorneys for said party of the second part, as soon as the parties of the first part dispose of their treasury stock to the amount of \$1,000 or interest other capital in said company to the amount of \$1,000, and \$3,000 to said party of the second part, on the day that the plant now occupied by the parties of the first part in said city of Escanaba is turned over to them, and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part, without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party for the balance due on unpaid stock. Party of the second part agrees to \*sell her said stock of \$20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part, without cost. Said stock to be transferred as paid for.

"In witness whereof the parties have here-

unto set their hands and seals the day and year first above written."

Thereupon, over the objections of the defendant Jacobs, the plaintiff was permitted to testify that the company never carried out the agreement under which the suit was brought, and that she never recovered a single dollar in satisfaction of her claim. The defendant requested the court to instruct the jury that the settlement of the Michigan case constituted a bar to this action. These instructions were refused, and the trial resulted in a verdict and judgment in favor of the plaintiff in the sum of \$4,000.

The cause was taken to the appellate court of Illinois, which first reversed, and then, on rehearing, affirmed, the judgment of the trial court; and afterwards to the supreme court of Illinois, which, on December 18, 1899, affirmed the judgment of the appellate court. A writ of error was thereupon allowed by this court.

**Messrs. Louis J. Blum and Edgar C. Blum** submitted the cause for plaintiff in error:

This court has jurisdiction of a case presenting the question whether or no a judgment rendered in one state has received full faith and credit in the courts of another state.

*Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430; *Dupusseau v. Rochereau*, 21 Wall. 130, 22 L. ed. 588.

A refusal to give due effect to such judgment denies to the party claiming under it a right secured to him by the Federal Constitution and laws.

*Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

This clause of the Constitution requires, not merely that such records be received in evidence, but that they be given effect.

*Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

The judgment of the Michigan court is a final judgment, not a mere nonsuit.

*United States v. Parker*, 120 U. S. 96, 30 L. ed. 604, 7 Sup. Ct. Rep. 454; *Bank of Commonwealth v. Hopkins*, 2 Dana, 395; *Merritt v. Campbell*, 47 Cal. 542; *Hubbell v. United States*, 171 U. S. 209, 43 L. ed. 138, 18 Sup. Ct. Rep. 828.

The Michigan judgment is not open to doubt or contradiction in the courts of Illinois, but must be accepted by them as conclusive.

*Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Southern P. R. Co. v. United States*, 168 U. S. 50, 42 L. ed. 377, 18 Sup. Ct. Rep. 18; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42



L. ed. 202, 17 Sup. Ct. Rep. 905; *Mason Lumber Co. v. Buchtel*, 101 U. S. 639, 25 L. ed. 1074; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218; 2 Story, Const. § 1310; Bigelow, Estop. 3d ed. 209-219; 2 Black, Judgm. § 625; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; *Voorhees v. Jackson, ex dem. Bank of United States*, 10 Pet. 474, 9 L. ed. 500; *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Norton v. House of Mercy*, 41 C. C. A. 396, 101 Fed. 382; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 171, 34 L. R. A. 694, 66 N. W. 1095; *Dickinson v. Hayes*, 31 Conn. 417; *Jacobson v. Miller*, 41 Mich. 98, 1 N. W. 1013; *Rae v. Hulbert*, 17 Ill. 577.

In no case wherein the meaning of the judgment or decree is obvious,—as, where the decree is a mere finding of facts,—is proof of effect in the state wherein rendered introduced or required. In the following cases the judgments and decrees have been given effect as a matter of course without such proof:

*Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; *Sweet v. Brackley*, 53 Me. 346; *Rogers v. Rogers*, 15 B. Mon. 375; *Destrehan v. Scudder*, 11 Mo. 313; *Hassell v. Hamilton*, 33 Ala. 283; *Rae v. Hulbert*, 17 Ill. 577; *Low v. Mussey*, 41 Vt. 393.

In some cases a new agreement in itself affords satisfaction. In others satisfaction is had only by its performance. In the former class of cases the remedy is upon the new promise.

*Simmons v. Clark*, 56 Ill. 96; *Bank of Commonwealth v. Hopkins*, 2 Dana, 395; *Cumber v. Wane*, 1 Smith Lead. Cas. 146.

Moreover, the defendant in error received satisfaction under the new agreement. She obtained a release, so far as the corporation is concerned, of the liability for the amount still due on her stock subscription. She obtained, or secured the right to obtain, a dismissal of the damage suit against her, and as the defendant in the Michigan case, by the terms of the order, was compelled to pay his own costs incurred before the dismissal of her suit against it, to that extent there was a recovery by her and a judgment against it.

*Merritt v. Campbell*, 47 Cal. 546.

When a plaintiff receives satisfaction, regardless of its source, his claim upon the same subject-matter is barred as against the world.

*Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129.

Although the corporation may not have been liable in the Michigan case, yet a release to it is a release to all against whom the claim is asserted.

*Leddy v. Barney*, 139 Mass. 397, 2 N. E. 107; *Brown v. Marsh*, 7 Vt. 320; *Hopkinson* 182 U. S.

*v. Shelton*, 37 Ala. 311; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Rep. 330; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

Mr. John F. Dillon submitted the cause for defendant in error. Messrs. Andrew J. Hirschl and John W. Byam were with him on the brief:

Plaintiff in error waived and abandoned in the state courts his present contentions.

*North Chicago Street R. Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895.

The decision of the state supreme court, not resting on a Federal question, cannot be here reviewed.

*Secherger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

The supreme court of Illinois does not take judicial notice of the statutes or law of Michigan. Nor can this court on writ of error in this case.

*Miller v. Wilson*, 146 Ill. 528, 34 N. E. 1111; *Dearlove v. Edwards*, 166 Ill. 621, 46 N. E. 1081; *Hakes v. National State Bank*, 164 Ill. 275, 45 N. E. 444; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

A dismissal, though reciting that it is by agreement, is not a bar to a subsequent suit.

*Haldeman v. United States*, 91 U. S. 585, 23 L. ed. 433.

Nor is a decree when entered by consent.

*Gay v. Wadhams*, 73 Ill. 415; *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402.

A judgment on a different subject-matter cannot be used as a bar.

*Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024.

The prayer for a directed verdict must be by "written" instruction.

*West Chicago Street R. Co. v. Foster*, 175 Ill. 396, 51 N. E. 690.

The jury may ignore an erroneous instruction.

*McNulta v. Ensch*, 134 Ill. 46, 24 N. E. 631; *West Chicago Street R. Co. v. Manning*, 170 Ill. 422, 48 N. E. 958.

Whether one party has been released by a release executed to another or by satisfaction received from another, is always a question of fact, to be determined by the jury from all the circumstances, and should be submitted to the jury.

*Cooley. Torts*, p. \*139; *Robinson v. Stow*, 39 Ill. 568; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Parmelee v. Lawrence*, 44 Ill. 410; *Moore v. Stanwood*, 98 Ill. 608; *Thomason v. Clark*, 31 Ill. App. 407; *Lumberman's Ins. Co. v. Preble*, 50 Ill. 332.

A discontinuance does not bar a subsequent action for the same cause.

Am. & Eng. Enc. Law, p. 667, and cases cited. See *Haldeman v. United States*, 91 U. S. 584, 23 L. ed. 433; 2 Black, Judgm. ¶ 701.

The question whether a given thing has been received in satisfaction, in the absence of an express agreement in so many words, is a question of fact.

*Hart v. Boller*, 15 Serg. & R. 162, 16 Am. Dec. 536.

An accord without satisfaction does not limit the recovery by the creditor to the amount agreed upon by the accord, but he may sue on the original claim.

*Campbell v. Hurd*, 26 N. Y. Supp. 458; *Simmons v. Clark*, 74 Hun, 235, 58 Ill. 96.

The accord must be actually and fully executed to form a defense.

*Frost v. Johnson*, 8 Ohio, 395; *Smith v. Cranford*, 84 Hun, 318, 32 N. Y. Supp. 377, Aff'd in 155 N. Y. 640, 49 N. E. 1104; *Simmons v. Clark*, 56 Ill. 96.

[585] \*Mr. Justice Shiras, delivered the opinion of the court:

'The plaintiff in error alleges error in the action of the Illinois courts in failing to give full faith and credit to the judicial record and proceedings of the circuit court of Delta county, Michigan.

A contention is made on behalf of the defendant in error that the decision of the [586] state supreme court did not rest on a \*Federal question, and that, hence, under the doctrine of *Seeberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128, and cases therein cited, we have no jurisdiction to review it.

But the record discloses that, at the trial in the circuit court of Cook county, the defendant, after having put in evidence the record of proceedings in the circuit court of Delta county, Michigan, wherein *Dora Marks* was plaintiff and the *Chicago Furniture & Lumber Company* was defendant, asked the court to give the following instruction:

"You are instructed that if you find from the evidence that the plaintiff herein instituted a suit in the circuit court of Delta county, Michigan, against the *Chicago Furniture & Lumber Company*, for the purpose of recovering the \$4,000 involved in this suit now before you, and that she made a settlement of this cause with the defendant therein or anyone else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant." And in support of the motion for a new trial it appears that the defendant alleged that "the verdict and the action of the court fail to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, in the case of *Dora Marks v. The Chicago Furniture & Lumber Company*, contrary to article 4, § 1, of the Constitution of the United States, which provides: 'Full faith and credit shall be given in every state to the public acts, records, and judicial proceedings of every other state.'"

It also appears that, in the 10th assignment of error filed in the appellate court it was alleged that the circuit court had erred in failing to give full faith and credit to the judgment, records, and judicial proceedings of the circuit court of Delta county, Michigan, as required by the Constitution of the United States.

It further appears that, in the assignment

of errors filed in the supreme court of Illinois to the judgment and action of the appellate court, it was alleged that the appellate court erred in "not reversing said judgment by reason of the error of the circuit court in failing to give full faith and credit to the judgment record, and judicial proceedings of the circuit court of Delta county, Michigan," and also error was alleged in that "the \*ap-[587] pellate court erred, as did the circuit court, in failing to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, rendered in the case of *Dora Marks v. The Chicago Furniture & Lumber Company*, and introduced in evidence in this cause, which judgment is as follows: 'This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party,' as required by said article 4, § 1, of the Constitution of the United States."

And it is assigned for error in this court that the courts below failed to give full faith and credit to the judicial records and proceedings of the circuit court of Delta county, Michigan, in the case of *Dora Marks v. The Chicago Furniture & Lumber Company*, and thus deprived the plaintiff in error of his rights and privileges under said article 4, § 1, of the Constitution of the United States; and, indeed, this is the sole error relied on here by the plaintiff in error.

We think, therefore, that the question whether the record and judicial proceedings in the Michigan court received full faith and credit in the courts of Illinois is one for us to consider and determine, and we hence decline to dismiss the writ of error. *Green v. Van Buskirk*, 5 Wall. 314, 18 L. ed. 601; *Carpenter v. Strange*, 141 U. S. 87, 103, 35 L. ed. 640, 646, 11 Sup. Ct. Rep. 960; *Huntington v. Attrill*, 146 U. S. 657, 684, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

We come, then, to the question whether, upon the facts disclosed in this record, the courts of Illinois gave full faith and credit, within the meaning of the Constitution of the United States, to the judgment and judicial proceedings of the state court of Michigan.

And, first, What was the case made by the pleadings?

The declaration was in action on the case, and alleged that the defendant induced the plaintiff, by false and fraudulent representations, to join him and one Neufeldt in a scheme to form a corporation for the purpose of carrying on the business of the manufacture and sale of furniture in the town of Escanaba, in the state of Michigan, and to furnish and pay to the defendant the sum of \$5,000, for which the plaintiff was to receive shares of stock in the proposed company; that, relying on \*the said false and [588] fraudulent representations (the nature of which were stated in the declaration), the plaintiff paid over the said sum of \$5,000, and became a member of the corporation known as the *Chicago Furniture & Lumber Company*, composed of the plaintiff, the defendant, and said Neufeldt; that, owing to the fact that the said representations as to



the defendant and Neufeldt putting in large sums of money into the enterprise proved to be false and untrue, as the defendant well knew, the shares of stock taken by plaintiff were valueless, and so the defendant falsely deceived and defrauded the defendant, to her damage in the sum of \$10,000.

To this declaration the defendant pleaded the general issue of not guilty and several special pleas, setting forth, in several phases, that after the making of the said alleged false representations by the defendant, and after the plaintiff had parted with her money on the strength thereof, as set out in the declaration, the plaintiff, on or about the 4th of December, 1893, instituted an action in the circuit court of Delta county, Michigan, against the Chicago Furniture & Lumber Company, whereby she sought to recover from said company the sum of \$4,000, which she asserted the said company owed her as having been fraudulently contracted and procured; that the company was served and appeared; that afterwards the plaintiff and the defendant company came to a settlement of the said cause of action, and an order was duly entered on July 25, 1894, in said circuit court of Delta county, Michigan, in the following terms:

"This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party;" that the said cause of action set forth in the declaration in this cause is brought upon the same claim upon which the said action was brought by the said Dora Marks against the said Chicago Furniture & Lumber Company; that thus "the plaintiff has received satisfaction and payment of her said claim; and this the defendant is ready to verify."

To these special pleas the plaintiff filed a replication alleging that the cause of action set forth in her said declaration was not the same claim as that sued on by the plaintiff against the Chicago Furniture & Lumber Company in the circuit court of \*Delta county, Michigan, and that she, the plaintiff, did not, nor has she at any time, received satisfaction of her said claim sued on herein, and of this put herself upon the country.

In the trial of the issues thus made up the defendant put in evidence a certified copy of the proceedings in the Michigan court, and the plaintiff, in connection therewith, put in evidence an agreement between the Chicago Furniture & Lumber Company and Dora Marks, in the following terms:

"Articles of agreement made and entered into this 14th day of July, A. D. 1894, by and between the Chicago Furniture & Lumber Company, a corporation, of the city of Escanaba, Delta county, Michigan, parties of the first part, and Dora Marks, of Denver, Colorado, party of the second part. Party of the first part agrees to purchase the twenty thousand dollars worth of stock of the said Chicago Furniture & Lumber Company, which the party of the second part holds, for the sum of \$4,000, to be paid as follows: \$1,000 to Mead & Jennings, attorneys for said party of the second part, as soon as the said parties of the first part dis-

pose of their treasury stock to the amount of \$1,000 or interest other capital in said company to the amount of \$1,000, and \$3,000 to said party of the second part, on the day that the plant now occupied by the parties of the first part in said city of Escanaba is turned over to them and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part, without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of \$20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part, without cost. Said stock to be transferred as paid for."

On July 21, 1897, the jury found the defendant guilty, and assessed the plaintiff's damages at \$4,000, and on November 29, 1897, after a motion for a new trial had been made and overruled, a final judgment was entered according to the verdict.

\*As already stated, the judgment of the [590] circuit court was affirmed by the appellate court, whose judgment was affirmed by the supreme court of Illinois.

It is, of course, obvious that none of the errors assigned to the rulings of the trial court in the admission or rejection of evidence, or to its instructions to the jury, nor those assigned to the judgments of the appellate and supreme courts, can be considered by us except as they affect the question of the legal import of the Michigan judgment as concluding the controversy between the parties in the Illinois courts.

The trial court did not reject the record of the proceedings in the Michigan court as evidence entitled to be considered by the court and jury in the Illinois court. Did those proceedings disclose that the cause of action in the Michigan court was, in legal contemplation, the same with that asserted in the Illinois court? Did they disclose that the plaintiff, by making the settlement therein, had received satisfaction of her claim against Jacobs asserted in the present action? Did they disclose that the plaintiff, by bringing and discontinuing an action against the furniture company, accept the agreement of July 14, 1894, as a satisfaction of her alleged claim; and did such conduct on her part operate as a release of that company, and, if so, did the release operate in favor of the defendant in the present suit?

So far as these questions involve matters of fact they are concluded by the verdict of the jury. That verdict imports, under the issues formed by the pleadings, that the claim asserted against the corporation in the Michigan court was not the same with that asserted against Jacobs in the circuit court of Illinois, and that, whether or not the claims were the same, the plaintiff never received payment or satisfaction of her claim.



The plaintiff in error, therefore, is bound to maintain that, as a necessary implication of law, regardless of the verdict of the jury, the two actions asserted the same claim, and that the judgment and proceedings in the Michigan court precluded the plaintiff from maintaining a subsequent suit against the defendant in the Illinois court.

[591] It is, no doubt, true that the object of the plaintiff was the \*same in both suits; namely, to be indemnified for the loss incurred by putting her money into the venture, but it does not follow that the causes of action were the same. Apparently, the theory of her action against the company was to treat the money advanced as a loan made to the company and induced by false representations. But if she found herself mistaken in her choice of a remedy, she was not thereby deprived of a right of redress against the person who had deceived her. It is, however, contended that she was entitled to but one satisfaction, and that the legal import of the judgment in the Michigan court is that she had received a satisfaction of her claim in that suit. But we think that the judgment in question did not necessarily import that the plaintiff had received satisfaction of her claim. The recital that the cause had been settled was not an adjudication by the court. It evidently had reference to the agreement of July 14, 1894, which was matter *dehors* the record, and with which the court had ~~nothing~~ to do. The entry that the "cause is hereby discontinued by consent of both parties, without cost to either party," although entered as a judgment of the court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. The case of *Halderman v. United States*, 91 U. S. 584, 23 L. ed. 433, is quite in point. There a judgment entry in the words "dismissed agreed" was pleaded, in a subsequent action, as a former recovery; but it was held by the circuit court and by this court that such an entry did not sustain the plea. It was said by Mr. Justice Davis, delivering the opinion:

"It is a general rule that a plea of former recovery, whether it be by confession, verdict, or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. Conceding that this action is between the same parties, as well as for the same subject-matter as the former

[592] one, are the United \*States barred from a recovery by reason of anything alleged in the pleas? The first, second, and fourth pleas are not essentially different. In each the judgment relied on is 'that the said suit is not prosecuted and be dismissed.' This entry is nothing more than the record of a nonsuit, although the customary technical language is not used. But the plaintiffs in er-

ror deny that this is the effect of the order, and insist that the pleas present a case of retraxit, by which the United States forever lost their action, because they voluntarily announced to the court that, on the defendants' paying the costs, the suit would be dismissed. Such an announcement does not imply that they had no cause of action, or, if they had, that they intended to renounce it, or that it was adjusted. Nonsuits are frequently taken on payment of costs by the adverse party, in order that the controversy may be arranged out of court; but they do not preclude the institution and maintenance of subsequent suits in case of failure to settle the matters in dispute. . . . Whatever may be the effect given by the courts of Kentucky to a judgment entry 'dismissed agreed,' it is manifest that the words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it."

Such views apply still more strongly in the present case, because, as we have seen, the parties in the two suits were not the same, and because the agreement which led to the discontinuance of the suit in the Michigan court proved, when produced \*at [593] the trial of the present suit, to have been executory in its terms, and not, in any sense, a renunciation of the plaintiff's claim. It was also shown, to the satisfaction of the jury, that this agreement was never fulfilled by the company, and that the plaintiff had never received the money therein promised.

The case above cited also answers the contention of the plaintiff in error that it was not competent for the plaintiff to show that the discontinuance of the suit in Michigan was induced by an executory agreement on the part of the defendant company, and that such an agreement had not been fulfilled. If the defendant, instead of going to trial on the plaintiff's replication that she had never had satisfaction of the claim sued on, had demurred thereto on the ground that it was not competent to contradict the legal import of the Michigan judgment by the evidence offered, upon the principle of the case cited the demurrer must have been overruled.

We are of opinion that the trial court did not err in permitting the plaintiff to show that the entry of discontinuance in the



Michigan case was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement on the part of the defendant company which was never complied with. Such evidence was competent to support the plaintiff's replication to the defendant's plea in the present suit, that the plaintiff had received full satisfaction and payment of her said claim. In admitting such evidence the court did not refuse to give full faith and credit to the Michigan judgment, but properly allowed evidence, not to contradict the necessary legal import of that judgment, but to show the real meaning of the parties to that suit in agreeing upon its discontinuance.

As against the case of *Halderman v. United States*, the counsel for the plaintiff in error cite the subsequent case of *United States v. Parker*, 120 U. S. 89, 96, 30 L. ed. 601, 604, 7 Sup. Ct. Rep. 454, which they contend must be understood as overruling the prior case. In this view of the two cases we do not agree.

[594] In the latter case the question arose whether a former judgment in a suit by the United States against Parker as principal and Stuart as surety upon an official bond, was a judgment of \*nonsuit, which would have permitted the United States to bring another action, or whether it was equivalent to a retraxit, by which the United States forever lost their action, and the latter was held.

But this court did not thereby disapprove of the doctrine of the *Halderman Case*, or depart from its reasoning, as is seen in the fact that that case was cited, with others, as establishing the principle that a nonsuit is not conclusive as an estoppel, because it does not determine the right of the parties. This court, in discussing the facts of the case (after quoting the text of the practice act of Nevada, in which state the action had been tried), said:

"It thus appears that there are five instances in which the dismissal of an action has the force only of a judgment of nonsuit; 'in every other case,' the statute provides, 'the judgment shall be rendered on the merits.' If the case at bar is not included among the enumerated cases in which a dismissal is equivalent to a nonsuit, it must therefore be a judgment on the merits. In the present case the suit was not dismissed by the plaintiff himself before trial, nor by one party upon the written consent of the other, nor by the court for the plaintiff's failure to appear on the trial, nor by the court at the trial for an abandonment by the plaintiff of his cause; neither was a dismissal by the court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at the trial. The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a prima facie case. That evidence was passed upon judicially by the court, who determined its effect to be a bar to the cause of action. This was 182 U. S.

confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based on the ground of the finding of the court, as matter of fact and matter of law, that the subject-matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judicially that the defense relied upon was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants. Being, as already found, for the \*same cause of action as now sued upon, it operates as a bar to the present suit by way of estoppel."

This statement of the facts and law in that case clearly shows that the decision is not inconsistent with that announced in the case of *Halderman v. United States*, and also that it is not applicable to the case in hand.

These views dispose of the only question which our jurisdiction enables us to review.

Finding, as we do, that the courts of Illinois gave all that faith and credit to the judgment and judicial proceedings in the Michigan court to which they were entitled under the Constitution of the United States, the other errors assigned we cannot consider, and *the judgment of the Supreme Court of Illinois is affirmed.*

JOHN GLAVEY, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 595-610.)

*Officers—inspectors of vessels—right to salary.*

1. The failure of a special inspector of steam vessels to give a bond will not preclude him from recovering compensation for his services as such officer, when he has been duly appointed and taken the oath of office under the act of Congress of August 7, 1882.
2. The appointment of a local inspector of the hulls of steam vessels by the Secretary of the Treasury as a special inspector of foreign vessels, under the act of Congress of August 7, 1882, which fixes the compensation of such special inspectors at \$2,000 per year, entitles the appointee to such compensation for his services, though the appointment is made with the distinct condition that he is not to receive any additional compensation.

[No. 235.]

*Argued April 11, 12, 1901. Decided May 27, 1901.*

**A** PPEAL from a judgment of the Court of Claims dismissing a petition for salary of a special inspector of foreign steam vessels. *Reversed.*

See same case below, 35 Ct. Cl. 242.

The facts are stated in the opinion.

NOTE.—As to the compensation of persons holding two offices—see note to *United States v. Jones*, 37 L. ed. U. S. 325.

**Mr. Robert D. Benedict** argued the cause, and, with **Mr. E. S. Mussey**, filed a brief for appellant:

A person holding two distinct offices, each of which has its own duties and its own compensation, is, in the eye of the law, two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, is in such case entitled to recover the two compensations.

*United States v. Saunders*, 120 U. S. 126, 30 L. ed. 594, 7 Sup. Ct. Rep. 467.

Where the law creates the offices and fixes the compensation, the appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it.

*Adams v. United States*, 20 Ct. Cl. 117; *Garlinger v. United States*, 30 Ct. Cl. 217; *Goldsborough v. United States*, Taney's Dec. 88, Fed. Cas. No. 5,519; *Kehn v. State*, 93 N. Y. 294; *Upton v. United States*, 19 Ct. Cl. 49; *United States v. Symonds*, 120 U. S. 46, 30 L. ed. 557, 7 Sup. Ct. Rep. 411; *United States v. Barnette*, 165 U. S. 179, 41 L. ed. 677, 17 Sup. Ct. Rep. 286.

The fact that no bond was required or given is immaterial. The petitioner was an officer, not only *de facto*, but also *de jure*.

*United States v. Bradley*, 10 Pet. 343, 9 L. ed. 448; *United States v. Linn*, 15 Pet. 290, 10 L. ed. 742; *United States v. Le Baron*, 19 How. 73, 15 L. ed. 525; *United States v. Eaton*, 169 U. S. 331, 42 L. ed. 767, 18 Sup. Ct. Rep. 374.

The petitioner was not called upon to protest against the illegal clause of the appointment.

*Miller v. United States*, 103 Fed. 415.

The petitioner waived nothing; any such waiver is contrary to public policy.

*Ibid.*; *Fisher's Case*, 15 Ct. Cl. 323; *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38; *United States v. Symonds*, 120 U. S. 46, 30 L. ed. 557, 7 Sup. Ct. Rep. 411.

**Assistant Attorney General Pradt** argued the cause, and, with **Mr. Felix Brannigan**, filed a brief for appellee:

The so-called appointment to the office of inspector of foreign steam vessels is on its face merely an administrative direction from the head of the Treasury Department, which imposed upon the appellant as local inspector of hulls of steam vessels the duties of a special inspector of foreign steam vessels "without additional compensation." It is wholly defective as a commission in that it expressly withholds one of the necessary incidents of an office of profit, namely, salary.

*United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830.

If the court should consider that the above-mentioned letter was a valid appointment to the office of special inspector of foreign steam vessels, the most that can be said of appellant's position is that he was an officer *de facto*, and not *de jure*, because he did not qualify, as the statute required, by giving an official bond or tendering it.

*Williams v. United States*, 23 Ct. Cl. 46;

*Delaney v. United States*, 31 Ct. Cl. 44, 164 U. S. 282, 41 L. ed. 435, 17 Sup. Ct. Rep. 84; *Queen v. Cambridge*, 12 Ad. & El. 702; *United States v. Linn*, 15 Pet. 313, 10 L. ed. 751; *United States v. Flanders*, 112 U. S. 91, 28 L. ed. 631, 5 Sup. Ct. Rep. 67.

When a party by his silence seems to consent to a waiver of his right and has thereby misled the other party, he is estopped from asserting the right.

*Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129.

There can be no question that an individual can waive his own rights—even constitutional rights, much more a statutory right.

*Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987.

In the case at bar we have the very essence of a waiver: Voluntary choice to accept an appointment to an office with a salary attached to it by law and a tacit agreement not to claim that salary as long as he should be called upon to perform the mere nominal duties of that office in connection with another office for which he was being paid a competent salary.

*Farlow v. Ellis*, 15 Gray, 229; *Simmons v. Burlington, C. R. & N. R. Co.* 159 U. S. 278, 40 L. ed. 150, 16 Sup. Ct. Rep. 1.

\***Mr. Justice Harlan** delivered the opinion—[596] ion of the court:

This action was brought May 22d, 1897, to recover from the United States the sum of \$6,011.98, which amount the plaintiff Glavey, who was formerly a local inspector of vessels at New Orleans, alleged that he was entitled to receive for services performed by him as a special inspector of foreign steam vessels at the same city, at the rate of \$2,000 per annum from May 25th, 1891, to May 27th, 1894.

The court of claims dismissed the petition. The majority of that court were of opinion that under the terms of his appointment the plaintiff was precluded from demanding compensation for any services performed by him as special inspector of foreign steam vessels. The minority were of opinion that the statute having fixed the salary of a special inspector of foreign steam vessels, it was beyond the power of the Secretary, in whom was vested the power of appointment, to prescribe as a condition of the plaintiff's appointment that he should serve as such special inspector without compensation beyond that received by him as a local inspector. 35 Ct. Cl. 242.

By § 4400 of the Revised Statutes of the United States, title "Regulation of Steam Vessels," as the revision stood prior to August 7th, 1882, it was provided: "All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title."

Section 4415 of the same title relates to 182 U. S.



local boards of inspectors and the appointment of local inspectors.

[597] Section 4400 was amended and enlarged by the act of Congress approved August 7th, 1882, chap. 441, by adding at the end of \*that section these words: "And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of §§ 4417, 4418, 4421, 4422, 4423, 4424, 4470, 4471, 4472, 4473, 4479, 4482, 4488, 4489, 4496, 4497, 4499, and 4500 of this title, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid." 22 Stat. at L. 346.

By that act it was further provided that for the purpose of carrying into effect its provisions "the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two," § 2; that "the special inspectors of foreign steam vessels shall perform the duties of their office and make reports thereof to the Supervising Inspector General of Steam Vessels, under such regulations as shall be prescribed by the Secretary of the Treasury," § 3; that "each special inspector of foreign steam vessels shall execute a proper bond, to be approved by the Secretary of the Treasury, in such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office," § 4; that "the Secretary of the Treasury shall procure for the several inspectors heretofore referred to such instruments, stationery, printing, and other things necessary, including clerical help, where he shall deem the same necessary for the use of their respective offices, as may be required therefor," § 5; and that "the salaries of the special inspectors of foreign steam vessels and clerks provided for, together with their traveling and other expenses, when on official duty, and all instruments, books, blanks, stationery, furniture, and other things necessary to carry into effect the provisions of this act, shall be paid for by the Secretary of the Treasury, out of any moneys in the Treasury not otherwise appropriated." 22 Stat. at L. 346, chap. 441, § 6.

[598] \*The judgment of the court of claims was based upon a finding of facts which is here given in full:

"I. The claimant, a citizen of the United States, residing at New Orleans, La., was, on the 17th day of April, 1891, duly appointed, pursuant to Revised Statutes, § 4415, to the office of local inspector of hulls of steam vessels, for the district of New Orleans, La., and on April 21st, 1891, he accepted said appointment and duly qualified by taking the prescribed oath of office and by forwarding the same together with the 182 U. S.

official bond prescribed by law therefor to the Treasury Department. He then and there entered upon the discharge of his duties, and continued to discharge the same until May 27th, 1894. During the claimant's incumbency of said office he claimed each month the salary thereof by rendering his accounts therefor, which were promptly paid by the defendants.

"II. The report of the supervising inspector general for the fiscal year ending June 30th, 1889, recommended:

"That §§ 2 to 6, inclusive, of the amendment to § 4400, Revised Statutes, which provides a separate set of officers and clerks for the inspection of foreign steam vessels, be repealed, the reasons for the creation of such offices having ceased to exist upon the passage of the act approved June 19th, 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers, which fees were permanently appropriated previously for the support of the domestic inspection service, and which could not legally be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support. The action of Congress in the matter of creating the separate offices was based on the reasons given in the following extract from the special report of the supervising inspector general, dated January 21st, 1882: ". . . Authority should be given the Secretary of the Treasury to appoint these special inspectors and to pay their salaries, . . . per annum, and necessary traveling expenses, from funds appropriated from moneys in the Treasury not otherwise appropriated, as it would seem obviously improper that such special officers should be paid from the appropriation for the salaries and expenses of steamboat \*inspection from funds col-[599] lected by a tax on American steamboat owners and the licensed officers of such vessels." As the officers and clerks of both services are now paid from funds in the general Treasury, the advantage of uniting the two services must be clearly obvious, both as to public interests and economy in conducting the service. In the latter respect a saving can be made of all the salaries now being paid, except at the port of New York, where two of the officers and the clerk might be retained by transfer to the domestic service, dispensing with the services of the other two now employed. The inspectors at San Francisco, Boston, Philadelphia, Baltimore, and New Orleans could be dispensed with altogether, thereby saving to the government the sum of \$14,000 annually, the total of salaries now paid those officers. The additional work that would fall upon the domestic service by such dispensation would be as follows: At New York, 138 steamers; San Francisco, 11; Boston, 18; Portland, Me., 7; Philadelphia, 8; Baltimore, 10; Port Huron, 3; Marquette, 11; Buffalo, 8; Oswego, 22; Burlington, Vt., 3; Detroit, 2; New Orleans, 16. Total steamers, 257."

"III. By the finance report of the Secretary of the Treasury to the Speaker of the



House of Representatives, first session Fifty-first Congress (1889), it was recommended 'that all laws be repealed which provide a separate establishment for the inspection of foreign steam vessels, and that the inspectors of domestic steam vessels be authorized and required to perform all necessary services in connection with the inspection of foreign steamships. The offices proposed for abolition are virtually sinecures, and until they are abolished the Executive will remain subjected to importunity to fill them. The services of three of these officers have been dispensed with.' The three offices disposed of were those at San Francisco, Cal., New Orleans, La., and Philadelphia, Pa.

"IV. While the claimant was holding the office aforesaid, to wit, May 25th, 1891, he received from the Secretary of the Treasury a communication, of which the following is a true copy, viz.:

"Treasury Department,  
Office of the Secretary,  
Washington, D. C., May 15, 1891.

Mr. John Glavey,  
[600] \*New Orleans, La.

Sir:—

Under the provisions of an act of Congress approved August 7th, 1882, entitled 'An Act to Amend Section 4440 of title LII. of the Revised Statutes of the United States, Concerning the Regulation of Steam Vessels, you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath.

Respectfully yours,  
Charles Foster, Secretary."

"V. May 25th, 1891, the claimant took the oath therein referred to, which was in the usual form of an oath of office, and transmitted the same to the Secretary of the Treasury on that date. He was not required to, and did not, give or offer to give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath aforesaid until May 27th, 1894, the claimant performed the duties of a special inspector of foreign steam vessels at said port.

"VI. During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels, for which he was paid as aforesaid, make to the Secretary of the Treasury or to any other officer of the government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in

connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.

"VII. Prior to the time the claimant ceased to perform the services aforesaid he received from the acting Secretary of the Treasury a communication of which the following is a true copy:

"Treasury Department,  
Office of the Secretary,  
Washington, D. C.,  
December 15, 1893.

Mr. John Glavey, Inspector of Hulls of  
Steam Vessels, New Orleans, La.

Sir:—

Department \*letter of the 7th instant re-[601]  
questing you to tender your resignation as inspector of hulls of steam vessels for the tenth district is hereby revoked, and you are requested to tender your resignation as inspector of hulls of steam vessels for the district of New Orleans, La., also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor.

Respectfully yours,  
W. E. Curtis, Acting Secretary."

Thereafter he received from the acting Secretary another communication, of which the following is a copy:

"Treasury Department,  
Office of the Secretary,  
Washington, D. C.,  
April 14, 1894.

Mr. John Glavey, Inspector of Hulls of  
Steam Vessels, New Orleans, La.

Sir:—

Your services as inspector of hulls of steam vessels for the district of New Orleans, La., are hereby discontinued, to take effect upon the appointment and qualification of your successor.

Respectfully yours,  
S. Wike, Acting Secretary."

"And, thereafter, May 28th, 1894, the claimant's duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office, after which the claimant ceased to perform the duties of said office. The claimant performed the duties of said office as special inspector of foreign steam vessels until said May 26th, 1894, a period of three years and two days."

The learned Assistant Attorney General admits it to be a general principle that when an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled during his incumbency to be paid the salary prescribed by statute. He insists, however, that this principle is not applicable in the present case because, he contends, the Secretary of the Treasury did not mean, by his letter or communication of May 15th, 1891, to appoint Glavey to the office of special inspector of foreign steam vessels at the port of New Orleans.



We cannot sustain this contention. Section 4400 of the Revised Statutes was so amended by the act of August 7th, 1882, as to bring foreign steam vessels within the provisions of certain other specified sections; and by the same act, and for the purpose of carrying its provisions into effect, the Secretary of the Treasury was directed to appoint special inspectors of foreign steam vessels at designated ports, one of which was the port of New Orleans. In view of the express words of the act, his failure or refusal to appoint might have been regarded as a failure or refusal to discharge a duty distinctly imposed upon him by statute. And that seems to have been the view of that officer, for although he had officially declared to Congress that the office of special inspector of foreign steam vessels was virtually a "sinecure," he shows by his communication of May 15th, 1891, that he regarded the act of August 7th, 1882, as mandatory, and that he appointed Glavey in obedience to its provisions. As he had no authority to appoint Glavey except in virtue of that act, we cannot assume that he proceeded or intended to proceed outside of its provisions. We must take it that he meant just what he plainly and expressly declared, and consequently that he intended, in virtue of the authority given by the act of 1882, to appoint Glavey to the office of special inspector of foreign steam vessels at New Orleans.

The next contention of the government is that if the communication of May 15th, 1891, is to be taken as showing a valid appointment to the office in question, Glavey did not legally qualify as special inspector in that he did not give or tender the bond prescribed by § 4 of the act of 1882; consequently, it is argued, he was at most only an officer *de facto*.

Is it true that the execution of the required bond was necessary in order that Glavey could lawfully proceed in the discharge of the duties of the office to which he was appointed?

Some light is thrown upon this question by *United States v. Bradley*, 10 Pet. 343, 357, 364, 9 L. ed. 448, 453, 457. That was an action upon a bond of one who acted as paymaster in the army. The act under which the bond was taken provided that "all officers of the pay, commissary, and quartermaster's department shall, previous to their entering on the duties of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sum as the Secretary of War shall direct." 3 Stat. at L. 298, chap. 69, § 6. This court, speaking by Mr. Justice Story, after observing that the proper officers of a department to which the disbursement of public moneys was intrusted could take a valid bond to secure the government in respect of such moneys, said: "Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is that Hall was not entitled to act as paymaster until he had given the bond re-

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quired by the act of 1816, in the form therein prescribed; and that, not having given any such bond, he is not accountable as paymaster for any moneys received by him from the government. We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster."

The doctrine announced in that case was reaffirmed in *United States v. Linn*, 15 Pet. 290, 313, 10 L. ed. 742, 751, which was an action upon a writing obligatory given by a receiver of public moneys in a certain land office. The case came before this court upon questions in respect of which the judges of the circuit court were divided. Those questions were: 1. Whether the obligation of the receiver and his sureties, being without seal, was a bond within the act of Congress of May 10th, 1800, which provided that a receiver of public moneys for lands of the United States "shall, before he enters upon the duties of his office, give bond, with approved security . . . for the faithful discharge of his trust." 2 Stat. at L. 73, 75, chap. 55, § 6. 2. Whether such an instrument was good at common law. The court, speaking by Mr. Justice Thompson, and referring to the emoluments which the receiver was entitled to have, said: "These emoluments were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment. This was so held by this court in the case of *United States v. Bradley*, 10 Pet. 364, 9 L. ed. 456." After stating what had been decided in that case, the court proceeded: "According to this doctrine, which is [604] undoubtedly sound, Linn was a receiver *de jure*, as well as *de facto*, when the instrument in question was given."

In *United States v. Le Baron*, 19 How. 73, 78, 15 L. ed. 525, 527, the question was as to the time when a person nominated and confirmed as a deputy postmaster, and whose commission was put into the hands of the Postmaster General for delivery to the appointee, was to be deemed to have been invested with such office. This court, speaking by Mr. Justice Curtis, said: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all



that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

It may be here observed that the above cases are stronger than the present case in that the act of 1882 contained no provision requiring a special inspector of foreign steam vessels to execute a bond before entering on the duties of his office. We observe also that the principles announced in the *Bradley* and *Linn Cases* were recognized in *United States v. Eaton*, 169 U. S. 331, 42 L. ed. 767, 18 Sup. Ct. Rep. 374.

In view of the former decisions of this court, it cannot be held that the execution by Glavey of the bond required by the act of 1882 was a condition precedent to his right to exercise the functions of the office to which he was appointed by the Secretary of the Treasury. Congress did not so direct. His appointment was complete, at least, when he took the required oath and transmitted evidence of that fact to the Secretary. After taking the oath, evidencing thereby [605] his acceptance of the appointment, he was entitled to proceed in the execution of the duties of his office and became liable for any failure to properly discharge them.

It remains to inquire whether, by reason of the statement in the Secretary's letter or communication of May 15th, 1891, that the appointment in question was "without additional compensation" beyond that received by the appointee as local inspector of hulls of steam vessels, Glavey was estopped to demand the salary fixed by the act of 1882 for special inspectors of foreign steam vessels.

In *United States v. Symonds*, 120 U. S. 46, 49, 30 L. ed. 557, 558, 7 Sup. Ct. Rep. 412, the question was whether certain services were performed "at sea" within the meaning of § 1556 of the Revised Statutes fixing the pay of lieutenants in the navy when at sea, or when on shore duty, or when on leave or waiting orders. Symonds claimed that the services for which he sued were performed "at sea," and that he was entitled to the compensation fixed by the statute for services of that kind. This court said: "If the regulations of 1876 had not recognized services 'on board a practice ship at sea' as sea services, the argument on behalf of the government would imply that they could not be regarded by the courts, or by the proper accounting officers, as sea services; in other words, that the Secretary of the Navy could fix, by order and conclusively, what was and was not sea service. But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the

naval establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of or supplementary to, but not in conflict with, the statutes defining his powers, or conferring rights upon others. The contrary has \*never [606] been held by this court. What we now say is entirely consistent with *Gratiot v. United States*, 4 How. 80, 11 L. ed. 884, and *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith v. Whitney*, 116 U. S. 181, 29 L. ed. 605, 6 Sup. Ct. Rep. 570. In neither case, however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld. If the services of Symonds were in the meaning of the statute performed 'at sea,' his right to the compensation established by law for sea service is as absolute as is the right of any other officer to his salary as established by law." To the same effect was *United States v. Barnette*, 165 U. S. 174, 179, 41 L. ed. 675, 677, 17 Sup. Ct. Rep. 286.

In *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38, 42, the question was whether the compensation of a police surgeon was that fixed by statute or that named in a resolution of a board of police under which he was appointed. He accepted the appointment and performed the duties of the office for more than two years, drawing only the salary fixed by the resolution and which was less than that fixed by statute. The court of appeals of New York, speaking by Judge Miller,—all the members of the court who voted in the case concurring,—said: "As the statute gave the salary, I think fixing the amount at a less rate by resolution could not make it less than the statute declared. There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office after appointment is not a waiver of the statutory provision fixing the salary therefor, and does not establish a binding contract to perform the duties of the office for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent."

\*The ruling in that case was reaffirmed in [607] *Kehn v. State*, 93 N. Y. 291, 294, which involved the claim of a fireman whose compensation had been reduced by his superior officer below that fixed by law. The court, speaking by Judge Rapallo, reaffirmed the principles of the *Satterlee Case*, and ap-



proved the decision in *Goldsborough v. United States*, Taney Dec. 80, 88, Fed. Cas. No. 5,519, saying: "The present case, however, is stronger than either of those cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it."

In the *Goldsborough Case* referred to, Chief Justice Taney said: "Where an act of Congress declares that an officer of the government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation can neither be enlarged nor diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress."

In *Adams v. United States*, 20 Ct. Cl. 115, which involved the compensation due to one who had performed the duties of an inspector and also of deputy collector of customs, the court said: "The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it." In the same case it was also said: "Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the amount of compensation allowed by the collector and Secretary, ending with a receipt 'in full for compensation for the period above stated,' which the claimant signed. We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact [608] such a receipt and the claimant lost nothing by signing it. *Fisher's Case*, 15 Ct. Cl. 323; *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65."

We are of opinion that as the act of 1882 created a distinct, separate office—special inspector of foreign steam vessels—with a fixed annual salary for the incumbent, to be paid by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated; as the plaintiff was legally appointed by the Secretary a special inspector under and by virtue alone of that act; and as he entered upon the discharge of the duties appertaining to that position, he was entitled to demand the salary attached by Congress to the office in question.

It is said that the Secretary, before appointing the plaintiff, had reached the conclusion that the office of special inspector of foreign steam vessels was unnecessary, and that all laws providing a separate establishment for the inspection of foreign steam vessels should be repealed. Such undoubtedly was the opinion expressed by the Secretary in his report to the Speaker of the House of Representatives at the first session, 1889, of the Forty-first Congress. But Congress did not immediately heed his recommendation on that subject, and there was no repeal of the act of 1882 until the passage of the statute of March 1st, 1895 (28 Stat. at L. 699, chap. 146, § 1). During the entire term of his service as special inspector the act of 1882 was in force. If the Secretary, having become convinced that the special inspectors of foreign steam vessels were not needed and the public interests did not require the appointment of such officers, could properly, for such reasons, have withheld any action under the statute of 1882 until he again communicated his views to Congress, it does not follow that he could make an appointment under that statute conditioned that the appointee should accept a less salary than Congress prescribed. Whether a local inspector should be required to inspect foreign steam vessels without additional compensation, or whether the visitation and inspection of such vessels should be done by an officer acting under an appointment for that particular purpose, was a matter for the determination of Congress. The purpose of Congress, as indicated by the act of 1882, was to compensate the services of a special inspector of foreign steam vessels by an annual salary \*of a specified amount. It was [609]

not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and his appointee that the latter should not demand the compensation fixed by statute. Judge Lacombe, speaking for the circuit court of the United States for the southern district of New York in *Miller v. United States*, 103 Fed. 413, 415, well said: "Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel." If it were held otherwise, the result would be that the heads of executive departments could provide, in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective

positions for such compensation as the head of a department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the executive department of the government. Public policy forbids the recognition of any such power as belonging to the head of an executive department. The distribution of officers upon such a basis suggests evils in the administration of public affairs which it cannot be supposed Congress intended to produce by its legislation. Congress may control the whole subject of salaries\*for public officers; and when it declared that for the purpose of carrying into effect the provisions of the act of 1882 the Secretary of the Treasury "*shall appoint officers to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each,*" it was not for the Secretary to make the required appointments under a *disposition* with the

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appointee that he would take any less salary than that prescribed by Congress. The stipulation that Glavey, who was local inspector, should exercise the functions of his office of special inspector of foreign steam vessels "without additional compensation" was invalid under the statute prescribing the salary he should receive, was against public policy, and imposed no legal obligation upon him. And the mere failure of the appointee to demand his salary as such officer until after he had ceased to be local inspector, was not in law a waiver of his right to the compensation fixed by the statute.

The judgment of the Court of Claims is reversed and the cause is remanded for further proceedings consistent with this opinion.  
*Reversed.*

The Chief Justice, Mr. Justice **Brown**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** dissented.

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# MEMORANDA

OF

## CASES DISPOSED OF WITHOUT OPINIONS.

### TENTH RULE.

A. L. GUSMAN, on Behalf of SAMUEL WRIGHT, *Appellant*, v. L. H. MARRERO, Sheriff of the Parish of Jefferson, La. [No. 223.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. A. A. Birney* for appellant.

*Mr. Robert J. Perkins* for appellee.

October 29, 1900. *Dismissed*, with costs, pursuant to the 10th Rule. Reinstated November 12, 1900. See 21 Sup. Ct. Rep. 293, *ante*, 293.

HENRY D. P. ALLEN, *Plaintiff in Error*, v. CHARLES F. ALLEN *et al.* [No. 3.]

In Error to the Supreme Court of the State of California.

*Messrs. Jeff. Chandler and E. B. Holladay* for plaintiff in error.

*Messrs. James G. Maguire* for defendants in error.

October 29, 1900. *Dismissed*, with costs, pursuant to the 10th Rule.

KEOKUK & HAMILTON BRIDGE COMPANY, *Plaintiff in Error*, v. PEOPLE OF THE STATE OF ILLINOIS. [No. 63.]

In error to the Supreme Court of the State of Illinois.

*Messrs. Walter D. Davidge and Walter D. Davidge, Jr.*, for plaintiff in error.

No appearance for defendant in error.

October 31, 1900. *Dismissed*, with costs, pursuant to the 10th Rule.

HARRY H. BEASER, *Appellant*, v. CHARLES H. VILAS. [No. 128.]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

*Mr. A. L. Sanborn* for appellant.

*Mr. Wm. F. Vilas* for appellee.

December 4, 1900. *Dismissed*, with costs, pursuant to the 10th Rule.

JAMES M. LUDDEN, *Plaintiff in Error*, v. WALKER WINSTON. [No. 140.]

In error to the Circuit Court of the United States for the Southern District of New York.

*Mr. Henry W. Scott* for plaintiff in error.

*Mr. John J. Crawford* for defendant in error.

December 14, 1900. *Dismissed* with costs, pursuant to the 10th Rule.

WILLIAM MOORE *et al.*, *Appellants*, v. ALASKAN & NORTHWESTERN TERRITORIES TRADING COMPANY *et al.* [No. 156.]

Appeal from the District Court of the United States for the District of Alaska.

*Mr. J. J. Darlington* for appellants.

*Messrs. S. M. Stockslager and Geo. C. Heard* for appellees.

January 23, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

PIN KWAN, *Petitioner*, v. UNITED STATES. [No. 253]; and PING YIK, *Petitioner*, v. UNITED STATES. [No. 254.]

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Richard Crowley* for petitioners.

*The Attorney General* for respondent.

February 25, 1901. *Dismissed*, pursuant to the 10th Rule.

JAMES C. JORDAN, *Appellant*, v. EBEN D. JORDAN *et al.*, Executors, etc. [No. 203.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

*Mr. Robert M. Morse* for appellant.

*Mr. Solomon Lincoln* for appellees.

March 12, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

SOUTHERN RAILWAY COMPANY, *Appellant*, v. CITY OF MEMPHIS *et al.* [No. 206.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Wm. A. Henderson and F. P. Poston* for appellant.

No appearance for appellees.

March 13, 1901. *Dismissed* with costs, pursuant to the 10th Rule.

**SOROSIS FRUIT COMPANY, Appellant, v. C. B. BILLS, Trustee, etc.** [No. 219.]

Appeal from the Circuit Court of the United States for the Northern District of California.

*Mr. John Reynolds* for appellant.

*Mr. Joseph R. Patton* for appellee.

March 20, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

**ANNIE R. KEAN et al., Plaintiffs in Error, v. CALUMET CANAL & IMPROVEMENT COMPANY.** [No. 260.]

In Error to the Supreme Court of the State of Indiana.

April 23, 1901. *Dismissed*, with costs, pursuant to the 10th Rule. Judgment set aside and case reinstated for hearing May 27, 1901.

#### SIXTEENTH RULE.

**PUEBLOS OF SANTO DOMINGO & SAN FELIPE, Appellants, v. UNITED STATES.** [No. 105.]

Appeal from the Court of Private Land Claims.

*Mr. Geo. Hill Howard* for appellants.

*The Attorney General* for appellee.

November 14, 1900. *Dismissed*, pursuant to the 16th Rule, on motion of *Mr. Matthew G. Reynolds* for the appellee.

#### TWENTY-EIGHTH RULE.

**BENJAMIN H. SNELL, Petitioner, v. UNITED STATES.** [No. 324.]

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Mr. F. Edward Mitchell* for petitioner.

*The Attorney General* for respondent.

June 2, 1900. *Dismissed*, pursuant to 28th Rule.

#### MISCELLANEOUS.

**UNITED STATES, Plaintiff, v. STATE OF NORTH CAROLINA** [No. 9, original]; **UNITED STATES, Plaintiff, v. STATE OF SOUTH CAROLINA** [No. 10, original]; **UNITED STATES, Plaintiff, v. STATE OF FLORIDA** [No. 11, original]; **UNITED STATES, Plaintiff, v. STATE OF LOUISIANA** [No. 12, original].

*The Attorney General* for plaintiff.

*Messrs. J. C. L. Harris* and *Chas. Alston Cook* for North Carolina.

October 9, 1900. *Dismissed*, on Motion of *Mr. Solicitor General Richards* for the plaintiff.

**ALICE WEIL, Widow, etc., et al, Appellants, v. UNITED STATES.** [No. 440.]

Appeal from the Court of Claims.

October 9, 1900. *Docketed and dismissed* on motion of *Mr. William A. Maury* for the appellee.

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**R. M. MANLEY, Executor, etc., Plaintiff in Error, v. M. E. LARKIN, Sheriff, etc., et al.** [No. 22.]

In Error to the Supreme Court of the State of Kansas.

*Mr. David Martin* for plaintiff in error.

*Messrs. B. P. Waggener* and *Albert H. Horton* for defendants in error.

October 9, 1900. *Dismissed*, with costs, on authority of counsel for plaintiff in error.

**UNION PACIFIC RAILWAY COMPANY et al. Appellants, v. CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY.** [No. 118.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. W. R. Kelly* and *John N. Baldwin* for appellants.

*Messrs. Chas. J. Greene, R. W. Breckenridge,* and *Chas. F. Manderson* for appellee.

October 10, 1900. *Dismissed*, each party to pay his own costs, per stipulation of counsel.

**HARRY PLUMMER, as Executor, etc., Plaintiff in Error, v. UNITED STATES.** [No. 211.]

In Error to the District Court of the United States for the Southern District of New York.

*Messrs. Treadwell Cleveland* and *Wm. V. Rowe* for plaintiff in error.

*The Attorney General* for defendant in error.

October 22, 1900. *Dismissed*, on authority of counsel for the plaintiff in error, on motion of Assistant Attorney General *Hoyt*, for the defendant in error.

**ELIZABETH DORR et al., Plaintiffs in Error, v. AMY HUNTER.** [No. 464.]

In Error to the Supreme Court of the State of Illinois.

October 29, 1900. *Docketed and dismissed*, with costs, on motion of *Mr. Edmond McMahon* for the defendant in error.

**NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error, v. CHARLES E. HORTON, Administrator, etc.** [No. 120.]

In Error to the Supreme Court of the State of Missouri.

*Mr. F. N. Judson* for plaintiff in error.

No appearance for defendant in error.

October 29, 1900. *Dismissed*, with costs, on authority of counsel for plaintiff in error.

**JOSEPH SMITH, Plaintiff in Error, v. STATE OF TENNESSEE.** [No. 18.]

In Error to the Supreme Court of the State of Tennessee.

*Mr. J. M. Dickinson* for plaintiff in error.

*Mr. G. W. Pickle* for defendant in error.

November 5, 1900. *Dismissed*, with costs, on motion of *Mr. Frederick D. McKenney*, in behalf of counsel.



JOHN C. HUMES, *Appellant*, v. CITY OF FORT SMITH. [No. 91.]

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

*Messrs. U. M. Rose and G. B. Rose for appellant.*

*Mr. Wm. M. Cravens for appellee.*

November 8, 1900. *Dismissed*, with costs, on authority of counsel for the appellant.

J. C. HUBINGER COMPANY, *Appellant*, v. QUINCY HORSE RAILWAY & CARRYING COMPANY. [No. 228.]

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

*Mr. John E. Craig for appellant.*

*Mr. James F. Carrott for appellee.*

November 13, 1900. *Dismissed*, per stipulation.

DANIEL W. HARDING, *Appellant*, v. MYRTLE GILLET. [No. 483.]

Appeal from the Supreme Court of the Territory of Oklahoma.

November 14, 1900. Docketed and *dismissed*, with costs, on motion of Mr. William M. Springer for the appellee.

JENNIE NORCROSS, *Plaintiff in Error*, v. CHARLES W. SEXTON, Receiver, etc. [No. 220.]

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

*Mr. J. W. Hunsicker for plaintiff in error.*

No appearance for defendant in error.

November 14, 1900. Certificate *dismissed*.

S. HAYS, *Plaintiff in Error*, v. MICHAEL KLOPENSTINE. [No. 132.]

In Error to the Supreme Court of the State of Utah.

*Messrs. Arthur Brown and H. P. Henderson for plaintiff in error.*

No appearance for defendant in error.

December 5, 1900. *Dismissed*, with costs, on the authority of counsel for plaintiff in error.

PEOPLE'S RAILWAY COMPANY, *Plaintiff in Error*, v. LEWIS M. RUMSEY *et al.* [No. 288.]

In Error to the Supreme Court of the State of Missouri.

*Mr. Michael Kinealy for plaintiff in error.*

No appearance for defendants in error.

December 10, 1900. *Dismissed*, with costs, on motion of Mr. H. J. May in behalf of counsel for the plaintiff in error.

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CONSOLIDATED WATER COMPANY *et al.*, *Appellants*, v. E. S. BABCOCK *et al.* [No. 131.]

Appeal from the Circuit Court of the United States for the Southern District of California.

*Messrs. C. K. Davis, F. B. Kellogg, and Jno. D. Works for appellants.*

*Mr. H. E. Doolittle for appellees.*

January 8, 1901. *Dismissed*, with costs, on motion of counsel for appellants.

SHELBYVILLE & BLOOMFIELD RAILROAD COMPANY, *Plaintiff in Error*, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 170.]

In Error to the Court of Appeals of the State of Kentucky.

*Messrs. Alexander Pope Humphrey and George M. Davie for plaintiff in error.*

No appearance for defendant in error.

January 14, 1901. *Dismissed*, with costs, on motion of counsel for plaintiff in error.

HENRY A. WISE WOOD, *Petitioner*, v. HENRY F. BECHMAN. [No. 306.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Mr. Frederick P. Fish for petitioner.*

*Mr. Arthur E. Dowell for respondent.*

February 1, 1901. *Dismissed* on motion of counsel for the petitioner.

FREDERICK MAISH *et al.*, *Appellants*, v. UNITED STATES. [No. 268.]

Appeal from the Court of Private Land Claims.

*Mr. Rochester Ford for appellants.*

*The Attorney General for appellee.*

February 25, 1901. *Dismissed* per stipulation, on motion of Mr. Solicitor General Richards for the appellee.

HELEN M. GRIDLEY, *Plaintiff in Error*, v. THOUSAND ISLAND PARK ASSOCIATION. [No. 330.]

In Error to the Supreme Court of the State of New York.

*Messrs. Wm. Henry Dennis and Theodore E. Hancock for plaintiff in error.*

*Mr. Wm. A. Day for defendant in error.*

February 25, 1901. *Dismissed* per stipulation, on motion of Mr. William Henry Dennis for the plaintiff in error.

SAMUEL T. DAVIS, *Plaintiff in Error*, v. J. A. MAGOUN, JR., Treasurer of Woodbury County, Iowa. [No. 246.]

In Error to the Supreme Court of the State of Iowa.

*Mr. Henry J. Taylor for plaintiff in error.*

No appearance for defendant in error.

February 25, 1901. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

UNITED STATES, *Appellant*, v. PIN KWAN [No. 449]; and UNITED STATES v. PING YIK [No. 450].

Appeals from the District Court of the United States for the Northern District of New York.

*The Attorney General* for appellant.

No appearance for appellees.

February 25, 1901. *Dismissed* on motion of Mr. Assistant Attorney General Beck for the appellants.

PENNSYLVANIA COMPANY *et al.*, *Plaintiffs in Error*, v. CITY OF CHICAGO *et al.* [No. 164.]

In Error to the Supreme Court of the State of Illinois.

*Mr. Frank J. Loesch* for plaintiffs in error.

*Messrs. Charles M. Walker and Charles H. Soelke* for defendants in error.

March 6, 1901. *Dismissed* for the want of jurisdiction.

JOHN W. MURPHY *et al.*, as County Commissioners, *Plaintiffs in Error*, v. JOHN STOREY *et al.* [No. 202.]

In Error to the Supreme Court of the State of North Dakota.

*Mr. Fred A. Baker* for plaintiffs in error.

No appearance for defendants in error.

March 8, 1901. *Dismissed*, with costs, on motion of counsel for plaintiffs in error.

JOHN CHARLES BARCLAY, *Plaintiff in Error*, v. GRACE LESLIE BARCLAY. [No. 244.]

In Error to the Supreme Court of the State of Illinois.

*Mr. Charles S. Thornton* for plaintiff in error.

*Mr. Timothy J. Fell* for defendant in error.

April 17, 1901. *Dismissed*, with costs, on the authority of counsel for the plaintiff in error.

UNITED STATES for the Use and Benefit of the EDWARD HINES LUMBER COMPANY, *Plaintiff in Error*, v. FRANK HENDERLONG *et al.* [No. 401.]

In Error to the Circuit Court of the United States for the District of Indiana.

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*Mr. John G. Williams* for plaintiff in error.

*Mr. E. C. Field* for defendants in error.

May 13, 1901. *Dismissed*, with costs, per stipulation.

THOMAS L. SLOAN, *Appellant*, v. UNITED STATES. [No. 585.]

Appeal from the Circuit Court of the United States for the District of Nebraska.

*Mr. J. H. McGowan* for appellant.

*The Attorney General* and *John L. Webster* for appellee.

May 13, 1901. *Dismissed*, per stipulation.

LOENG UN, *Appellant*, v. UNITED STATES. [No. 370.]

Appeal from the District Court of the United States for the District of Montana.

*Mr. Henry N. Blake* for appellant.

*The Attorney General* for appellee.

May 20, 1901. *Dismissed*, on authority of counsel for appellant.

LONDON COMPANY *et al.* *Appellants*, v. JOHN H. BOLTON *et al.* [No. 704.]

Appeal from the Supreme Court of the Territory of Arizona.

May 27, 1901. Docketed and *dismissed*, with costs, on motion of Mr. L. T. Michener for the appellees.

LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error*, v. FARMERS' LOAN & TRUST COMPANY *et al.* [No. 687.]

In Error to the Supreme Court of the State of Illinois.

*Mr. Clarence A. Knight* for plaintiff in error.

No appearance for defendant in error.

May 27, 1901. The writ of error having been dismissed in No. 669, this case is *stricken from the docket*.

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## APPENDIX I.

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### ORDER.

It is ordered by the court that the first sentence of Rule 12 of the Rules of Practice in Equity be, and the same is hereby, amended so as to read as follows:

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof.

*Promulgated December 17, 1900.*

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## APPENDIX II.

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### ORDER.

It is ordered by the court that section 1 of Rule 5 of this court be, and the same is hereby, amended so as to read as follows:

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names as well as the surnames of the parties.

*Promulgated December 17, 1900.*

## APPENDIX III.

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### ORDER.

The reporter having represented that, owing to the number of decisions at the term, it will be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

*February 25, 1901.*

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## APPENDIX IV.

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### IN MEMORIAM.

#### BENJAMIN HARRISON.

Mr. Attorney General Griggs addressed the court as follows:

If your honors please, it is my sad duty to convey to the court the intelligence of the death of the Hon. Benjamin Harrison, of Indiana, which occurred at his home in Indianapolis yesterday. He was President of the United States from 1889 to 1893, and most distinguished as a citizen and a statesman, as a soldier, and a practitioner at the bar of this court. Out of respect to his memory I move that the court now adjourn until to-morrow.

The Chief Justice responded:

The court fully shares in the national sorrow, and sympathizes with the suggestion which has just been made.

The great services to his country rendered by this distinguished soldier, statesman, and citizen; the exalted offices so worthily filled by him; his conceded eminence at this bar; his private virtues,—make recognition of the loss sustained in his death involuntary and universal.

As a mark of respect to the memory of Benjamin Harrison, the court will now adjourn until to-morrow at the usual hour.

*March 14, 1900.*



## APPENDIX V

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### ORDER.

Ordered that the territory of Hawaii be, and it is hereby, assigned to the ninth judicial circuit under section 15 of the judiciary act of March 3, 1891.  
*April 15, 1901.*

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## APPENDIX VI.

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### Supreme Court of the United States.

OCTOBER TERM, 1900.

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#### ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of by the court, be, and the same are hereby, continued until the next term of the court.  
*May 28, 1901.*





















































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